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THE  
ENCYCLOPEDIA  
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UNITED STATES SUPREME  
COURT REPORTS

BEING A

Complete Encyclopedia of All the Case Law of the Federal  
Supreme Court up to and including Volume 206 U. S.  
Supreme Court Reports (Book 51 Lawyers' Edition)

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UNDER THE EDITORIAL SUPERVISION OF

THOMAS JOHNSON MICHIE

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Volume VIII

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#### CROSS REFERENCES.

See the titles APPEAL AND ERROR, vol. 1, p. 333; EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL, vol. 6, p. 1.

#### I. Definition.

The writ of mandamus is a remedy to compel the performance of a duty required by law, where the party seeking relief has no other legal remedy, and the duty sought to be enforced is clear and indisputable.<sup>1</sup>

**1. Definition.**—Board of Comm'rs *v.* Aspinwall, 24 How. 376, 377, 383, 16 L. Ed. 735; Bayard *v.* White, 127 U. S. 246, 250, 32 L. Ed. 116; Riggs *v.* Johnson County, 6 Wall. 166, 193, 18 L. Ed. 768.

The writ of mandamus is a summary order to enforce a duty, by supplying a remedy for the denial of an existing right, where, for the want of a specific remedy, there would otherwise be a failure of justice. Decatur *v.* Paulding, 14 Pet. 497, 518, 10 L. Ed. 559; Kendall *v.* United States, 12 Pet. 524, 620, 9 L. Ed. 1181.

Blackstone, in 3d volume of his commentaries, page 110, defines a mandamus to be "a command issuing in the king's name, from the court of king's bench, and directed to any person, corporation or inferior court of judicature, within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes to be consonant to right and justice." Marbury

*v.* Madison, 1 Cranch 137, 168, 2 L. Ed. 60; Kendall *v.* United States, 12 Pet. 524, 629, 9 L. Ed. 1181. Ex parte Crane, 5 Pet. 190, 192, 8 L. Ed. 92.

**Under Iowa code.**—Definition of mandamus, as given in the code of the state of Iowa, is, that it is an order of a court of competent jurisdiction commanding "an inferior tribunal, corporation, board, or person, to do or not to do an act, the performance or omission of which the law specially enjoins as a duty resulting from an office, trust, or station." Riggs *v.* Johnson County, 6 Wall. 166, 193, 18 L. Ed. 768. See Iowa Code, § 2179, Revision, 3761. And see, also, Chicago, etc., R. Co. *v.* Crane, 113 U. S. 424, 432, 28 L. Ed. 1064.

**Under laws of United States.**—"It is the appropriate writ, and proper to be employed, agreeable to the principles and usages of law, to compel the performance of a ministerial act, necessary to the completion of an individual right, arising under the laws of the United States." Ken

## II. Nature.

**A. Judicial Writ.**—The writ of mandamus is a judicial writ—a part of the recognized course of legal proceedings.<sup>2</sup>

**B. Prerogative Writ.**—The writ of mandamus, as known to the common law, issuing from the court of king's bench, by virtue of its general and supervisory powers, is a high prerogative writ and issued for cause shown.<sup>3</sup> This common-law character was somewhat changed by the statute of Anne.<sup>4</sup> By the modern practice in most of the states, the writ of mandamus has ceased to be a strictly prerogative writ, and become a private suit, brought for the purpose of enforcing a private right.<sup>5</sup> It is never a prerogative writ, according to the prin-

dall *v.* United States, 12 Pet. 524, 616, 9 L. Ed. 1181; McIntire *v.* Wood, 7 Cranch 504, 3 L. Ed. 420.

**2. Nature—Judicial writ.**—Rees *v.* Watertown, 19 Wall. 107, 117, 22 L. Ed. 72; Louisiana *v.* Jumel, 107 U. S. 711, 727, 27 L. Ed. 448; Kendall *v.* United States, 12 Pet. 524, 623, 9 L. Ed. 1181; Virginia *v.* Rives, 100 U. S. 313, 329, 25 L. Ed. 667; Thompson *v.* Allen County, 115 U. S. 550, 558, 29 L. Ed. 472.

**3. Prerogative writ.**—Ex parte Crane, 5 Pet. 190, 210, 8 L. Ed. 92; Marbury *v.* Madison, 1 Cranch 137, 171, 2 L. Ed. 60; Kendall *v.* United States, 12 Pet. 524, 620, 9 L. Ed. 1181; Decatur *v.* Paulding, 14 Pet. 497, 518, 10 L. Ed. 559; Kendall *v.* Stokes, 3 How. 87, 100, 11 L. Ed. 506; Board of Comm'rs *v.* Aspinwall, 24 How. 376, 384, 16 L. Ed. 735; Bath County *v.* Amy, 13 Wall. 244, 248, 20 L. Ed. 539; Kentucky *v.* Dennison, 24 How. 66, 97, 16 L. Ed. 717.

The writ of mandamus is clearly stated in 3 Bl. Com. 110, to be "a high prerogative writ, of a most extensively remedial nature." Kendall *v.* United States, 12 Pet. 524, 629, 9 L. Ed. 1181, Taney, C. J., dissenting. But see Taney's opinion in Kentucky *v.* Dennison, 24 How. 66, 97, 16 L. Ed. 717, in which he considers the prevailing opinion in this case settled law, as regards the writ when issued from federal courts.

**Presumed to be issued by king.**—The writ of mandamus was considered a prerogative writ, and sometimes called one of the flowers of the crown, upon the ground that the king himself is presumed to sit at the court of the king's bench, and that the writ is interposed by his authority to prevent the failure of justice where the law has established no other remedy. Kendall *v.* United States, 12 Pet. 524, 620, 9 L. Ed. 1181.

"It undoubtedly came into use by virtue of the prerogative power of the English crown, and was subject to regulations and rules which have long since been disused." Kentucky *v.* Dennison, 24 How. 66, 97, 16 L. Ed. 717.

**Considered writ of right.**—The writ, issuing from the king's bench, is called a prerogative writ, but considered a writ of right. Kendall *v.* United States, 12 Pet. 524, 614, 9 L. Ed. 1181. See post, "Writ of Right," II, F.

**At the time when the judiciary act of 1789 was passed, the writ of mandamus**

was a high prerogative writ, issuing in the king's name only, from the court of king's bench, requiring the performance of some act or duty, the execution of which the court had previously determined to be consonant with right and justice. It was not, like ordinary proceedings at law, a writ of right, and the court had no jurisdiction to grant it in any case except those in which it was the legal judge of the duty required to be performed. Nor was it applicable, as a private remedy, to enforce simple common-law rights between individuals. Bath County *v.* Amy, 13 Wall. 244, 248, 20 L. Ed. 539.

**4. Under statute of the 9th of Anne.**—"Since the statute of the 9th of Anne, authorizing pleadings in proceedings by mandamus, it has been held, that such a proceeding is in the nature of an action; and that a writ of error will lie upon the judgment of the court awarding a peremptory mandamus; but it never has been said in any book of authority, that this prerogative process is 'an action,' or 'a suit,' or 'a case,' at law; and never suggested that any court, not clothed with the prerogative powers of the king's bench, could issue the process, according to the principles of the common law, unless the power to do so had been conferred by statute." Kendall *v.* United States, 12 Pet. 524, 635, 9 L. Ed. 1181, Taney, C. J., dissenting. See United States *v.* Boutwell, 17 Wall. 604, 608, 21 L. Ed. 721. And see post, "Under Statute of Anne," IX, J, 9, b.

**5. In different state courts.**—Rosenbaum *v.* Bauer, 120 U. S. 450, 461, 30 L. Ed. 743, dissenting opinion of Bradley, J.

"A mandamus in cases of this kind is no longer regarded in this country as a mere prerogative writ. It is nothing more than an ordinary proceeding or action in which the performance of a specific duty, by which the rights of the petitioner are affected, is sought to be enforced." Hartman *v.* Greenhow, 102 U. S. 672, 675, 26 L. Ed. 271. See post, "Action or Suit," II, D.

**In Virginia.**—Under the practice in the state of Virginia, the writ of mandamus is no longer considered a prerogative writ. Hartman *v.* Greenhow, 102 U. S. 672, 675, 26 L. Ed. 271.

**In Iowa.**—Mandamus is not a prerogative writ, under the Iowa Code. Weber



ciples of the common law, when issued by a federal court;<sup>6</sup> for such courts cannot issue the writ by virtue of any general or supervisory powers, as possessed by the court of king's bench.<sup>7</sup> The writ at present is prerogative only in the sense that the court, in regard to its issuance, exercises a discretion.<sup>8</sup>

**C. Extraordinary Remedy.**—Mandamus is an extraordinary or supplemental remedy, which can be resorted to only in the absence of another adequate remedy.<sup>9</sup>

**D. Action or Suit.**—Since it is no longer a prerogative writ, the proceedings on a writ of mandamus are generally considered an action or suit, brought in a court of justice to assert a right, and prosecuted according to the usual forms of judicial proceedings.<sup>10</sup> The proceedings on the writ, under the statute of Anne, adopted in most of the states, are in effect as those in a personal action against the respondent;<sup>11</sup> a suit, within the meaning of that term as employed in the act granting the supreme court jurisdiction to review the final decisions of the highest court of a state;<sup>12</sup> a case, within the meaning of the act conferring jurisdiction

*v. Lee County*, 6 Wall. 210, 212, 18 L. Ed. 781.

**6. In federal courts.**—*Riggs v. Johnson County*, 6 Wall. 166, 197, 18 L. Ed. 768; *Hagan v. Lucas*, 10 Pet. 400, 9 L. Ed. 470; *Kendall v. United States*, 12 Pet. 524, 615, 621, 9 L. Ed. 1181; *Board of Comm'rs v. Aspinwall*, 24 How. 376, 384, 16 L. Ed. 735; *Hartman v. Greenhow*, 102 U. S. 672, 675, 26 L. Ed. 271; *Union Pac. R. Co. v. Hall*, 91 U. S. 343, 355, 23 L. Ed. 428; *Kendall v. Stokes*, 3 How. 87, 100, 11 L. Ed. 506; *Kentucky v. Dennison*, 24 How. 66, 97, 16 L. Ed. 717; *Riggs v. Johnson County*, 6 Wall. 518, 520, 18 L. Ed. 918; *The Supervisors v. Durant*, 9 Wall. 415, 417, 19 L. Ed. 732.

**7. Federal courts have no general powers.**—*Board of Comm'rs v. Aspinwall*, 24 How. 376, 384, 16 L. Ed. 735. See post, "Of United States Courts," VII, F.

**Federal court in District of Columbia.**—Although the common law of Maryland is in force in the District of Columbia and the circuit court therein possesses more comprehensive powers in regard to the issuance of the writ than federal courts elsewhere, the writ when issued by it is not a prerogative writ. *Kendall v. United States*, 12 Pet. 524, 613, 9 L. Ed. 1181.

The common law, as then existing in Maryland, had been changed by the statute of the 9th of Anne, which was at the time of this decision in force in both the state and district. *United States v. Boutwell*, 17 Wall. 604, 608, 21 L. Ed. 721. See post, "In District of Columbia," VII, F, 7, c.

**8. Prerogative in sense of discretionary.**—See post, "Discretion of Court," VIII, B.

**9. Extraordinary remedy.**—*Duke v. Turner*, 204 U. S. 623, 631, 51 L. Ed. 652; *United States v. Addison*, 22 How. 174, 183, 16 L. Ed. 304; *Ex parte Wall*, 107 U. S. 265, 272, 27 L. Ed. 552; *In re Rice*, 155 U. S. 396, 403, 39 L. Ed. 198; *Connecticut Mut. Life Ins. Co., Petitioner*, 131 U. S., appx. clxxx, clxxxi, 26 L. Ed. 561. See post, "As Dependent upon Existence of Other Remedy," VIII, G.

**10. Action or suit.**—*Kendall v. Stokes*,

3 How. 87, 100, 11 L. Ed. 506; *Postmaster-General v. Trigg*, 11 Pet. 173, 174, 9 L. Ed. 676; *Kendall v. United States*, 12 Pet. 524, 615, 9 L. Ed. 1181; *Weston v. Charleston*, 2 Pet. 449, 7 L. Ed. 481; *Bath County v. Amy*, 13 Wall. 244, 248, 20 L. Ed. 539; *Gusman v. Marrero*, 180 U. S. 81, 87, 45 L. Ed. 436; *Knox County v. Harshman*, 131 U. S., appx. clxvi, 25 L. Ed. 191. See, ante, "Prerogative Writ," II, B.

"It is \* \* \* in substance a personal action, and it rests upon the averred and assumed fact that the defendant has neglected or refused to perform a personal duty, to the performance of which by him the relator has a clear right." *United States v. Boutwell*, 17 Wall. 604, 607, 21 L. Ed. 721, quoted in *Warner Valley Stock Co. v. Smith*, 165 U. S. 28, 32, 41 L. Ed. 621.

**Action for recovery of money.**—When a proceeding in mandamus is used as an action at law to recover money, it is subject to the principles which govern money actions. *Louis v. Brown Tp.*, 109 U. S. 162, 27 L. Ed. 892; *Kendall v. United States*, 12 Pet. 524, 614, 9 L. Ed. 1181; *Rosenbaum v. Bauer*, 120 U. S. 450, 461, 30 L. Ed. 743, dissenting opinion of Bradley, J.

**Suit for specific performance.**—The writ of mandamus, when issued to compel the levy and collection of a tax to satisfy a judgment against a municipal corporation, is in the nature of a suit to enforce the specific performance of a contract. *Antoni v. Greenhow*, 107 U. S. 769, 781, 27 L. Ed. 468. See post, "Levy and Collection of Taxes," VIII, M, 4.

**11. Under statute of Anne.**—Since the passage of the statute of the 9th of Anne, ch. 20, § 1, which permits the relator to traverse the respondent's return, mandamus has become a personal action. This statute was in force in Maryland when the District of Columbia was a part of that state, and is in force in the district. *United States v. Boutwell*, 17 Wall. 604, 608, 21 L. Ed. 721. See post, "Under Statute of Anne," IX, J, 9, b.

**12. Within act granting appellate ju-**

upon the United States circuit court for the District of Columbia;<sup>13</sup> and an ordinary action, under the Iowa code.<sup>14</sup> It is not a civil action nor a suit in equity, within the meaning of the statute of limitations in Oklahoma;<sup>15</sup> nor a suit in law or equity against a state, within the meaning of the eleventh amendment to the constitution of the United States, when directed to an officer of the state.<sup>16</sup>

**E. Original or Final Process.**—Although obtained by an independent suit,<sup>17</sup> in the federal courts, the writ can only be issued in aid of an existing jurisdiction;<sup>18</sup> and, therefore, in such courts, a proceeding on mandamus can never be a new or original action or suit;<sup>19</sup> but a writ, authorized by the 14th section of the judiciary act, as ancillary to other proceedings which give jurisdiction; and, when issued, becomes a substitute for the ordinary process of execution.<sup>20</sup> In some of the states, mandamus is in the nature of an original suit.<sup>21</sup>

**F. Writ of Right.**—The writ of mandamus is a writ of right, but the proceedings upon it are matters of discretion.<sup>22</sup>

**jurisdiction over state courts.**—Mandamus is a suit within the meaning of that term as employed in § 709 of the Revised Statutes. *American Express Co. v. Michigan*, 177 U. S. 404, 406, 44 L. Ed. 823; *Columbian Ins. Co. v. Wheelright*, 7 Wheat. 534, 5 L. Ed. 516; *Holmes v. Jennison*, 14 Pet. 540, 10 L. Ed. 579; *Kendall v. United States*, 12 Pet. 524, 9 L. Ed. 1181. See the title APPEAL AND ERROR, vol. 1, p. 549.

**13. Within act conferring jurisdiction upon federal courts in District of Columbia.**—Mandamus is a case within the act of February 27, 1801, granting the United States circuit court for the District of Columbia jurisdiction in "all cases in law and equity." *Kendall v. United States*, 12 Pet. 524, 614, 9 L. Ed. 1181. But see dissenting opinion of Taney, C. J., on p. 633. See post, "In District of Columbia," VII, F, 7, c.

**14. Under Iowa code.**—Chicago, etc., R. Co. v. Crane, 113 U. S. 424, 432, 28 L. Ed. 1064.

**15. Under Oklahoma code—Statute of limitations.**—*Duke v. Turner*, 204 U. S. 623, 631, 51 L. Ed. 652. See post, "Limitations and Laches," IX, E. 2.

**16. Suit against state within eleventh amendment.**—*Scott v. Donald*, 165 U. S. 107, 41 L. Ed. 648.

Under the facts and circumstances which exist in this case a writ of mandamus to the auditor and treasurer of the state of South Carolina to assess and collect a tax to pay a judgment rendered against a township which had ceased to exist, is not a suit against the state within the meaning of the amendment of the United States constitution. *Graham v. Folsom*, 200 U. S. 248, 254, 50 L. Ed. 464. See post, "Limitations upon," VII, F. 3.

**17. Original or final process.**—*Davies v. Corbin*, 112 U. S. 36, 40, 28 L. Ed. 627; *Virginia v. Rives*, 100 U. S. 313, 329, 25 L. Ed. 667. See post, "Procedure," IX.

**18. Federal courts have only ancillary jurisdiction.**—See post, "As Ancillary Proceeding," VII, F, 7, b, (3).

**19. Not original suit.**—*Harshman v. Knox County*, 129 U. S. 306, 318, 30 L. Ed. 1152; *Virginia v. Rives*, 100 U. S. 313, 329, 25 L. Ed. 667.

**20. Final process in federal courts.**—*Weber v. Lee County*, 6 Wall. 210, 212, 18 L. Ed. 781; *Riggs v. Johnson County*, 6 Wall. 166, 198, 18 L. Ed. 768; *Riggs v. Johnson County*, 6 Wall. 518, 520, 18 L. Ed. 918; *Kentucky v. Dennison*, 24 How. 66, 97, 16 L. Ed. 717; *The Supervisors v. Durant*, 9 Wall. 415, 417, 19 L. Ed. 732; *County of Greene v. Daniel*, 102 U. S. 187, 195, 26 L. Ed. 99; *Bath County v. Amy*, 13 Wall. 244, 20 L. Ed. 539; *Graham v. Norton*, 15 Wall. 427, 21 L. Ed. 177; *Davies v. Corbin*, 112 U. S. 36, 40, 28 L. Ed. 627; *Harshman v. Knox County*, 122 U. S. 306, 318, 30 L. Ed. 1152; *Thompson v. United States*, 103 U. S. 480, 484, 26 L. Ed. 521; *Labette County Comm'rs v. Moulton*, 112 U. S. 217, 223, 28 L. Ed. 698; *Davenport v. County of Dodge*, 105 U. S. 237, 242, 26 L. Ed. 1018; *Amy v. The Supervisors*, 11 Wall. 136, 137, 20 L. Ed. 101; *Hawley v. Fairbanks*, 108 U. S. 543, 552, 27 L. Ed. 820; *Chanute City v. Trader*, 132 U. S. 210, 214, 33 L. Ed. 345; *Louisiana v. United States*, 103 U. S. 289, 293, 26 L. Ed. 358.

The writ of mandamus is described in *Riggs v. Johnson County*, 6 Wall. 166, 198, 18 L. Ed. 768, as "a proceeding ancillary to the judgment which gives jurisdiction, and, when issued, becomes a substitute for the ordinary process of execution to enforce the payment of the same, as provided in the contract."

**When issued to compel levy of taxes.**

—A mandamus issued to compel the levy and collection of a tax to enforce a judgment, whereon an execution has been issued and returned nulla bona, is in the nature of an execution to collect the judgment. *Louisiana v. United States*, 103 U. S. 289, 293, 26 L. Ed. 358.

"A mandamus to collect a tax for the payment of a judgment, or a mandamus to pay a judgment, is process in execution." *Memphis v. Brown*, 97 U. S. 300, 302, 24 L. Ed. 924.

**21. Original suit in some state courts.**—*Davenport v. County of Dodge*, 105 U. S. 237, 242, 26 L. Ed. 1018; *County of Greene v. Daniel*, 102 U. S. 187, 195, 26 L. Ed. 99.

**22. Writ of right.**—*Decatur v. Paulding*, 14 Pet. 497, 518, 10 L. Ed. 559; *Kendall*



**G. Legal Remedy.**—The remedy by mandamus is essentially and exclusively a legal remedy, and is unknown to equity.<sup>23</sup>

**H. Affirmative Remedy.**—The relief granted by mandamus is affirmative.<sup>24</sup>

**I. Summary Remedy.**—The proceedings on a writ of mandamus are summary.<sup>25</sup>

### III. Distinctions.

The writ of mandamus is in its effect equivalent to a mandatory injunction.<sup>26</sup> It also appears to have some analogy to a bill in equity for the restraint of an act.<sup>27</sup>

### IV. Origin and History.

The writ of mandamus was introduced to prevent disorder from a failure of justice and defect of police.<sup>28</sup> It has been a well-known process in the hands of the courts of common law for ages.<sup>29</sup>

### V. Object and Purpose.

The office of a writ of mandamus is to compel the performance of an existing<sup>30</sup> duty<sup>31</sup> resting upon the person to whom the writ is directed.<sup>32</sup>

### VI. Rule of Decision.

The laws, in regard to mandamus, of a state in which it is sitting, may be adopted by a federal suit.<sup>33</sup>

*v. United States*, 12 Pet. 524, 614, 9 L. Ed. 1181. See post, "Discretion of Court," VIII, B.

But it seems not to have been considered a writ of right at common law. *Bath County v. Amy*, 13 Wall. 244, 248, 20 L. Ed. 539.

**23. Legal remedy.**—*Heine v. Levee Comm'rs*, 19 Wall. 655, 660, 22 L. Ed. 223; *Smith v. Bourbon County*, 127 U. S. 105, 111, 32 L. Ed. 73; *Morgan v. Town Clerk*, 7 Wall. 610, 613, 618, 19 L. Ed. 202; *Ward v. Gregory*, 7 Pet. 633, 8 L. Ed. 810; *Kendall v. United States*, 12 Pet. 524, 623, 9 L. Ed. 1181.

Mandamus is a remedy at law and not in equity. *Craig v. Leitensdorfer*, 123 U. S. 189, 209, 31 L. Ed. 114.

A mandamus is a civil suit at law no matter by what name it is called. Dissenting opinion of *Bradley, J.*, in *Rosenbaum v. Bauer*, 120 U. S. 450, 461, 30 L. Ed. 743. See post, "Of Courts of Equity," VII, D.

**24. Affirmative remedy.**—*Walkley v. Muscatine*, 6 Wall. 481, 18 L. Ed. 930.

For prohibitive relief, see the titles INJUNCTIONS, vol. 6, p. 1022; PROHIBITION.

**25. Summary remedy.**—*Decatur v. Paulding*, 14 Pet. 497, 5181, 10 L. Ed. 559; *Kendall v. United States*, 12 Pet. 524, 620, 9 L. Ed. 1181; *Perkins v. Fourniquet*, 14 How. 313, 328, 330, 14 L. Ed. 435; *In re Blake*, 175 U. S. 114, 118, 44 L. Ed. 94. But see *Tennessee v. Sneed*, 96 U. S. 69, 75, 24 L. Ed. 610; *Union Pac. R. Co. v. Hall*, 91 U. S. 343, 356, 23 L. Ed. 428, Mr. Justice *Bradley*, dissenting.

In cases of mandamus, prohibition and habeas corpus, the proceedings are summary. *Holmes v. Jennison*, 14 Pet. 540, 564, 10 L. Ed. 579.

**No more speedy than suit at law.**—"A

suit at law to recover money unlawfully exacted is as speedy, as easily tried, and less complicated than a proceeding by mandamus." *Tennessee v. Sneed*, 96 U. S. 69, 75, 24 L. Ed. 610.

**26. Distinctions—From mandatory injunction.**—*Warner Valley Stock Co. v. Smith*, 165 U. S. 28, 33, 41 L. Ed. 621.

**27. Preventive injunction.**—*Union Pac. R. Co. v. Hall*, 91 U. S. 343, 355, 23 L. Ed. 428. See, also, *Board of Liquidation v. McComb*, 92 U. S. 531, 541, 23 L. Ed. 623; *Noble v. Union River Logging R. Co.*, 147 U. S. 165, 172, 37 L. Ed. 123.

**Issued upon same grounds.**—The principles governing the allowance of an injunction or a mandamus to control the action of an officer are the same. *Gaines v. Thompson*, 7 Wall. 347, 352, 19 L. Ed. 62.

**28. Origin and history.**—*Labette County Comm'rs v. Moulton*, 112 U. S. 217, 225, 28 L. Ed. 698.

**29. History.**—*Thompson v. Allen County*, 115 U. S. 550, 558, 29 L. Ed. 472.

**30. Object and purpose—Enforcement of existing duty.**—"The object of the writ is to enforce the performance of an existing duty, not to create a new one." Ex parte *Rowland*, 104 U. S. 604, 612, 26 L. Ed. 861. See post, "Existing," VIII, E, 2.

**31.**—"The office of a mandamus is to compel the performance of a plain and positive duty." Ex parte *Cutting*, 94 U. S. 14, 20, 24 L. Ed. 49. See post, "As Dependent upon Nature of Duty to Be Enforced," VIII, E.

**32. By person to whom directed.**—*United States v. Boutwell*, 17 Wall. 604, 607, 21 L. Ed. 721; *Warner Valley Stock Co. v. Smith*, 165 U. S. 28, 32, 41 L. Ed. 621; *Commissioners v. Sellow*, 99 U. S. 624, 626, 25 L. Ed. 333. See post, "Personal," VIII, E, 4.

**33. Rule of decision.**—"Public property

## VII. Jurisdiction.

**A. In General.**—The power to issue a writ of mandamus in a proper case is a branch of the common-law power of a court.<sup>34</sup> The jurisdiction to issue this writ is unusually confined in the highest court of original jurisdiction of a state.<sup>35</sup>

**B. Nature of.**—The issuance of a writ of mandamus to an officer involves the exercise of an original jurisdiction, but the jurisdiction exercised in the issuance to an inferior court of the United States is in its nature appellate.<sup>36</sup>

**C. Necessity for.**—The want of jurisdiction to issue the legal writ of mandamus cannot be supplied by converting the proceeding into a bill in equity on the principle that the rights of the complainant are equitable.<sup>37</sup>

**D. Of Courts of Equity.**—A court of chancery has no jurisdiction to issue the writ.<sup>38</sup>

**E. Of English Courts.**—By the common law, the writ of mandamus is granted by the court of king's bench, by virtue of its prerogative and supervisory power over inferior courts.<sup>39</sup>

**F. Of United States Courts.**—1. **IN GENERAL.**—The jurisdiction of the federal courts to grant the writ of mandamus is merely ancillary.<sup>40</sup> They can issue it only in aid of an existing jurisdiction, and a prior judgment is necessary for its support.<sup>41</sup>

2. **SOURCE OF—***a. Common Law.*—At English common law, the jurisdiction to issue the writ of mandamus is confided in the highest court of original jurisdiction.<sup>42</sup> But the common law has not been adopted as a system in the United

of a county in the state of Iowa is exempt from execution, and the act of the general assembly provides that the property of the citizen shall in no case be taken to satisfy the debt of the municipality. Proper remedy of the judgment creditor in such a case in the state court, is by mandamus to compel the proper officers of the county to levy a tax to pay the judgment. Such a creditor having recovered judgment in the circuit court, is entitled to the same remedy under the Process Acts passed by congress." *Weber v. Lee County*, 6 Wall. 210, 212, 18 L. Ed. 781. See post, "After Exhaustion of Discretion," VIII, E, 8, d; "General Rules of Practice," VIII, K, 5, a.

**A federal court to which a case has been certified from another federal court under the act of February 28, 1839, may proceed under § 3770 of the Iowa code, as if the cause had been originally brought in that court.** *Supervisors v. Rogers*, 7 Wall. 175, 181, 19 L. Ed. 162.

**34. Jurisdiction—At common law.**—Courts possessing common-law jurisdiction may issue the writ. This jurisdiction may, however, be taken away by statute. *Kendall v. United States*, 12 Pet. 524, 620, 9 L. Ed. 1181.

**35. Usually confided in highest court.**—*Kendall v. United States*, 12 Pet. 524, 620, 9 L. Ed. 1181.

**36. Nature of jurisdiction.**—Ex parte Crane, 5 Pet. 190, 193, 8 L. Ed. 92; *Decatur v. Paulding*, 14 Pet. 497, 518, 10 L. Ed. 559; *Virginia v. Rives*, 100 U. S. 313, 329, 25 L. Ed. 667; Ex parte Bradley, 7 Wall. 364, 376, 19 L. Ed. 214.

**37. Necessity for.**—The lack of jurisdiction cannot be supplied by converting a

proceeding to compel the issuance of municipal aid bonds in payment of subscription to stock of a railroad company into a bill in equity on the ground that the complainant, a judgment creditor of the railroad company, has merely an equitable right to subrogation as between himself and his debtor. *Smith v. Bourbon County*, 127 U. S. 105, 112, 32 L. Ed. 73.

**38. Of courts of equity.**—*Thompson v. Allen County*, 115 U. S. 550, 558, 29 L. Ed. 472. See ante, "Legal Remedy," II, G.

**39. Of English courts.**—*Board of Comm'rs v. Aspinwall*, 24 How. 376, 384, 16 L. Ed. 735.

This power is confided in the court of king's bench because the king at one period of the judicial history of that country, is said to have sat in person, and is presumed still to sit. *Kendall v. United States*, 12 Pet. 524, 620, 9 L. Ed. 1181. See, also, *Bath County v. Amy*, 13 Wall. 244, 428, 20 L. Ed. 539.

**Parliament may confer jurisdiction on other courts.**—"No doubt, the British parliament might authorize the court of common pleas to issue this writ." *Kendall v. United States*, 12 Pet. 524, 621, 9 L. Ed. 1181.

**Territorial extent of jurisdiction.**—See post, "Territorial Extent of Jurisdiction," VII, L.

**40. Of United States courts—Ancillary.**—See post, "As Ancillary Proceeding," VII, F, 7, b, (3).

**41. Necessity for prior judgment.**—See post, "Necessity for," VIII, M, 4, d, (1); "Obtaining Judgment," IX, D, 2.

**42. Source of—Common law.**—*Kendall v. United States*, 12 Pet. 524, 620, 9 L. Ed. 1181.



States generally, except in the District of Columbia.<sup>43</sup> Therefore, this jurisdiction is not confided in the supreme court of the United States by analogy to the court of king's bench in England.<sup>44</sup>

b. *Constitution and Statutes*.—The power of the courts of the United States to issue this writ is derived solely from the constitution and laws of the United States.<sup>45</sup> Other than those in the District of Columbia, the inferior federal courts derive this power from the fourteenth section of the judiciary act.<sup>46</sup>

3. *LIMITATIONS UPON*.—The limitation upon federal jurisdiction in the eleventh amendment to the United States constitution does not extend to the case of a mandamus to compel state officers to perform a purely ministerial duty.<sup>47</sup>

4. *EXTENT OF*.—a. *Under Constitution*.—The jurisdiction to issue the writ of mandamus is embraced within the jurisdictional grant to the federal government of all cases arising under the laws of the United States.<sup>48</sup>

b. *Under Acts of Congress*.—The full judicial power vested in the federal government by the constitution has not been delegated to the federal courts as to the issuance of the writ of mandamus.<sup>49</sup>

c. *Under State Laws*.—No federal question arises, in the case of a state's denial of the writ to compel the application of proceeds of a sale to a certain indebtedness, on the ground that the state law requires it to be otherwise applied.<sup>50</sup>

d. *To Enforce Levy of Taxes*.—A federal court has no inherent jurisdiction to levy taxes for any purpose, or to enforce a tax already levied, except through the agencies provided by law; but where the tax is provided for by law, officers exist whose duty it is to levy and collect it, and it is necessary to enforce its judgment, a federal court has jurisdiction to enforce its levy and collection.<sup>51</sup>

e. *In Extradition Cases*.—The United States courts have no jurisdiction in mandamus to compel the governor of one state to deliver a fugitive from justice to the authorities of another state, seeking his extradition.<sup>52</sup>

**43. Common law not adopted in federal system.**—*Kendall v. United States*, 12 Pet. 524, 620, 9 L. Ed. 1181; *Board of Comm'rs v. Aspinwall*, 24 How. 376, 384, 16 L. Ed. 735.

As to the jurisdiction in the District of Columbia, see post, "In District of Columbia," VII, F, 7, c.

**44. No analogy between king's bench and supreme court.**—*Kendall v. United States*, 12 Pet. 524, 621, 9 L. Ed. 1181. See post, "Of Supreme Court," VII, F, 5.

**45. Constitution and statutes.**—*Board of Comm'rs v. Aspinwall*, 24 How. 376, 378, 384, 16 L. Ed. 735; *Bath County v. Amy*, 13 Wall. 244, 247, 20 L. Ed. 539. See post, "Extent of," VII, F, 4.

**46. Derived from judiciary act.**—"Under the judiciary act, the power to issue this writ, and the purposes for which it may be issued, in the courts of the United States, other than in this district, is given by the 14th section of the act, under the general delegation of power 'to issue all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.'" *Kendall v. United States*, 12 Pet. 524, 621, 9 L. Ed. 1181.

As to the court in the district, see post, "In District of Columbia," VII, F, 7, c.

**47. Limitations upon.**—*Scott v. Donald*, 165 U. S. 107, 41 L. Ed. 648. See ante, "Action or Suit," II, D.

**48. Extent of—Under constitution.**—*Kendall v. United States*, 12 Pet. 524, 616, 9 L. Ed. 1181.

**49. Under acts of congress.**—*Kendall v. United States*, 12 Pet. 524, 616, 9 L. Ed. 1181.

**Power of congress to delegate.**—"Authority to that effect might doubtless be given to those courts by an act of congress; but the insuperable difficulty at present is, that neither the judiciary act nor any other act of congress has conferred upon them any such power." *The Secretary v. McGarrahan*, 9 Wall. 298, 19 L. Ed. 579.

**Judiciary act—Eleventh section.**—The jurisdiction to issue the writ of mandamus is not given to the inferior courts of the United States by the eleventh section of the judiciary act to the same extent as the grant of judicial power by the constitution. *McIntire v. Wood*, 7 Cranch 504, 505, 3 L. Ed. 420, followed in *McCluny v. Silliman*, 2 Wheat. 369, 370, 4 L. Ed. 263.

**Fourteenth section.**—The fourteenth section of the judiciary act would sanction the issuing of the writ in cases not covered by the eleventh section thereof, but within the constitutional grant of judicial power. *McIntire v. Wood*, 7 Cranch 504, 505, 3 L. Ed. 420.

**50. Under state laws.**—*Louisiana v. New Orleans*, 108 U. S. 568, 27 L. Ed. 823.

**51. To enforce levy of taxes.**—See post, "Levy and Collection of Taxes," VIII, M, 4; "State Offices," VII, F, 7, b, (5), (d); "State Courts," VII, F, 7, b, (5), (e); "Where Writ Issues from United States Court," VII, J, 2.

**52. In extradition cases.**—This is be-

5. OF SUPREME COURT—*a. In General.*—The supreme court can issue the writ only in cases where it has original or appellate jurisdiction.<sup>53</sup> The power to issue writs of mandamus is conferred upon the federal supreme court by the thirteenth section of the judiciary act.<sup>54</sup> This section has always been held to exclude authority to issue the writ to state courts and officers, except where issued as a process to enforce a judgment.<sup>55</sup>

*b. Original Jurisdiction.*—The federal supreme court possesses no original jurisdiction to issue the writ of mandamus.<sup>56</sup> In so far as it attempts to confer original jurisdiction upon the court, the thirteenth section of the judiciary act is unconstitutional.<sup>57</sup> As previously stated, the writ can only be issued to an officer by virtue of an original jurisdiction,<sup>58</sup> therefore the federal court cannot issue the writ to an officer.<sup>59</sup> The court has no jurisdiction to issue the writ

cause of the inherent want of jurisdiction in the federal courts, and not because mandamus is the improper proceeding. *Kentucky v. Dennison*, 24 How. 66, 98, 16 L. Ed. 717. See the title EXTRADITION, vol. 6, p. 225.

53. Of supreme court.—*In re Massachusetts*, 197 U. S. 482, 488, 49 L. Ed. 845; *In re Glaser*, 198 U. S. 171, 173, 49 L. Ed. 1000; *Ex parte Bradstreet*, 6 Pet. 774, 8 L. Ed. 577.

In cases over which the federal supreme court possesses neither original nor appellate jurisdiction, it cannot grant the writ of mandamus as ancillary thereto. *In re Massachusetts*, 197 U. S. 482, 488, 49 L. Ed. 845.

54. Conferred by 13th section of judiciary act.—Under the thirteenth section of the judiciary act of Sept. 24, 1789, ch. 20, the supreme court has "power to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed or persons holding office under the United States." *United States v. Addison*, 22 How. 174, 183, 16 L. Ed. 304; *American Const. Co. v. Jacksonville, etc., R. Co.*, 148 U. S. 372, 379, 37 L. Ed. 486; *Marbury v. Madison*, 1 Cranch 137, 176, 2 L. Ed. 60; *McCluny v. Silliman*, 2 Wheat. 369, 370, 4 L. Ed. 263; *Ex parte Newman*, 14 Wall. 152, 165, 20 L. Ed. 877; *In re Blake*, 175 U. S. 114, 118, 44 L. Ed. 94.

"The Revised Statutes (§ 688), re-enacted this provision in a modified form, without removing the limitation as to the courts to which and the officers to whom it may issue." *In re Green*, 141 U. S. 325, 326, 35 L. Ed. 765.

55. To issue writ to state courts and officers.—*Graham v. Norton*, 15 Wall. 427, 21 L. Ed. 177; *In re Blake*, 175 U. S. 114, 118, 44 L. Ed. 94.

It appears from the petition of the applicant, which he asks leave to file, that he has been disbarred from the practice of law as an attorney and counsellor in the courts of Colorado by order of the supreme court of that state; and that he prays for a writ of mandamus from the federal supreme court, commanding the judges of that court to restore him to his office and to vacate the order of disbar-

ment. This federal court cannot give him the aid he seeks by that writ, whatever may be the ground upon which the state court proceeded, and in whatever light its action may be regarded. *In re Green*, 141 U. S. 325, 326, 35 L. Ed. 765.

56. Original jurisdiction.—*Marbury v. Madison*, 1 Cranch 137, 175, 2 L. Ed. 60; *Riggs v. Johnson County*, 6 Wall. 166, 188, 18 L. Ed. 768; *Kendall v. United States*, 12 Pet. 524, 621, 9 L. Ed. 1181; *United States v. Schurz*, 102 U. S. 378, 395, 26 L. Ed. 167; *United States v. Boutwell*, 17 Wall. 604, 609, 21 L. Ed. 721; *The Life, etc., Ins. Co. v. Adams*, 9 Pet. 573, 603, 9 L. Ed. 234; *In re Green*, 141 U. S. 325, 326, 35 L. Ed. 765; *Ex parte Hoyt*, 13 Pet. 279, 290, 10 L. Ed. 161; *Ex parte Newman*, 14 Wall. 152, 165, 20 L. Ed. 877.

Although it may be said that the opinion in the case of *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60, is mere dictum, it is now, by repeated sanction in subsequent cases, the settled doctrine of the federal court. *United States v. Schurz*, 102 U. S. 378, 395, 26 L. Ed. 167.

Exceptions to rule.—It is stated in the case of *In re Green*, 141 U. S. 325, 326, 35 L. Ed. 765, that there are a few exceptions to this rule; but they are not defined.

Under the constitution, the power to issue this as an original writ, in the general sense of the common law, cannot be given to the federal supreme court, according to the decision in *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60. *Kendall v. United States*, 12 Pet. 524, 621, 9 L. Ed. 1181.

57. Effect of 13th section of judiciary act.—*Marbury v. Madison*, 1 Cranch 137, 175, 2 L. Ed. 60; *Riggs v. Johnson County*, 6 Wall. 166, 188, 18 L. Ed. 768.

The original jurisdiction of the federal supreme court is defined by the constitution itself. *Ex parte Newman*, 14 Wall. 152, 165, 20 L. Ed. 877. See the title COURTS, vol. 4, p. 1006.

58. Issuance to officer.—See ante, "Nature of," VII. B; post, "Executive and Ministerial Officers of Government," VIII. L.

59. *Marbury v. Madison*, 1 Cranch 137, 175, 176, 2 L. Ed. 60; *Riggs v. Johnson County*, 6 Wall. 166, 188, 18 L. Ed. 768;



to the secretary of the United States,<sup>60</sup> nor to the register of the land office.<sup>61</sup> The court cannot issue the writ to compel a public officer to become a party to a suit of his predecessor.<sup>62</sup>

c. *Appellate Jurisdiction.*—The supreme court may issue the writ of mandamus through its appellate jurisdiction;<sup>63</sup> and, to the extent that it confers appellate jurisdiction, the thirteenth section of the judiciary act is constitutional.<sup>64</sup> The jurisdiction to issue the writ to an inferior court of the United States is in its nature appellate.<sup>65</sup> The court may also issue the writ to enable it to exercise an appellate jurisdiction.<sup>66</sup> The supreme court cannot by the writ of mandamus, compel a circuit court to reinstate a cause remanded to a state court.<sup>67</sup> The express grant of authority to issue writs of mandamus to national courts and officers has always been held to exclude authority to issue these writs to state courts and officers, except where issued as process to enforce judgments.<sup>68</sup> It is undecided whether this court can issue the writ of mandamus to a state court to enforce its own judgments on appeal.<sup>69</sup> It can issue the writ

Ex parte Newman, 14 Wall. 152, 165, 20 L. Ed. 877; Ex parte Hoyt, 13 Pet. 279, 290, 10 L. Ed. 161.

Although a mandamus may be directed to courts, yet to issue such a writ to an officer, for the delivery of a paper, is, in effect, the same as to sustain an original action for that paper, and therefore seems not to belong to appellate, but to original jurisdiction. McCluny v. Silliman, 2 Wheat. 369, 370, 4 L. Ed. 263.

60. *To secretary of state.*—The supreme court of the United States has not power to issue a mandamus to the secretary of state of the United States, it being an exercise of original jurisdiction not warranted by the constitution. Marbury v. Madison, 1 Cranch 137, 2 L. Ed. 60.

"The secretary of state, being a person holding an office under the authority of the United States, is precisely within the letter of this description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore, absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign." Marbury v. Madison, 1 Cranch 137, 173, 2 L. Ed. 60.

61. *To register of land office.*—The federal supreme court has not jurisdiction to issue a writ of mandamus to the register of a land office of the United States, commanding him to enter the appearance of a party for certain tracts of land, according to the 7th section of the act of the 10th of May, 1800, "providing for the sale of the lands of the United States northwest of the Ohio, and above the mouth of Kentucky river;" which mandamus had been refused by the supreme court of the state of Ohio, upon a submission by the register to the jurisdiction of that court, being the highest court of law or equity in that state. McCluny v. Silliman, 2 Wheat. 369, 4 L. Ed. 263, distinguished in Kendall v. United States, 12 Pet. 524, 526, 614, 9 L. Ed. 1181.

62. *To compel officer to become party to suit of predecessor.*—United States v.

Boutwell, 17 Wall. 604, 609, 21 L. Ed. 721. See post, "Abatement and Revival," IX, H.

63. *Appellate jurisdiction.*—The writ is one of the modes provided by congress for the exercise of our appellate jurisdiction. Virginia v. Rives, 100 U. S. 313, 329, 25 L. Ed. 667.

64. *Thirteenth section of judiciary act.*—See the title APPEAL AND ERROR, vol. 1, p. 427.

65. *To inferior federal courts.*—See ante, "Nature of," VII, B.

*To court of claims.*—See the title APPEAL AND ERROR, vol. 1, p. 522.

*To circuit court.*—See the title APPEAL AND ERROR, vol. 1, pp. 427, 489.

*To circuit court of appeals.*—See the title APPEAL AND ERROR, vol. 1, p. 489.

66. *To aid appellate jurisdiction.*—Marbury v. Madison, 1 Cranch 137, 175, 2 L. Ed. 60; Insurance Co. v. Comstock, 16 Wall. 258, 270, 21 L. Ed. 493; Kendall v. United States, 12 Pet. 524, 622, 9 L. Ed. 1181.

67. *To reinstate case removed from state court.*—Under the fifth section of the act of March 3, 1875, the federal supreme court could issue the writ to compel a circuit court to proceed with a cause which it has wrongfully remanded to a state court; but, under the act of March 3, 1887, re-enacted August 3, 1888, under which no writ of error or appeal upon orders to remand a case to a state court is permitted, a judgment of the circuit court is final, and cannot be controlled by mandamus. In re Pennsylvania Co., 137 U. S. 451, 453, 34 L. Ed. 738.

68. *To state courts.*—Riggs v. Johnson County, 6 Wall. 166, 189, 18 L. Ed. 768; Graham v. Norton, 15 Wall. 427, 428, 21 L. Ed. 177.

69. "The power of the supreme court to issue writs of mandamus to the other courts of the United States, has been frequently exercised. United States v. Peters, 5 Cranch 115, 3 L. Ed. 53; Livingston v. Dorgenois, 7 Cranch 577, 3 L. Ed. 444. But in the case of Martin v. Hunter, 1 Wheat. 304, 4 L. Ed. 97, the court, in

to the supreme court of a territory.<sup>70</sup>

d. *Jurisdiction of Single Justice*.—The chief justice of the supreme court, residing in the fourth circuit, who, under the act of congress of 1802, ch. 31, holds the court at the August term, has not power to grant a rule for a mandamus, or a rule to show cause why a mandamus shall not issue. Such a rule does not fall within the description of cases enumerated in the act of congress, for the action of the court at the August term.<sup>71</sup>

6. OF CIRCUIT COURT OF APPEALS.—A circuit court of appeals may issue the writ of mandamus.<sup>72</sup>

7. OF CIRCUIT COURTS—*a. Constitutional Provision*.—Under the United States constitution, it is within the power of congress to grant to the circuit and other inferior courts jurisdiction of writs of mandamus in all cases arising under the laws of the United States. Congress has, however, not done so to that extent.<sup>73</sup>

b. *In the States*—(1) *Statutory Provision*.—The eleventh section of the judiciary act did not confer jurisdiction to issue mandamus upon the circuit courts.<sup>74</sup> This power was conferred by the fourteenth section.<sup>75</sup> This juris-

pronouncing its opinion upon its appellate jurisdiction, in causes brought from the highest court of law or equity of a state, deemed it unnecessary to give any opinion on the question, whether this court has authority to enforce its own judgments on appeal, by issuing a writ of mandamus to the state court, as the question was not thought necessarily involved in the decision of that cause." *McCluny v. Silliman*, 2 Wheat. 369, 370, 4 L. Ed. 263; *Martin v. Hunter*, 1 Wheat. 304, 362, 4 L. Ed. 97.

70. *To courts of territories*.—The federal supreme court had jurisdiction to issue a writ of mandamus to the supreme court of the territory of Idaho. *Clough v. Curtis*, 134 U. S. 361, 33 L. Ed. 945.

71. *Jurisdiction of single justice*.—*Ex parte Hennen*, 13 Pet. 225, 10 L. Ed. 136. As to terms of supreme court, see 4 Fed. Stat. Anno. 692.

72. *Circuit court of appeals*.—See 4 Fed. Stat. Anno. 430, which gives such courts circuit court powers. As to powers of circuit courts, see post, "Of Circuit Courts," VII, F, 7.

73. *Circuit courts—Constitutional provision*.—*Kendall v. United States*, 12 Pet. 524, 616, 9 L. Ed. 1181; *Riggs v. Johnson County*, 6 Wall. 166, 187, 18 L. Ed. 768; *McIntire v. Wood*, 7 Cranch 504, 506, 3 L. Ed. 420; *McClung v. Silliman*, 2 Wheat. 369, 370, 4 L. Ed. 263; *Covington, etc., Bridge Co. v. Hager*, 203 U. S. 109, 111, 51 L. Ed. 111; *The Secretary v. McGarrahan*, 9 Wall. 298, 19 L. Ed. 579; *United States v. Schurz*, 102 U. S. 378, 26 L. Ed. 167; *Louisiana v. Jumel*, 107 U. S. 711, 727, 763, 27 L. Ed. 448; *Harlan, J., dissenting*; *Bath County v. Amy*, 13 Wall. 244, 20 L. Ed. 539; *Davenport v. County of Dodge*, 105 U. S. 237, 26 L. Ed. 1018.

The mere fact that the relief sought by mandamus concerns a right secured by the constitution does not enlarge this jurisdiction. *Covington, etc., Bridge Co. v. Hager*, 203 U. S. 109, 111, 51 L. Ed. 111.

*Circuit court of District of Columbia*.—Congress has granted to the circuit court

for the District of Columbia the entire quantity of jurisdiction, to which the judicial power of the United States extends under the constitution. See post, "In District of Columbia," VII, F, 7, c.

74. *Statutory provision—Eleventh section of judiciary act*.—*Bath County v. Amy*, 13 Wall. 244, 248, 20 L. Ed. 539; *Rosenbaum v. Bauer*, 120 U. S. 450, 455, 30 L. Ed. 743.

75. *Fourteenth section*.—*McIntire v. Wood*, 7 Cranch 504, 505, 3 L. Ed. 420; *Rosenbaum v. Bauer*, 120 U. S. 450, 30 L. Ed. 743; *In re Blake*, 175 U. S. 114, 119, 44 L. Ed. 94. See Revised Statutes, § 716.

"Under the judiciary act, the power to issue this writ, and the purposes for which it may be issued, in the courts of United States, other than in this district, is given by the 14th section of the act, under the general delegation of power 'to issue all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.'" *Kendall v. United States*, 12 Pet. 524, 621, 9 L. Ed. 1181.

"Had the 11th section of the judiciary act covered the whole ground of the constitution, there would be much reason for exercising this power, in many cases wherein some ministerial act is necessary to the completion of an individual right arising under laws of the United States, and the 14th section of the same act would sanction the issuing of the writ for such a purpose. But although the judicial power of the United States extends to cases arising under the laws of the United States, the legislature have not thought proper to delegate the exercise of that power to its circuit courts, except in certain specified cases. When questions arise under those laws, in the state courts, and the party who claims a right or privilege under them is unsuccessful, an appeal is given to the supreme court, and this provision the legislature has thought sufficient, at present, for all the political purposes intended to be answered by the



diction has not been enlarged generally by any subsequent acts;<sup>76</sup> but, in the interstate commerce act, congress has given jurisdiction to the circuit courts of mandamus in certain cases;<sup>77</sup> and congress has conferred jurisdiction upon them to issue mandamus to the Union Pacific Railroad Company to compel it to operate its road as required by law.<sup>78</sup>

(2) *As Original Proceeding*.—Until congress shall otherwise provide, the circuit courts of the United States have no power to issue a writ of mandamus in an original action, brought for the purpose of securing relief by the writ;<sup>79</sup> and this result is not changed because the relief sought concerns an alleged right, secured by the constitution of the United States.<sup>80</sup>

clause of the constitution, which relates to this subject." *McIntire v. Wood*, 7 Cranch 504, 506, 3 L. Ed. 420, quoted in *McClung v. Silliman*, 2 Wheat. 369, 370, 4 L. Ed. 263.

Were there nothing more, then, in the judiciary act than the grant of general authority by its 11th section to take cognizance of all suits of a civil nature at common law, it might well be doubted whether it was intended to confer the extraordinary powers residing in the British court of king's bench to award prerogative writs. All doubts upon this subject, however, are set at rest by the 14th section of the same act, which enacted that circuit courts shall have "power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary to the exercise of their respective jurisdictions and agreeable to the principles and usages of law." Among those "other writs," no doubt, mandamus is included; and this special provision indicates that the power to grant such writs generally was not understood to be granted by the 11th section, which conferred, only to a limited extent, upon the circuit courts the judicial power existing in the government under the constitution. *Bath County v. Amy*, 13 Wall. 244, 248, 20 L. Ed. 539.

**76. Subsequent acts.**—The acts here referred to are the acts of March 3, 1875, and of March 3, 1887, ch. 373, § 1, corrected by the act of August 13, 1888, ch. 866, § 1, found in 4 Fed. Stat. Anno. 266. *Knapp v. Lake Shore, etc., R. Co.*, 197 U. S. 536, 541, 49 L. Ed. 870; *Hess v. Reynolds*, 113 U. S. 73, 79, 80, 28 L. Ed. 927; *Rosenbaum v. Bauer*, 120 U. S. 450, 458, 30 L. Ed. 743; *Louisiana v. Jumel*, 107 U. S. 711, 727, 27 L. Ed. 448. See post, "As Ancillary Proceeding," VII, F, 7, b, (3).

**Process act.**—The act of congress of May 19, 1828, directed that the proceedings in suits at law in states admitted to the Union since 1879, is a process act, designed only to regulate proceedings in federal courts after they have obtained jurisdiction, not to enlarge jurisdiction. *Bath County v. Amy*, 13 Wall. 244, 250, 20 L. Ed. 539.

**77. Interstate commerce acts.**—Jurisdiction to issue mandamus is conferred by § 6, of the interstate commerce act to enforce the filing or publishing by a common

carrier of its schedules or tariffs of rates, fares and charges. *Knapp v. Lake Shore, etc., R. Co.*, 197 U. S. 536, 543, 49 L. Ed. 870.

"And such jurisdiction is also given to the circuit courts and district courts upon the relation of any person or persons, firm or corporation, alleging a violation of any of the provisions of the act which prevents the relator from having interstate traffic moved on terms as favorable as any other shipper." *Knapp v. Lake Shore, etc., R. Co.*, 197 U. S. 536, 543, 49 L. Ed. 870.

But such court is not given jurisdiction of the writ to compel the railroad to make a report of matters specified in § 20 of the act. *Knapp v. Lake Shore, etc., R. Co.*, 197 U. S. 536, 49 L. Ed. 870; *Covington, etc., Bridge Co. v. Hager*, 203 U. S. 109, 111, 51 L. Ed. 111. See post, "As Original Proceeding," VII, F, 7, b, (2).

**78. Act concerning Union Pacific Railroad.**—The act of congress of March 3, 1873, confers upon the proper circuit court of the United States jurisdiction to hear and determine all cases of mandamus to compel the Union Pacific Railroad Company to operate its road as required by law. *Union Pac. R. Co. v. Hall*, 91 U. S. 343, 23 L. Ed. 428.

**79. As original proceeding.**—*Covington, etc., Bridge Co. v. Hager*, 203 U. S. 109, 111, 51 L. Ed. 111; *Kendall v. United States*, 12 Pet. 524, 9 L. Ed. 1181; *United States v. Schurz*, 102 U. S. 378, 26 L. Ed. 167. See ante, "Nature of," VII, B.

It is the well-settled doctrine of the federal supreme court that the circuit courts cannot use the writ of mandamus as an original and independent remedy, but are limited to its use as a process in the enforcement of rights when jurisdiction has been already acquired for other purposes. *Heine v. Levee Comm'rs*, 19 Wall. 655, 660, 22 L. Ed. 223.

**Under interstate commerce act.**—Sections twelve and twenty of the interstate commerce act do not confer jurisdiction, of an original proceeding by mandamus, upon the circuit courts. *Knapp v. Lake Shore, etc., R. Co.*, 197 U. S. 536, 543, 49 L. Ed. 870.

**80. To enforce constitutional right.**—*Covington, etc., Bridge Co. v. Hager*, 203 U. S. 109, 111, 51 L. Ed. 111.

(3) *As Ancillary Proceeding.*—The circuit courts of the United States have no jurisdiction in original cases of mandamus,<sup>81</sup> and have only power to issue such writs in aid of their jurisdiction in cases already pending,<sup>82</sup> wherein juris-

**81. As ancillary proceeding.**—"None of the circuit courts in the several states can issue the writ as an exercise of original jurisdiction, any more than this court, but they may issue it whenever it is necessary, agreeably to the principles and usages of law, to the exercise of their proper jurisdiction." *Riggs v. Johnson County*, 6 Wall. 166, 189, 18 L. Ed. 768.

**82. Covington, etc., Bridge Co. v. Hager**, 203 U. S. 109, 110, 111, 51 L. Ed. 111; *Bath County v. Amy*, 13 Wall. 244, 251, 20 L. Ed. 539; *Graham v. Norton*, 15 Wall. 427, 428, 429, 21 L. Ed. 177; *Kendall v. United States*, 12 Pet. 524, 526, 9 L. Ed. 1181; *Riggs v. Johnson County*, 6 Wall. 166, 197, 18 L. Ed. 768; *Rosenbaum v. Bauer*, 120 U. S. 450, 453, 455, 30 L. Ed. 743; *Labette County Comm'r's v. Moulton*, 112 U. S. 217, 221, 28 L. Ed. 698; *McIntire v. Wood*, 7 Cranch 504, 3 L. Ed. 420; *Gaines v. Thompson*, 7 Wall. 347, 349, 19 L. Ed. 62; *The Secretary v. McGarrath*, 9 Wall. 298, 311, 19 L. Ed. 579; *Board of Comm'r's v. Aspinwall*, 24 How. 376, 384, 16 L. Ed. 735; *Heine v. Levee Comm'r's*, 19 Wall. 655, 22 L. Ed. 223; *County of Greene v. Daniel*, 102 U. S. 187, 195, 26 L. Ed. 99; *Davenport v. County of Dodge*, 105 U. S. 237, 242, 26 L. Ed. 1018.

"The circuit courts in the several states may issue the writ of mandamus in a proper case, where it is necessary to the exercise of their respective jurisdictions, agreeably to the principles and usages of law." *Riggs v. Johnson County*, 6 Wall. 166, 198, 18 L. Ed. 768.

**Confined to cases of necessity.**—"The power of the circuit courts to issue the writ of mandamus is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction." *United States v. Addison*, 22 How. 174, 183, 16 L. Ed. 304.

There is no act of congress which has conferred upon circuit courts authority to issue the writ of mandamus as an original proceeding, or at all, except when necessary for the exercise of the jurisdiction conferred upon them by law. *Bath County v. Amy*, 13 Wall. 244, 250, 20 L. Ed. 539.

**Restricted by statute—Judiciary act.**—"Power to issue such writs is granted by the 14th section, but with the restriction that they shall be necessary to the exercise of the jurisdiction given." *Bath County v. Amy*, 13 Wall. 244, 249, 20 L. Ed. 539; *McIntire v. Wood*, 7 Cranch 504, 3 L. Ed. 420; *McCluny v. Silliman*, 2 Wheat. 369, 370, 4 L. Ed. 263; *Davenport v. County of Dodge*, 105 U. S. 237, 26 L. Ed. 1018; *Kendall v. United States*, 12 Pet. 524, 9 L. Ed. 1181; *Riggs v. Johnson County*, 6 Wall. 166, 189, 18 L. Ed. 768.

**Same—Act of 1875.**—The doctrine of *Bath County v. Amy*, 13 Wall. 244, 20 L.

Ed. 539, was reaffirmed in *Davenport v. County of Dodge*, 105 U. S. 237, 26 L. Ed. 1018, without any question being raised as to the power of the circuit court to issue writs of mandamus since the passage of the act of March 3, 1875, c. 137. *Louisiana v. Jumel*, 107 U. S. 711, 762, 27 L. Ed. 448.

"It has been repeatedly held, as to the circuit courts, that they have no power under § 716 of revised statutes to issue writs of prohibition and mandamus, except when necessary in the exercise of their existing jurisdiction." In re *Massachusetts*, 197 U. S. 482, 488, 49 L. Ed. 845; *County of Greene v. Daniel*, 102 U. S. 187, 195, 26 L. Ed. 99; *United States v. Schurz*, 102 U. S. 378, 393, 26 L. Ed. 167; *Davenport v. County of Dodge*, 105 U. S. 237, 242, 243, 26 L. Ed. 1018; *Louisiana v. Jumel*, 107 U. S. 711, 727, 27 L. Ed. 448; *Rosenbaum v. Bauer*, 120 U. S. 450, 456, 30 L. Ed. 743; *Smith v. Bourbon County*, 127 U. S. 105, 112, 32 L. Ed. 73.

"It seems to me entirely clear that since the act of March 3, 1875, c. 137, enlarged the jurisdiction of the circuit court, they have power, in the first instance, and in advance of a judgment to issue a mandamus, to compel the performance of purely ministerial acts, which require no exercise of discretion, and are necessary to the protection or completion of an individual right arising under the constitution or the laws of the United States." *Louisiana v. Jumel*, 107 U. S. 711, 763, 27 L. Ed. 448, Harlan, J. dissenting; *Rosenbaum v. Bauer*, 120 U. S. 450, 30 L. Ed. 743.

**Same—Act of 1887.**—In the case of *Knapp v. Lake Shore, etc., R. Co.*, 197 U. S. 536, 49 L. Ed. 870, it was argued for the government that while decisions of the federal supreme court under the judiciary act of September 24, 1789, c. 20, § 1 Stat. 73, and the act of March 3, 1875, 18 Stat. 470, had been construed to confer no original jurisdiction in mandamus in the United States courts, yet the act of March 3, 1887, 24 Stat. 552, c. 373, in view of the modern development in proceedings by mandamus, should be held to confer the jurisdiction upon the circuit courts to entertain original suits in mandamus. The contention was rejected and the prior cases adhered to. *Covington, etc., Bridge Co. v. Hager*, 203 U. S. 109, 111, 51 L. Ed. 111.

**To enforce judgment.**—In many cases its issuance is justified in such cases as the only means of executing judgments. *Labette County Comm'r's v. United States*, 112 U. S. 217, 221, 28 L. Ed. 698; *Riggs v. Johnson County*, 6 Wall. 166, 198, 18 L. Ed. 768; *Kentucky v. Dennison*, 24 How. 66, 97, 16 L. Ed. 717.

To enforce its judgment, a federal court



diction has been acquired by other means and by other process.<sup>83</sup>

(4) *Suit by Citizens of Different States*—(a) *Instituted in Federal Court*.—The circuit courts have no jurisdiction of an original mandamus, under the grant of jurisdiction of suits between citizens of different states, or where alien is a party.<sup>84</sup>

(b) *Removed to Federal Court*.—The circuit court acquires no jurisdiction of an original writ of mandamus by the removal of such cause from a state court on the ground of the diverse citizenship of the parties.<sup>85</sup>

(5) *To Particular Officers and Courts*—(a) *Parties to Original Suit*.—Although the jurisdiction in mandamus is ancillary merely, it can be exercised over persons not parties to the judgment sought to be enforced.<sup>86</sup>

(b) *United States Officers*.—A circuit court has no jurisdiction to issue a

may issue the writ to a state officer. *Graham v. Norton*, 15 Wall. 427, 428, 21 L. Ed. 177.

**83. Jurisdiction must be otherwise acquired.**—"It is authorized only when ancillary to a jurisdiction already acquired." *Bath County v. Amy*, 13 Wall. 244, 249, 20 L. Ed. 539.

"In other words, the writ cannot be used to confer a jurisdiction which the circuit court would not have without it." *Bath County v. Amy*, 13 Wall. 244, 249, 20 L. Ed. 539; *Heine v. Levee Comm'rs*, 19 Wall. 655, 660, 22 L. Ed. 223; *Rosenbaum v. Bauer*, 120 U. S. 450, 455, 30 L. Ed. 743.

"Express determination of this court is, that it can only be issued by those courts in cases where the jurisdiction already exists, and not where it is to be acquired by means of the writ." *Riggs v. Johnson County*, 6 Wall. 166, 197, 18 L. Ed. 768.

**Necessity for judgment.**—A judgment at law is necessary to support the writ, which is in the nature of an execution to carry the judgment into effect. *Davenport v. County of Dodge*, 105 U. S. 237, 242, 26 L. Ed. 1018; *County of Greene v. Daniel*, 102 U. S. 187, 26 L. Ed. 99; *Graham v. Norton*, 15 Wall. 427, 21 L. Ed. 177; *Bath County v. Amy*, 13 Wall. 244, 20 L. Ed. 539.

"In the courts of the United States. \* \* \* a mandamus can only be granted in aid of an existing jurisdiction, and in this class of cases a judgment against the corporation is an essential prerequisite to such a writ, although in the courts of the state it is not. This whole subject was fully considered at the last term in *Davenport v. County of Dodge*, 105 U. S. 237, 26 L. Ed. 1018, where the other cases establishing the rule are cited." *Chickamining v. Carpenter*, 106 U. S. 663, 665, 27 L. Ed. 307.

**84. Suit by citizens of different states.**—*Rosenbaum v. Bauer*, 120 U. S. 450, 458, 30 L. Ed. 743; *Bath County v. Amy*, 13 Wall. 244, 248, 20 L. Ed. 539. See the title COURTS, vol. 4, p. 936.

**85. Removed to circuit court.**—The plaintiff filed a petition for the removal of an original proceeding for a writ of mandamus to the fiscal officers of a city, to compel them to pay interest on city

bonds into the circuit court of the United States for the district of California, on the ground of diversity of citizenship in the parties. The court cannot acquire jurisdiction by the removal of an original mandamus proceeding. *Rosenbaum v. Bauer*, 120 U. S. 450, 30 L. Ed. 743.

"As this court, while §§ 11 and 12 of the act of 1789 were in force, and § 14 of that act was also in force, always held, even where the requisite diversity of citizenship existed, that the restriction of § 14 operated to prevent original cognizance by a circuit court, under § 11, of a proceeding by mandamus not necessary for the exercise of a jurisdiction which had previously otherwise attached, so, with §§ 1 and 2 of the act of 1875 in force at the same time with § 716 of the Revised Statutes, the restriction of § 716 must operate to prevent cognizance by removal, by a circuit court, under § 2 of the act of 1875, even where the requisite diversity of citizenship exists, of a like proceeding by mandamus." *Rosenbaum v. Bauer*, 120 U. S. 450, 458, 30 L. Ed. 743.

"It is impossible to see how, with legally identical language in § 2 with that in § 1, jurisdiction by removal can exist, under § 2 of the act of 1875, of proceedings like those before us, founded on citizenship." *Rosenbaum v. Bauer*, 120 U. S. 450, 457, 30 L. Ed. 743.

"If by existing laws the circuit court of the United States has no power to issue such writs, still, upon the removal of the mandamus suit from the state court, the former had power to do what the state court could legally have done had there been no removal, viz, make peremptory the alternative mandamus granted at the beginning of the suit by the inferior state court." *Louisiana v. Jumel*, 107 U. S. 711, 768, 27 L. Ed. 448, Harlan, J., dissenting.

**86. To persons not parties.**—"The objection that the circuit court had no jurisdiction to issue its mandamus to the plaintiffs in error is based upon the supposition that because they are not parties to the judgment against Oswego Township, and are not officers of or representatives of that municipal corporation, but are officers of the county of Labette, the proceeding against them is the exercise of an original jurisdiction, which does not

writ of mandamus to an officer of the United States, where not necessary to the exercise of an existing jurisdiction.<sup>87</sup>

(c) *United States Courts*.—Under the fourteenth section of the judiciary act, the circuit courts of the United States may issue the writ of mandamus to the district courts, in cases where a writ of error or appeal lies to the circuit courts.<sup>88</sup> The appellate jurisdiction of the circuit courts has been taken away by statute.<sup>89</sup>

(d) *State Officers*.—A circuit court may issue the writ of mandamus to state officers in proper cases.<sup>90</sup> It may issue the writ to compel state officers to levy and collect taxes to discharge its judgments.<sup>91</sup> The court cannot assume the

belong to that court," was not sustained. *Labette County Comm'rs v. Moulton*, 112 U. S. 217, 221, 28 L. Ed. 698.

"An illustration to the contrary is found in that class of cases of which *Krippendorf v. Hyde*, 110 U. S. 276, 25 L. Ed. 145, is an example." *Labette County Comm'rs v. Moulton*, 112 U. S. 217, 221, 28 L. Ed. 698.

**87. United States officers.**—*McIntire v. Wood*, 7 Cranch 504, 3 L. Ed. 420; *In re Blake*, 175 U. S. 114, 119, 44 L. Ed. 94; *Kendall v. United States*, 12 Pet. 524, 615, 9 L. Ed. 1181.

"The authority to issue the writ of mandamus to an officer of the United States, commanding him to perform a specific act, required by a law of the United States, is within the scope of the judicial powers of the United States, under the constitution. But \* \* \* the whole of that power has not been communicated by law to the circuit courts, or, in other words, that it was then a dormant power, not yet called into action, and vested in those courts." *Kendall v. United States*, 12 Pet. 524, 615, 9 L. Ed. 1181.

"In *McIntire v. Wood*, in 1813, 7 Cranch 504, 3 L. Ed. 420, it was held that a circuit court had no power to issue a mandamus to the register of a land office of the United States, commanding him to grant a final certificate of purchase to the plaintiff for lands to which he supposed himself entitled under the laws of the United States." *Rosenbaum v. Bauer*, 120 U. S. 450, 453, 30 L. Ed. 743.

The case of *McIntire v. Wood*, 7 Cranch 504, 3 L. Ed. 420, was affirmed in *McCluny v. Silliman*, 2 Wheat. 369, 4 L. Ed. 263, and *McClung v. Silliman*, 6 Wheat. 598, 5 L. Ed. 340.

"In *McClung v. Silliman*, in 1821, 6 Wheat. 598, 5 L. Ed. 340, a mandamus was applied for in a circuit court of the United States to compel the register of a land office of the United States to issue papers to show the pre-emptive interest of the plaintiff in certain land. The writ was refused." *Rosenbaum v. Bauer*, 120 U. S. 450, 454, 30 L. Ed. 743.

**88. United States courts.**—This power was exercised, not as in the court of king's bench as a supervisory power, but as in the United States supreme court as a means of bringing the case to final judgment to be reviewed. *Kendall v.*

*United States*, 12 Pet. 524, 622, 9 L. Ed. 1181.

**89. No appellate jurisdiction since 1891.**—See Act of March 3, 1891, ch. 517, Fed. Stat. Anno. 254, 395.

**90. To state officers.**—*Morgan v. Town Clerk*, 7 Wall. 610, 612, 19 L. Ed. 202; *Rosenbaum v. Bauer*, 120 U. S. 450, 30 L. Ed. 743.

**91. To compel levy of taxes.**—Where the commissioners of a county have authority by statute to issue bonds, and are required to levy a tax to pay the interest coupons as they become due, and, having issued such bonds, they neglect or refuse to assess the tax or pay the interest, a writ of mandamus is the proper legal remedy. The circuit courts of the United States have authority to issue such writ of mandamus against the commissioners, where it is necessary, as a remedy for suitors in such court. *Board of Comm'rs v. Aspinwall*, 24 How. 376, 16 L. Ed. 735.

"Consistently with the views in those cases, this court, in *Riggs v. Johnson County*, in 1867, 6 Wall. 166, 18 L. Ed. 768, held that a circuit court had power to issue a mandamus to officers of a county, commanding them to levy a tax to pay a judgment rendered in that court against the county for interest on bonds issued by the county, where a statute of the state, under which the bonds were issued, had made such levy obligatory on the county. This ruling has been repeatedly followed since, and rests on the view that the issue of the mandamus is an award of execution on the judgment, and is a proceeding necessary to complete the jurisdiction exercised by rendering the judgment." *Rosenbaum v. Bauer*, 120 U. S. 450, 454, 30 L. Ed. 743.

"The same doctrine was applied, in *Graham v. Norton*, in 1872, 15 Wall. 427, 21 L. Ed. 177, where a circuit court of the United States had affirmed the action of a district court in granting a mandamus to compel a state auditor to issue certificates as to the amount of illegal taxes paid by the applicant, the issuing of such certificates being provided for by a statute of the state. This court held that neither the circuit court nor the district court had jurisdiction to issue the writ." *Rosenbaum v. Bauer*, 120 U. S. 450, 455, 30 L. Ed. 743. See



executive authority of a state.<sup>92</sup> A mandamus will not be awarded to compel county officers of a state to do any act which they are not authorized to do by the laws of the state from which they derive their powers.<sup>93</sup>

(e) *State Courts*.—The circuit courts of the United States have no power to issue writs of mandamus to state courts, by way of original proceeding. The court can issue the writ only where it is necessary or ancillary to an existing jurisdiction otherwise acquired.<sup>94</sup>

c. *In District of Columbia*.—The circuit court of the United States in the District of Columbia, under the act of 1801, could issue the writ of mandamus as an original process in all cases of law and equity arising under the laws of the United States.<sup>95</sup> The same jurisdiction is now possessed by the supreme

post, "Levy and Collection of Taxes," VIII, M, 4.

**92. To assume executive authority of state.**—"These, then, are suits by creditors at large, of the class provided for in the act of 1874, to compel, by judicial process, the officers of the state to enforce the provisions of the act, when the state, by an amendment to its constitution, has undertaken to prohibit them from doing so, and when the court, if it requires an officer to proceed, cannot protect him with a judgment to which the state is a party. The persons sued are the executive officers of the state, and they are proceeded against in their official capacity. The money in the treasury is the property of the state, and not in any legal sense the property of the bond or coupon holders." *Louisiana v. Jumel*, 107 U. S. 711, 720, 27 L. Ed. 448.

"Even if this is a case which was properly removed—a question we do not deem it necessary now to decide. The remedy sought, in order to be complete, would require the court to assume all the executive authority of the state, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection, and disbursement of the tax in question until the bonds, principal and interest, were paid in full, and that, too, in a proceeding in which the state, as a state, was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place." *Louisiana v. Jumel*, 107 U. S. 711, 727, 27 L. Ed. 448.

There is no statute or judicial decision giving the bondholders a remedy in the state courts or elsewhere, either by mandamus against the state in its political capacity, to compel it to do what it has agreed should be done, but which it refuses to do. *Louisiana v. Jumel*, 107 U. S. 711, 720, 27 L. Ed. 448.

**93. To compel acts not authorized by law.**—*Supervisors v. United States*, 18 Wall. 71, 77, 21 L. Ed. 771. See post, "Authorized by Statute," VIII, M, 4, b.

**94. To state courts.**—*Bath County v. Amy*, 13 Wall. 244, 20 L. Ed. 539; *In re Blake*, 175 U. S. 114, 119, 44 L. Ed. 94;

*Rosenbaum v. Bauer*, 120 U. S. 450, 455, 30 L. Ed. 743.

"Applying this rule to the present case it is decisive. The relator's claim for payment had not been brought to judgment in the circuit court, nor had it been put in suit. His application for a mandamus was, therefore, an original proceeding, neither necessary nor ancillary to any jurisdiction which the court then had. For this reason it should have been denied, and the judgment that a peremptory mandamus should issue was erroneous." *Bath County v. Amy*, 13 Wall. 244, 251, 20 L. Ed. 539.

"In *Bath County v. Amy*, in 1871, 13 Wall. 244, 20 L. Ed. 539, the holder of bonds issued by a county in Kentucky applied to the circuit court of the United States for a mandamus to compel the county court to levy a tax to pay the interest on the bonds, on the ground that a statute of the state required the county court to do so. No judgment had been obtained for the interest. In Kentucky such a proceeding could have been maintained in a court of the state, without a prior judgment, and would have been there treated as a suit of a civil nature at common law, and not a mere incident to another suit. The circuit court awarded the mandamus, but this court reversed the judgment, holding that it was doubtful whether the writ of mandamus was intended to be embraced in the grant of power in the 11th section of the judiciary act of 1789, to the circuit courts, to take cognizance of suits of a civil nature, at common law, where the diversity of citizenship there specified existed; but that the special provision of the 14th section of the act, while, no doubt, including mandamus under the term 'other writs,' indicated that the power to grant that writ generally was not understood to be covered by the 11th section." *Rosenbaum v. Bauer*, 120 U. S. 450, 455, 30 L. Ed. 743.

**95. In District of Columbia.**—*Kendall v. United States*, 12 Pet. 524, 619, 9 L. Ed. 1181; *Decatur v. Paulding*, 14 Pet. 497, 10 L. Ed. 559; *United States v. Schurz*, 102 U. S. 378, 394, 26 L. Ed. 167; *The Secretary v. McGarrahan*, 9 Wall. 298, 312, 19 L. Ed. 579; *Riggs v. Johnson County*, 6 Wall. 166, 197, 18 L. Ed. 768;

court of the district.<sup>96</sup>

8. OF DISTRICT COURTS.—A district court of the United States cannot issue an original writ of mandamus.<sup>97</sup>

**G. Of State Courts**—1. IN GENERAL.—In states where the common law is adopted and governs in the administration of justice, power to issue this writ is generally confided to the highest court of original jurisdiction.<sup>98</sup> This common-law principle, however, may be modified by the legislature in any way that they may deem proper and expedient.<sup>99</sup>

2. TO UNITED STATES OFFICERS.—A state court has no authority to issue a mandamus to an officer of the United States.<sup>1</sup>

**H. Of Territorial Courts.**—A territorial legislature may confer upon the supreme court of a territory power to issue the writ in aid of its appellate jurisdiction.<sup>2</sup>

*Louisiana v. Jumel*, 107 U. S. 711, 763, 27 L. Ed. 448, Harlan, J., dissenting; *United States v. Black*, 128 U. S. 40, 45, 32 L. Ed. 354; *United States v. Guthrie*, 17 How. 284, 15 L. Ed. 102.

**Different from other circuit courts.**—“The case of *Columbia Ins. Co. v. Wheelwright*, 7 Wheat. 534, 5 L. Ed. 516, furnishes a very strong, if not conclusive, inference, that this court did not consider the circuit court of this district as standing on the same footing with the circuit courts in the state; and impliedly admitting that it had power to issue a mandamus in a case analogous to the present.” *Kendall v. United States*, 12 Pet. 524, 618, 9 L. Ed. 1181.

**Full quantity of federal jurisdiction.**—By the third and fifth sections of the act of the 27th of February, 1801, the circuit court of the District of Columbia was invested with the entire quantity of jurisdiction to which by the constitution the judicial power of the United States was extended. *Kendall v. United States*, 12 Pet. 524, 621, 9 L. Ed. 1181. See ante, “Under Constitution,” VII, F, 4, a.

**To federal officer.**—“In the case of *Kendall v. United States*, 12 Pet. 524, 9 L. Ed. 1181, it was decided in this court, that the circuit court for Washington county, in the District of Columbia, has the power to issue a mandamus to an officer of the federal government, commanding him to do a ministerial act.” *Decatur v. Paulding*, 14 Pet. 497, 514, 10 L. Ed. 559.

**To secretary of navy.**—This court had jurisdiction to issue the writ to the secretary of the navy. *Decatur v. Paulding*, 14 Pet. 497, 10 L. Ed. 559.

**To secretary of treasury.**—The circuit court of the United States for the District of Columbia, had not the power to issue a writ of mandamus, commanding the secretary of the treasury to pay a judge of the territory of Minnesota his salary, for the unexpired term of his office, from which he had been removed by the president of the United States. *United States v. Guthrie*, 17 How. 284, 15 L. Ed. 102.

**96. Supreme court of district.**—See post, “Of Courts of District of Columbia,” VII, I.

**97. Of district courts.**—Mandamus from the district courts will not lie by an assignee in bankruptcy, representing sundry bankrupts, against the auditor of a state, to recover from the state, taxes long before paid into the state treasury, upon the ground that the legislature had by law directed them to be refunded to the parties who had paid the same, or to their representatives. Such a mandamus is not ancillary to a jurisdiction already acquired but is in effect an original proceeding. *Graham v. Norton*, 15 Wall. 427, 21 L. Ed. 177. See the title COURTS, vol. 4, p. 899.

**98. Of state courts—Common-law rule.**—*Kendall v. United States*, 12 Pet. 524, 620, 9 L. Ed. 1181.

**99. Statutory changes.**—“In some of the states, this power is vested in other judicial tribunals than the highest court of original jurisdiction.” *Kendall v. United States*, 12 Pet. 524, 621, 9 L. Ed. 1181.

**1. To United States officers.**—*McClung v. Silliman*, 6 Wheat. 598, 5 L. Ed. 340; *Kendall v. United States*, 12 Pet. 524, 619, 9 L. Ed. 1181; *In re Blake*, 175 U. S. 114, 119, 44 L. Ed. 94.

Neither under its jurisdiction not granted to the general government and remaining in the state, nor under its jurisdiction in regard to the real estate within the boundaries of a state, can the supreme court of Ohio mandamus a register of the land office of the United States to enter the application of a party alleging himself entitled to a pre-emption interest to certain lands under the seventh section of the act of May 10, 1800. *McClung v. Silliman*, 6 Wheat. 598, 5 L. Ed. 340. See, also, *McCluny v. Silliman*, 2 Wheat. 369, 4 L. Ed. 263, for history of this case.

It is not easy to conceive, on what legal ground a state tribunal can, in any instance, exercise the power of issuing a mandamus to a register of the land office. *Kendall v. United States*, 12 Pet. 524, 617, 9 L. Ed. 1181. See post, “Where Writ Issues from State Court,” VII, J, 3; “Determination of Jurisdiction,” VII, K.

**2. Of territorial courts.**—*Clough v. Curtis*, 134 U. S. 361, 33 L. Ed. 945.



**I. Of Courts of District of Columbia.**—The supreme court of the District of Columbia is authorized to issue the writ of mandamus as an original process in cases where, by the principles of the common law, the petitioner is entitled to it.<sup>3</sup>

**J. Concurrent and Conflicting Jurisdiction**—1. **IN GENERAL.**—The state and national courts being independent of each other, neither can impede or arrest any action the other may take, within the limits of its jurisdiction, for the satisfaction of its judgments and decrees, by the writ of mandamus.<sup>4</sup>

2. **WHERE WRIT ISSUES FROM UNITED STATES COURT.**—To enforce its judgment, a federal court has authority to issue a writ of mandamus to the officers of a state, and the state is powerless to prevent the officers from obeying the mandamus by injunctions.<sup>5</sup> It makes no difference whether the relators have been made a defendant to the proceeding in the state court for an injunction or not;<sup>6</sup> nor whether the injunction have issued before or after the suit in the federal court was begun.<sup>7</sup>

3. **WHERE WRIT ISSUES FROM STATE COURT.**—A state court has jurisdiction of a writ of mandamus to a state recorder to erase inscriptions against the property of the petitioner in favor of a corporation for which a receiver has been appointed by a federal court.<sup>8</sup>

**K. Determination of Jurisdiction.**—The extent to which the writ of mandamus from the federal courts can give relief against decisions in the state courts involves a question respecting the process of the federal courts; and, that being so, it is peculiarly the province of the federal supreme court to decide all questions which concern the subject.<sup>9</sup> It is usually not within the province of the federal court to decide whether a state court has jurisdiction to issue the

**3. Of courts of District of Columbia.**—*United States v. Black*, 128 U. S. 40, 45, 32 L. Ed. 354; *United States v. Schurz*, 102 U. S. 378, 26 L. Ed. 167. See ante, "In District of Columbia," VII, F, 7, c.

**4. Concurrent and conflicting jurisdiction.**—*Riggs v. Johnson County*, 6 Wall. 166, 205, 18 L. Ed. 768; *Amy v. The Supervisors*, 11 Wall. 136, 20 L. Ed. 101; *In re Blake*, 175 U. S. 114, 119, 44 L. Ed. 94.

**5. Where writ issues from United States court.**—*Amy v. The Supervisors*, 11 Wall. 136, 137, 20 L. Ed. 101; *The Mayor v. Lord*, 9 Wall. 409, 19 L. Ed. 704; *Hawley v. Fairbanks*, 108 U. S. 543, 552, 27 L. Ed. 820; *Riggs v. Johnson County*, 6 Wall. 166, 18 L. Ed. 768; *United States v. Keokuk*, 6 Wall. 514, 518, 18 L. Ed. 933.

**Basis of rule.**—This is not on account of any paramount jurisdiction in the latter, but because they are entirely independent in their sphere of action. *Weber v. Lee County*, 6 Wall. 210, 212, 18 L. Ed. 781.

**Enjoining levy of tax.**—Mandamus from a federal court to officers of a county in a state, to levy a tax to pay interest on bonds issued by the county on which a relator has obtained judgment, and has no means of obtaining satisfaction but by the levy of a tax, cannot be, in any way, controlled by an injunction from a state court to those officers against a levy. *Riggs v. Johnson County*, 6 Wall. 166, 18 L. Ed. 768; *The Supervisors v. Durant*, 9 Wall. 415, 19 L. Ed. 732.

An injunction from a state court against a city's levying a tax to pay certain bonds of the city, cannot be set up to prevent a mandamus from the federal courts ordering the city to levy a tax to pay a judgment obtained against it on those same bonds. *The Mayor v. Lord*, 9 Wall. 409, 19 L. Ed. 704.

**6. Relator party to injunction.**—*The Supervisors v. Durant*, 9 Wall. 415, 19 L. Ed. 732.

**7. Injunction prior in time to mandamus.**—*The Supervisors v. Durant*, 9 Wall. 415, 19 L. Ed. 732; *Riggs v. Johnson County*, 6 Wall. 166, 18 L. Ed. 768; *United States v. Keokuk*, 6 Wall. 514, 18 L. Ed. 933.

Where the court of the state of Illinois enjoined a county clerk from assessing taxes to pay bonds issued under the act of March 24, 1869, because instead of pursuing under §§ 12 and 13 of that act providing for a certification of the vote, amount of bonds and interest from the town clerk to the county clerk, the petitioners pursued under §§ 4 and 5 of the act of April 16, 1869, providing for registration of the bonds by the state auditor, a judgment subsequently obtained in a federal court establishing the right of the petitioners to the tax can be enforced by mandamus. *Hawley v. Fairbanks*, 108 U. S. 543, 551, 27 L. Ed. 820.

**8. Where writ issues from state court.**—*Calhoun v. Lanaux*, 127 U. S. 634, 32 L. Ed. 297.

**9. Determination of jurisdiction—Of federal courts.**—*Butz v. Muscatine*, 8 Wall. 575, 19 L. Ed. 490.

writ of mandamus; but, when the state court issues the writ to a federal officer, it may interfere.<sup>10</sup>

**L. Territorial Extent of Jurisdiction.**—The mandamus jurisdiction of the court of king's bench is coextensive with judicial sovereignty.<sup>11</sup>

### VIII. Grounds for Mandamus.

**A. In General.**—Two things must concur to authorize a mandamus: the officer to whom it is directed must be one to whom, on legal principles, such writ can be issued; and the person applying for it must be without any other specific or legal remedy.<sup>12</sup> The writ does not issue as a matter of course.<sup>13</sup>

**B. Discretion of Court.**—Whether or not the writ shall issue usually rests in the sound discretion of the court.<sup>14</sup>

**C. When Grounds to Exist.**—Whether or not a mandamus will issue to protect the rights of the public is to be determined upon the facts existing at the time of final judgment, and not the facts existing at the time of filing the petition.<sup>15</sup>

**D. As Dependent upon Nature of Rights to Be Enforced**—1. IN GENERAL.—Mandamus lies to enforce a right which the court has previously determined, or at least supposes, to be consonant to right and justice.<sup>16</sup>

2. DOUBTFUL RIGHTS.—Mandamus will issue only where there is a clear legal right sought to be enforced. It will not issue to enforce a doubtful right.<sup>17</sup>

**10. Of state courts.**—"Whether a state court generally possesses a power to issue writs of mandamus, or what modifications of its powers may be imposed on it, by the laws which constitute it, it is correctly argued, that this court cannot be called upon to decide. But when the exercise of that power is extended to officers commissioned by the United States, it is immaterial, under what law that authority be asserted, the controlling power of this court may be asserted on the subject, under the description of an exemption claimed by the officer over whom it is exercised." *McClung v. Silliman*, 6 Wheat. 598, 603, 5 L. Ed. 340.

**11. Territorial extent of jurisdiction.**—*Kendall v. United States*, 12 Pet. 524, 621, 9 L. Ed. 1181.

**12. Grounds for—In general.**—*Ex parte Crane*, 5 Pet. 190, 217, 8 L. Ed. 92.

The writ of mandamus lies where there is a right to execute an office, perform a service or exercise a franchise, and the person is kept out of possession, and dispossessed of such right, and has no other specific legal remedy. *Kendall v. United States*, 12 Pet. 524, 620, 9 L. Ed. 1181.

The writ lies where there is a refusal to perform a ministerial act involving no exercise of judgment or discretion. It lies, also, where the exercise of judgment and discretion are involved and the officer refuses to decide, provided that, if he decided, the aggrieved party could have his decision reviewed by another tribunal. It is applicable only in these two classes of cases. *Commissioner of Patents v. Whiteley*, 4 Wall. 522, 534, 18 L. Ed. 335.

**Extension of.**—The grounds for mandamus have gradually been extended. *Virginia v. Rives*, 100 U. S. 313, 323, 25 L. Ed. 667.

**13. Does not issue as matter of course.**—*Postmaster-General v. Trigg*, 11 Pet.

173, 9 L. Ed. 676; *Ex parte Taylor*, 14 How. 3, 12, 14 L. Ed. 302. See post, "Discretion of Court," VIII, B.

**14. Discretion of court.**—*In re Key*, 189 U. S. 84, 85, 47 L. Ed. 720; *American Const. Co. v. Jacksonville, etc., R. Co.*, 148 U. S. 372, 379, 37 L. Ed. 486; *In re Rice*, 155 U. S. 396, 403, 39 L. Ed. 198. See ante, "Prerogative Writ," II, B; post, "Discretion of Court," IX, I, 3.

"If sometimes demandable ex debito justitiæ, it is certainly not on a record like this." *In re Key*, 189 U. S. 84, 85, 47 L. Ed. 720.

"The writ of mandamus is subject to the legal and equitable discretion of the court, and it ought not to be issued in cases of doubtful right." *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 302, 8 L. Ed. 949.

**15. When grounds to exist.**—In this regard "there is a very great difference between an indictment for not fulfilling a public duty, and a mandamus commanding the party liable to fulfillment." *Northern Pac. R. Co. v. Dustin*, 142 U. S. 492, 508, 35 L. Ed. 1092, quoting *Great Western Ry. v. The Queen*, 1 El. & Bl. 878.

But in the later case of *International Contracting Co. v. Lamont*, 155 U. S. 303, 308, 39 L. Ed. 160, it is stated that there "must be a duty which exists at the time when the application for the mandamus is made." See post, "Existing," VIII, E, 2.

**16. As dependent upon nature of rights to be enforced.**—*Marbury v. Madison*, 1 Cranch 137, 169, 2 L. Ed. 60; *Postmaster-General v. Trigg*, 11 Pet. 173, 9 L. Ed. 676; *Redfield v. Windom*, 137 U. S. 636, 643, 34 L. Ed. 811.

**17. Doubtful rights.**—*Kendall v. United States*, 12 Pet. 524, 620, 9 L. Ed. 1181; *Marbury v. Madison*, 1 Cranch 137, 166,



3. **CONTRACTUAL RIGHTS.**—The remedy by mandamus cannot be invoked to enforce obligations arising simply from contract as distinguished from duties imposed by law;<sup>18</sup> but the statute of Louisiana, authorizing the enforcement of contracts of municipal corporations by mandamus, is not an impairment of the obligation of contract.<sup>19</sup>

4. **CONDITIONAL RIGHTS.**—Conditional rights cannot be enforced by mandamus.<sup>20</sup>

5. **REMOTE INTERESTS.**—Mandamus will not lie to protect mere remote interests.<sup>21</sup>

6. **TITLE AND POSSESSION OF OFFICE.**—Mandamus will not lie to admit a person to or remove him from an office, where such acts involve the exercise of a discretion.<sup>22</sup> Mandamus is the proper remedy to compel recognition of the acts of de facto officers pending the determination of their right to office by quo warranto.<sup>23</sup>

169, 2 L. Ed. 60; *Redfield v. Windom*, 137 U. S. 636, 644, 34 L. Ed. 811; *Commonwealth v. Boutwell*, 13 Wall. 526, 531, 20 L. Ed. 631; *Ex parte Cutting*, 94 U. S. 14, 24 L. Ed. 49; *United States v. Duell*, 172 U. S. 576, 586, 43 L. Ed. 559; *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 302, 8 L. Ed. 949; *Reeside v. Walker*, 11 How. 272, 289, 13 L. Ed. 693; *United States v. Gomez*, 3 Wall. 752, 18 L. Ed. 212; *United States v. Boutwell*, 17 Wall. 604, 607, 21 L. Ed. 721; *Caledonian Coal Co. v. Baker*, 196 U. S. 432, 440, 49 L. Ed. 540; *Union Pac. R. Co. v. Hall*, 91 U. S. 343, 356, 23 L. Ed. 428; *United States v. Thoman*, 156 U. S. 353, 39 L. Ed. 450; *United States v. County of Macon*, 99 U. S. 582, 25 L. Ed. 331; *United States v. The Commissioner*, 5 Wall. 563, 18 L. Ed. 692; *Ex parte Bradley*, 7 Wall. 364, 376, 19 L. Ed. 214; *Northern Pac. R. Co. v. Dustin*, 142 U. S. 492, 506, 35 L. Ed. 1092; *Postmaster-General v. Trigg*, 11 Pet. 173, 9 L. Ed. 676; *In re Key*, 189 U. S. 84, 85, 47 L. Ed. 720; *Thompson v. Allen County*, 115 U. S. 550, 553, 29 L. Ed. 472; *County Comm'rs v. Wilson*, 109 U. S. 621, 625, 27 L. Ed. 1053; *Respublica v. Guardians*, 2 Dall. 224, 1 L. Ed. 358; *Smith v. Bourbon County*, 127 U. S. 105, 110, 32 L. Ed. 73; *Virginia v. Rives*, 100 U. S. 313, 329, 25 L. Ed. 667; *Board of Comm'rs v. Aspinwall*, 24 How. 376, 385, 16 L. Ed. 735; *Insurance Co. v. The Treasurer*, 11 Wall. 204, 20 L. Ed. 112.

The writ will not issue as of course in cases of doubtful rights. *United States v. Gomez*, 3 Wall. 752, 18 L. Ed. 212; *In re Key*, 189 U. S. 84, 85, 47 L. Ed. 720; *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 8 L. Ed. 949.

18. **Contractual rights.**—*New Orleans, etc., R. Co. v. New Orleans*, 157 U. S. 219, 225, 39 L. Ed. 679. See post, "To Enforce Contract," VIII, H, 3.

19. **Of municipal corporations in Louisiana.**—*New Orleans, etc., R. Co. v. New Orleans*, 157 U. S. 219, 39 L. Ed. 679. See the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 758. And see post, "Enforcement of Municipal Obligations," VIII, M, 3.

20. **Conditional rights.**—*Nugent v. Arizona Imp. Co.*, 173 U. S. 338, 43 L. Ed. 721; *Hawley v. Fairbanks*, 108 U. S. 543, 545, 549, 27 L. Ed. 820.

Where the board of control of the territory of Arizona contracted with the petitioner to lease convict labor to him in pursuance of a statute which required the lessee to give a good and sufficient bond, and there was no evidence that such bond was given, the respondent, superintending the territorial prison at Yuma, refused to deliver the convicts, and a writ of mandamus was sought to compel him to do so; it was held, that the contract was inoperative in the absence of the required bond and that mandamus would not issue. *Nugent v. Arizona Imp. Co.*, 173 U. S. 338, 43 L. Ed. 721.

21. **Remote interests.**—*Board of Liquidation v. McComb*, 92 U. S. 531, 536, 23 L. Ed. 623. See post, "Parties in Interest," IX, F, 1, b.

22. **Title and possession of office.**—*Keim v. United States*, 177 U. S. 290, 44 L. Ed. 774. See, also, *White v. Berry*, 151 U. S. 366, 43 L. Ed. 199. See post, "Appointment of Officers," VIII, E, 8, c, (2).

The writ will not issue when the term of office is for an uncertain duration. *Ex parte Hennen*, 13 Pet. 225, 230, 10 L. Ed. 136.

Quo warranto and not mandamus is the proper proceeding to acquire title to an office; as to which, see the title **QUO WARRANTO**.

23. **To compel recognition of de facto officer.**—In this case there was pending a writ of quo warranto to determine the right of county commissioners to their offices. Until the final determination of this writ such commissioners were de facto officers. The county clerk refused to recognize them and record their proceedings on the county books. Mandamus is the proper remedy to compel this duty in the clerk. *In re Delgado*, 140 U. S. 586, 588, 35 L. Ed. 578.

"It is a suit by certain parties showing themselves to be de facto commissioners,

7. **RIGHTS UNDER DIRECTORY STATUTE.**—Rights under a directory statute cannot be so enforced.<sup>21</sup>

8. **PRIVATE RIGHTS.**—The writ lies to enforce individual rights arising under laws of United States.<sup>25</sup>

**E. As Dependent upon Nature of Duty to Be Enforced.**—1. **IN GENERAL.**—Mandamus will not issue unless there is a legal duty resting upon the person to whom directed.<sup>26</sup>

2. **EXISTING.**—The duty must exist at the time the application for the mandamus is made.<sup>27</sup> This duty must exist independent of the writ; for the writ itself imposes no new or additional duty.<sup>28</sup>

3. **POSITIVE.**—A duty to be enforceable by mandamus must be plain,<sup>29</sup> positive,<sup>30</sup> and clearly defined.<sup>31</sup> It must not only be authorized by law; but the

to compel the clerk of that board to respect their possession of the office, discharge his duties as clerk to the acting board, and not assume to himself judicial functions." *In re Delgado*, 140 U. S. 586, 591, 35 L. Ed. 578.

24. **Rights under directory statute.**—*United States v. Thoman*, 156 U. S. 353, 39 L. Ed. 450. See the title **MUNICIPAL CORPORATIONS**.

25. **Private rights.**—*Kendall v. United States*, 12 Pet. 524, 616, 9 L. Ed. 1181. See post, "Private Individuals," IX, F, 1, e.

**Under the English doctrine**, mandamus is a prerogative writ, and grantable only when the public justice of the state is concerned. *Kendall v. United States*, 12 Pet. 524, 620, 9 L. Ed. 1181.

26. **As dependent upon nature of duty to be enforced.**—*Supervisors v. United States*, 18 Wall. 71, 77, 83, 21 L. Ed. 771; *Laclede Gas Light Co. v. Murphy*, 170 U. S. 78, 95, 42 L. Ed. 955; *Northern Pac. R. Co. v. Dustin*, 142 U. S. 492, 503, 35 L. Ed. 1092; *Reeside v. Walker*, 11 How. 272, 290, 13 L. Ed. 693; *Kendall v. United States*, 12 Pet. 524, 9 L. Ed. 1181; *United States v. Duell*, 172 U. S. 576, 582, 43 L. Ed. 559; *Mississippi v. Johnson*, 4 Wall. 475, 499, 18 L. Ed. 437; *County Comm'rs v. Wilson*, 109 U. S. 621, 625, 27 L. Ed. 1053; *International Contracting Co. v. Lamont*, 155 U. S. 303, 308, 39 L. Ed. 160; *Commonwealth v. Boutwell*, 13 Wall. 526, 20 L. Ed. 631; *Marbury v. Madison*, 1 Cranch 137, 172, 2 L. Ed. 60; *Commissioners v. Selwau*, 99 U. S. 624, 626, 25 L. Ed. 333; *Bayard v. White*, 127 U. S. 246, 249, 32 L. Ed. 116.

The question as to the issuance or refusal of a mandamus is to be determined upon the existence of a duty in the respondent to perform the obligations sought to be enforced. *County Comm'rs v. Wilson*, 109 U. S. 621, 626, 27 L. Ed. 1053.

"A writ of mandamus to compel a railroad corporation to do a particular act in constructing its road or buildings, or in running its trains, can be issued only when there is a specific legal duty on its part to do that act, and clear proof of a breach of that duty." *Northern Pac. R. Co. v. Dustin*, 142 U. S. 492, 498, 35 L. Ed. 1092.

The secretary of war cannot be compelled by writ of mandamus to sign a contract with a contractor for the removal of dirt in the construction of a canal at the price \$1.97 per cubic yard, when there is an existing contract between the parties to perform the work at \$1.37 per cubic yard. *International Contracting Co. v. Lamont*, 155 U. S. 303, 308, 39 L. Ed. 160.

27. **Existing duty.**—*International Contracting Co. v. Lamont*, 155 U. S. 303, 308, 39 L. Ed. 160; *Ex parte Rowland*, 104 U. S. 604, 612, 26 L. Ed. 861. See ante, "When Grounds to Exist," VIII, C.

There is an existing duty resting upon an officer despite the fact that there is an unconstitutional statute purporting to relieve him from such duty. *Board of Liquidation v. McComb*, 92 U. S. 531, 541, 23 L. Ed. 623.

28. **Must exist independent of writ.**—*Commissioners v. Loague*, 129 U. S. 493, 501, 32 L. Ed. 780; *Boynnton v. Blaine*, 139 U. S. 306, 319, 35 L. Ed. 183; *United States v. County of Clark*, 95 U. S. 769, 773, 24 L. Ed. 545; *Supervisors v. United States*, 18 Wall. 71, 77, 21 L. Ed. 771; *Ex parte Rowland*, 104 U. S. 604, 612, 26 L. Ed. 861; *Laclede Gas Light Co. v. Murphy*, 170 U. S. 78, 95, 42 L. Ed. 955.

"Thus, in the case of *Ex parte Rowland*, 104 U. S. 604, 612, 26 L. Ed. 861, this court, speaking through Mr. Chief Justice Waite, said: 'It is settled that more cannot be required of a public officer by mandamus than the law has made it his duty to do. The object of the writ is to enforce the performance of an existing duty, not to create a new one.'" *International Contracting Co. v. Lamont*, 155 U. S. 303, 308, 39 L. Ed. 160.

29. **Positive duty.**—*Ex parte Cutting*, 94 U. S. 14, 20, 24 L. Ed. 49.

30. *Kendall v. United States*, 12 Pet. 524, 613, 9 L. Ed. 1181; *Ex parte Jordan*, 94 U. S. 248, 251, 24 L. Ed. 123.

31. *Supervisors v. Rogers*, 7 Wall. 175, 180, 19 L. Ed. 162; *United States v. Union Pac. R. Co.*, 98 U. S. 569, 609, 25 L. Ed. 143; *Ex parte Cutting*, 94 U. S. 14, 20, 24 L. Ed. 49; *Northern Pac. R. Co. v. Dustin*, 142 U. S. 492, 504, 35 L. Ed. 1092.

The duty must be clear and indis-



law must require it to be performed.<sup>32</sup>

4. **PERSONAL.**—The duty sought to be performed must be personal to the person or officer to whom directed, and not merely appertaining to the office.<sup>33</sup>

5. **PERFORMABLE.**—Mandamus lies to enforce such duties only as can be performed by the person to whom the writ is directed.<sup>34</sup> The power of performance must exist independently of the command of the writ.<sup>35</sup>

6. **UNPERFORMED.**—Where the person, against whom the writ is sought, has

putable. *Board of Comm'rs v. Aspinwall*, 24 How. 376, 16 L. Ed. 735.

The duty must be both clearly defined and peremptory. *Commonwealth v. Boutwell*, 13 Wall. 526, 20 L. Ed. 631; *International Contracting Co. v. Lamont*, 155 U. S. 303, 308, 39 L. Ed. 160.

**32. Required by law.**—*Commonwealth v. Boutwell*, 13 Wall. 526, 20 L. Ed. 631; *International Contracting Co. v. Lamont*, 155 U. S. 303, 308, 39 L. Ed. 160. See ante, "Rights under Directory Statute," VIII, D, 7; post, "To Railroads," VIII, N, 4; "Secretary of Treasury," VIII, L, 6, c, (3); "Secretary of Navy," VIII, L, 6, c, (5).

"A mandamus will not lie against the secretary of the treasury unless the laws require him to do what he is asked in the petition to be made to do." *Reeside v. Walker*, 11 How. 272, 13 L. Ed. 693.

"It is true that the mandamus now moved for is not for the performance of an act expressly enjoined by statute. It is to deliver a commission; on which subject, the acts of congress are silent. This difference is not considered as affecting the case." *Marbury v. Madison*, 1 Cranch 137, 172, 2 L. Ed. 60.

**33. Personal duty.**—*United States v. Boutwell*, 17 Wall. 604, 607, 21 L. Ed. 721; *Caledonian Coal Co. v. Baker*, 196 U. S. 432, 440, 49 L. Ed. 540; *The Secretary v. McGarrahan*, 9 Wall. 298, 19 L. Ed. 579; *Ex parte Rowland*, 104 U. S. 604, 617, 26 L. Ed. 861.

"That duty may have originated in one way or in another. It may, as is alleged in the present case, have arisen from the acceptance of an office which has imposed the duty upon its incumbent. But no matter out of what facts or relations the duty has grown, what the law regards and what it seeks to enforce by a writ of mandamus, is the personal obligation of the individual to whom it addresses the writ." *United States v. Boutwell*, 17 Wall. 604, 607, 21 L. Ed. 721, quoted in *Warner Valley Stock Co. v. Smith*, 165 U. S. 28, 32, 41 L. Ed. 621.

It is the duty and not the person to whom directed that is considered in determining whether a mandamus will issue. *Marbury v. Madison*, 1 Cranch 137, 170, 2 L. Ed. 60. See post, "Heads of Departments," VIII, L, 6, a; "Reinstatement of Appeal," VIII, K, 5, o, (2), (c); "Signing," VIII, K, 5, k, (2).

**The writ does not reach office.**—What the law seeks to enforce by a writ of

mandamus is the personal obligation of the individual to whom it is directed. Although such person be an officer and the duty sought to be enforced be official, still the writ is aimed exclusively against him as a person, and he only can be punished for disobedience. The writ does not reach the office. *Caledonian Coal Co. v. Baker*, 196 U. S. 432, 440, 49 L. Ed. 540.

**34. Performable.**—*Boynton v. Blaine*, 139 U. S. 306, 319, 35 L. Ed. 183; *Commissioners v. Loague*, 129 U. S. 493, 501, 32 L. Ed. 780; *Laclede Gas Light Co. v. Murphy*, 170 U. S. 78, 95, 42 L. Ed. 955.

The board of public improvements of the city of St. Louis, consisting of a president, the street commissioner, the sewer commissioner, the water commissioner, the harbor and wharf commissioner and the park commissioner, has existed for many years under the charter and ordinances of that city. Each of these commissioners is the head of the department indicated by the title of the office, and has special charge thereof, but subject to the general control of the board, and the board is charged with the duty among other things, of furnishing data and information to the municipal assembly of the city in respect of matters with which it is called upon to deal; preparing and recommending ordinances for the improvement and lighting of the streets; and establishing regulations for excavations and the laying of gas pipes in the streets. It had made no application to the municipal assembly, directly or through the board of public improvements, for authority to proceed. It had not filed any application with the board of public improvements giving details of the streets it wished to occupy, and the manner in which the wires, etc., were to be secured, supported and insulated, and a plat of the routes nor asked that board for a permit for the occupancy it desired. The street commissioner had no power under the charter and ordinances to issue the permit requested in the absence of the assent of the board of public improvements, which had general control; and the court could not command him to do that which it was not his official duty to perform. *Laclede Gas Light Co. v. Murphy*, 170 U. S. 78, 95, 98, 99, 42 L. Ed. 955.

**35. The writ itself confers no authority.** *Laclede Gas Light Co. v. Murphy*, 170 U. S. 78, 95, 42 L. Ed. 955. See ante, "Existing," VIII, E, 2.

performed the full duty imposed upon him by law, he cannot be compelled by mandamus to do more.<sup>36</sup>

7. **MINISTERIAL DUTIES**—*a. General Rule.*—It is elementary law that mandamus will lie to enforce a ministerial as contradistinguished from discretionary duty.<sup>37</sup>

**36. Duty unperformed.**—In this case the petitioner recovered two judgments against Taylor County, Kentucky, upon coupons for payment of interest on bonds issued by the county in payment of its subscription to stock in a railroad company. The petition prays that the respondent, presiding judge of such county, levy and cause to be collected, a tax to pay the judgment. The answer to the petition sets forth that the respondent had caused such tax to be levied by an order to that effect, and that he had also ordered that the county collector do collect such tax. By the acts of the state of Kentucky of 1859, 1871, and 1872, it made it the duty of the judge to levy the tax annually. Held, that as the judge had made the levy and ordered its collection, he had done all required of him by law, and nothing more could be compelled by mandamus. *Bass v. Taft*, 137 U. S. 458, 34 L. Ed. 752. See post, "Where Office Performed Full Duty," VIII, M. 4, h.

**37. Ministerial duties.**—*Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60; *McIntire v. Wood*, 7 Cranch 504, 2 L. Ed. 420; *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 302, 8 L. Ed. 949; *Sibbald v. United States*, 12 Pet. 488, 9 L. Ed. 1167; *Kendall v. United States*, 12 Pet. 524, 527, 609, 616, 9 L. Ed. 1181; *Decatur v. Paulding*, 14 Pet. 497, 499, 10 L. Ed. 539; *Kendall v. Stokes*, 3 How. 87, 11 L. Ed. 506; *Brashear v. Mason*, 6 How. 92, 93, 101, 12 L. Ed. 357; *Reeside v. Walker*, 11 How. 272, 273, 290, 13 L. Ed. 693; *United States v. Seaman*, 17 How. 223, 230, 231, 15 L. Ed. 226; *United States v. Guthrie*, 17 How. 284, 303, 304, 15 L. Ed. 102; *Mississippi v. Johnson*, 4 Wall. 475, 499, 18 L. Ed. 437; *Commissioner of Patents v. Whiteley*, 4 Wall. 522, 534, 18 L. Ed. 335; *United States v. The Commissioners*, 5 Wall. 563, 18 L. Ed. 692; *Ex parte DeGroot*, 6 Wall. 497, 18 L. Ed. 887; *Gaines v. Thompson*, 7 Wall. 347, 352, 19 L. Ed. 62; *Ex parte Bradley*, 7 Wall. 364, 376, 19 L. Ed. 214; *The Secretary v. McGarrahan*, 9 Wall. 298, 312, 19 L. Ed. 579; *Litchfield v. The Register & Receiver*, 9 Wall. 575, 577, 19 L. Ed. 681; *Lower v. United States*, 91 U. S. 536, 539, 23 L. Ed. 420; *Board of Liquidation v. McComb*, 92 U. S. 531, 541, 23 L. Ed. 623; *Virginia v. Rives*, 107 U. S. 313, 329, 25 L. Ed. 667; *United States v. Schurz*, 102 U. S. 378, 403, 26 L. Ed. 167; *Ex parte Rowland*, 104 U. S. 604, 613, 26 L. Ed. 861; *Louisiana v. Jumel*, 107 U. S. 711, 762, 27 L. Ed. 448; *Harlan, J.*, dissenting; *Butterworth v. Hoe*, 112 U. S. 50, 28 L. Ed. 656; *Carrick*

*v. Lamar*, 116 U. S. 423, 426, 29 L. Ed. 677; *Hagood v. Southern*, 117 U. S. 52, 69, 29 L. Ed. 805; *Ex parte Bradstreet*, 7 Pet. 634, 8 L. Ed. 80; *Harrington v. Holler*, 111 U. S. 796, 28 L. Ed. 602; *United States v. Schurz*, 102 U. S. 378, 394, 395, 26 L. Ed. 167; *United States v. Black*, 128 U. S. 40, 32 L. Ed. 354; *United States v. Guthrie*, 17 How. 284, 15 L. Ed. 102; *Georgia v. Stanton*, 6 Wall. 50, 18 L. Ed. 721; *Commissioners v. Loague*, 129 U. S. 493, 32 L. Ed. 780; *Clough v. Curtis*, 134 U. S. 361, 371, 33 L. Ed. 945; *Redfield v. Windom*, 137 U. S. 636, 641, 34 L. Ed. 811; *In re Washington, etc., R. Co.*, 140 U. S. 91, 95, 35 L. Ed. 339; *Noble v. Union River Logging R. Co.*, 147 U. S. 165, 171, 37 L. Ed. 123; *International Contracting Co. v. Lamont*, 155 U. S. 303, 308, 39 L. Ed. 160; *United States v. Duell*, 172 U. S. 576, 582, 43 L. Ed. 559; *Smith v. Bourbon County*, 127 U. S. 105, 110, 32 L. Ed. 73; *Barkley v. Levee Comm'rs*, 93 U. S. 258, 265, 23 L. Ed. 893.

The duty must be strictly ministerial. *Reeside v. Walker*, 11 How. 272, 270, 13 L. Ed. 693; *United States v. Guthrie*, 17 How. 284, 303, 15 L. Ed. 102; *Redfield v. Windom*, 137 U. S. 636, 644, 34 L. Ed. 811.

"This doctrine was clearly and fully set forth by Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60, and has since been many times reasserted by this court." *International Contracting Co. v. Lamont*, 155 U. S. 303, 308, 39 L. Ed. 160.

In the cases of *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60, and *Kendall v. United States*, 12 Pet. 524, 527, 9 L. Ed. 1181, nothing was left to the discretion. There was no room for the exercise of judgment. The law required the performance of a single specific act; and that performance, it was held, might be required by mandamus. *Mississippi v. Johnson*, 4 Wall. 475, 499, 18 L. Ed. 437.

A mandamus can issue only in cases where the act to be done is merely ministerial, and with regard to which nothing like judgment or discretion, in the performance of his duties, is left to the officer. *United States v. Guthrie*, 17 How. 284, 15 L. Ed. 102, cited in *Ex parte DeGroot*, 6 Wall. 497, 18 L. Ed. 887; *United States v. Seaman*, 17 How. 225, 230, 15 L. Ed. 226; *Gaines v. Thompson*, 7 Wall. 347, 352, 19 L. Ed. 62; *The Secretary v. McGarrahan*, 9 Wall. 298, 312, 19 L. Ed. 579.

This is a rule of the common law of Maryland and adopted in the District of Columbia. *Kendall v. United States*, 12 Pet. 524, 9 L. Ed. 1181.



b. *Exceptions.*—In the extreme caution with which the remedy of mandamus is applied by the courts, there are cases when the writ will not be issued to compel the performance of even a purely ministerial act.<sup>38</sup>

c. *What Are Ministerial Duties.*—Ministerial duties are those duties, specifically assigned by law, which require a precise, definite and certain act in their performance.<sup>39</sup>

8. **DISCRETIONAL DUTIES**—a. *To Control Discretion.*—Mandamus has never been regarded as the proper writ to control the judgment and discretion of an officer in the decision of a matter as to which the law gives him the power and imposes upon him the duty to decide for himself.<sup>40</sup>

b. *To Compel Action.*—But it does lie even where the exercise of judgment and discretion are involved and the officer refuses to decide to compel him to

**38. Exception.**—In a case, for instance, where the intention of the officer, though acting within the scope of his duty, had been frustrated by a clerical mistake, *United States v. Schurz*, 102 U. S. 378, 26 L. Ed. 167, or where the case is one of doubtful right, *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 302, 8 L. Ed. 949; or in a case where the relator having another adequate remedy, the granting of the writ may in this summary proceeding affect the rights of persons who are not parties thereto, or where it will be attended with manifest hardship and difficulties. *Redfield v. Windom*, 137 U. S. 636, 644, 34 L. Ed. 811.

**39. What are ministerial.**—*Kendall v. United States*, 12 Pet. 524, 613, 9 L. Ed. 1181; *Marbury v. Madison*, 1 Cranch 137, 166, 2 L. Ed. 60; *Hagood v. Southern*, 117 U. S. 52, 69, 29 L. Ed. 805. See post, "Heads of Departments," VII, L, 6, c.

A ministerial duty is one which the officer is bound to perform without further question. *Redfield v. Windom*, 137 U. S. 636, 644, 34 L. Ed. 811.

"It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law." *Mississippi v. Johnson*, 4 Wall. 475, 498, 18 L. Ed. 437.

**Auditing claim.**—The act of auditing a claim required to be audited by statute is ministerial. *Lower v. United States*, 91 U. S. 536, 23 L. Ed. 420. See post, "Auditing Claims," VIII, M, 2, g.

**To entertain an appeal.**—The duty to entertain an appeal is ministerial. *Craig v. Leitensdorfer*, 123 U. S. 189, 208, 31 L. Ed. 114. See post, "Entertainment of Appeal," VIII, M, 5, o, (2), (a).

**Defined by orders of superior.**—Where the duty to be performed involves the exercise of no discretion but consists only in executing the orders of a superior, it is merely ministerial. *United States v. Seaman*, 17 How. 225, 231, 15 L. Ed. 226. See post, "Subordinate Officers," VIII, L, 3.

**Delivery of patent.**—After the determination of all discretionary matters in regard to its issuance, the land office has merely a ministerial duty to perform in the delivery of a patent. *United States v. Schurz*, 102 U. S. 378, 403, 26 L. Ed. 167. See post, "Delivering Patent," VIII, L, 6, d, (4), (c).

**Allowance of claim against United States.**—The postmaster general was simply required to give the credit. This was not an official act, in any other sense than being a transaction in the department where the books and accounts were kept; and was an official act, in the same sense that an entry in the minutes of a court, pursuant to an order of the court, is an official act. There is no room for the exercise of any discretion, official or otherwise; all that is shut out by the direct and positive command of the law, and the act required to be done is, in every just sense, a mere ministerial act. *Kendall v. United States*, 12 Pet. 524, 614, 9 L. Ed. 1181. See post, "Postmaster General," VIII, L, 6, c, (6).

**40. Discretional duties—Control of.**—*Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 325, 47 L. Ed. 1074; *United States v. The Commissioner*, 5 Wall. 563, 565, 18 L. Ed. 692; *The Secretary v. McGarahan*, 9 Wall. 298, 312, 19 L. Ed. 579; *Board of Liquidation v. McComb*, 92 U. S. 531, 541, 23 L. Ed. 623; *Marbury v. Madison*, 1 Cranch 137, 165, 2 L. Ed. 60; *Ex parte Cutting*, 94 U. S. 14, 22, 24 L. Ed. 49; *Respublica v. Guardians*, 2 Dall. 224, 1 L. Ed. 358; *United States v. Seaman*, 17 How. 225, 230, 15 L. Ed. 226; *Redfield v. Windom*, 137 U. S. 636, 644, 34 L. Ed. 811; *Ex parte Morgan*, 114 U. S. 174, 29 L. Ed. 135; *Wyman v. Halstead*, 109 U. S. 654, 658, 27 L. Ed. 1068; *In re Pollitz*, 206 U. S. 323, 331, 51 L. Ed. 1081; *Gaines v. Thompson*, 7 Wall. 347, 19 L. Ed. 62; *Carrick v. Lamar*, 116 U. S. 423, 426, 20 L. Ed. 677; *Decatur v. Paulding*, 14 Pet. 497, 499, 10 L. Ed. 559; *United States v. Guthrie*, 17 How. 284, 15 L. Ed. 102; *Litchfield v. The Register and Receiver*, 9 Wall. 575, 577, 19 L. Ed. 681; *United States v. Black*, 128 U. S. 40, 47, 32 L. Ed. 354.

The judgment and discretion reposed in an officer as a part of his official functions cannot be controlled by the writ. *Gaines v. Thompson*, 7 Wall. 347, 352, 19 L. Ed. 62; *The Secretary v. McGarahan*, 9 Wall. 298, 312, 19 L. Ed. 579.

This judgment and discretion are to be exercised by the officer and not the court. *United States v. Guthrie*, 17 How. 284, 303, 15 L. Ed. 102. See post, "To Control Discretion," VIII, K, 2, b.

act, provided that, if he decided, the aggrieved party could have his decision reviewed by another tribunal.<sup>41</sup>

c. *What Are Discretionary Duties*—(1) *In General*.—A duty is discretionary if discretion and judgment are to be exercised in its performance.<sup>42</sup>

(2) *Appointment of Officers*.—The duties exercised in the appointment and removal of a public officer are discretionary.<sup>43</sup>

(3) *Political Duties*.—Political duties, performed in the confidential agency of the president, are discretionary.<sup>44</sup>

(4) *Payment of Claim to Domiciliary or Ancillary Administrator*.—The discretion of a federal officer to pay a claim, due from the United States to the estate of a deceased person, to the domiciliary administrator or to an ancillary administrator, cannot be controlled by mandamus.<sup>45</sup>

d. *After Exhaustion of Discretion*.—Where the duties sought to be enforced consist of both discretionary and ministerial acts, and all discretion has been exhausted, mandamus lies to compel the performance of the remaining ministerial duties.<sup>46</sup>

**F. As Dependent upon Breach of Duty**.—The writ is never granted in anticipation of an omission of duty,<sup>47</sup> but only after actual default.<sup>48</sup>

**41. To compel action**.—Commissioner of Patents *v. Whiteley*, 4 Wall. 522, 534, 18 L. Ed. 335; United States *v. Black*, 128 U. S. 40, 32 L. Ed. 354; Redfield *v. Windom*, 137 U. S. 636, 644, 34 L. Ed. 811. See post, "Compelling Action," VIII, K, 1.

**42. What are discretionary duties**.—United States *v. Seaman*, 17 How. 225, 15 L. Ed. 226.

**43. Appointment of officers**.—"The appointment to an official position in the government, even if it be simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. Therefore it is one of those acts over which the courts have no general supervising power. In the absence of specific provision to the contrary, the power of removal from office is incident to the power of appointment." Keim *v. United States*, 177 U. S. 290, 293, 44 L. Ed. 774.

**44. Political duties**.—Marbury *v. Madison*, 1 Cranch 137, 165, 2 L. Ed. 60. See post, "Heads of Departments," VIII, L, 6, c.

**45. Payment of claim to domiciliary or ancillary administrator**.—Wyman *v. Halstead*, 109 U. S. 654, 658, 27 L. Ed. 1068. See the title EXECUTORS AND ADMINISTRATORS, vol. 6, p. 185.

**46. After exhaustion of discretion**.—Thus the land officers may be compelled to deliver a patent after exhausting all discretion as to the validity of its issuance. United States *v. Schurz*, 102 U. S. 378, 403, 26 L. Ed. 167. See post, "Delivering Patent," VIII, L, 6, d, (4), (c).

**Mandamus will lie against the secretary of state of the United States to compel him to deliver a commission to a justice of the peace whose appointment was made and commission signed by the president**

of the United States under seal of the United States affixed thereto by the secretary of state. The subsequent duty of the secretary of state is prescribed by law, and not guided by the will of the president. All discretion possessed by the president in regard to the appointment is exhausted and the appointment made complete by his signing the commission. Marbury *v. Madison*, 1 Cranch 137, 167, 2 L. Ed. 60.

**Under the laws of Louisiana**, adopted by rule of the district courts, it is the duty of the judge to either grant a new trial within three days or sign the judgment as entered. If the judge refuse to sign the judgment within three days, his discretion is exhausted and he may be mandamus to sign it. Life & Fire Ins. Co. *v. Wilson*, 8 Pet. 291, 296, 303, 8 L. Ed. 949.

**47. As dependent upon breach of duty**.—Ex parte Cutting, 94 U. S. 14, 20, 24 L. Ed. 49.

**48. Board of Comm'rs v. Aspinwall**, 24 How. 376, 16 L. Ed. 735; Riggs *v. Johnson County*, 6 Wall. 166, 193, 18 L. Ed. 768; The Supervisors *v. Durant*, 9 Wall. 415, 417, 19 L. Ed. 732; United States *v. New Orleans*, 98 U. S. 381, 397, 25 L. Ed. 225; Labette County Comm'rs *v. Moulton*, 112 U. S. 217, 28 L. Ed. 698; United States *v. County of Clark*, 95 U. S. 769, 774, 24 L. Ed. 545; Caledonian Coal Co. *v. Baker*, 196 U. S. 432, 440, 49 L. Ed. 540; United States *v. Boutwell*, 17 Wall. 604, 608, 21 L. Ed. 721; Warner Valley Stock Co. *v. Smith*, 165 U. S. 28, 32, 41 L. Ed. 621; Bass *v. Taft*, 137 U. S. 458, 34 L. Ed. 752; Connecticut Mut. Life Ins. Co., Petitioner, 131 U. S., appx. clxxx, clxxi, 26 L. Ed. 561; Northern Pac. R. Co. *v. Dustin*, 142 U. S. 492, 498, 35 L. Ed. 1092; Commissioner of Patents *v. Whiteley*, 4 Wall. 522, 534, 18 L. Ed. 335. See ante, "Existing," VIII, E, 2.

Previous to the time of an actual breach, the respondent may discharge



**G. As Dependent upon Existence of Other Remedy—1. GENERAL RULE.**

—The writ of mandamus is an appropriate remedy only in cases where there is no other adequate specific remedy.<sup>49</sup> The only occasions upon which it issues are those in which the law has provided no other adequate specific remedy, where in justice and good government there ought to be one.<sup>50</sup>

2. **STATUTORY CHANCES.**—By statute, in some of the states, it is provided that a petitioner shall not be denied the writ of mandamus, simply because he has another remedy.<sup>51</sup> Under such statutes, the inquiry, whether there is even a better mode of redress than the one asked for, does not arise. It is enough to know that the writ is appropriate and efficient.<sup>52</sup>

**3. WHAT REMEDIES SUFFICIENT—**a. *In General.*—The remedy which will pre-

the duty and render the court's interposition unnecessary. *United States v. Boutwell*, 17 Wall. 604, 608, 21 L. Ed. 721.

Mandamus to compel a railroad to construct its road or buildings, will lie only after clear proof of a breach of duty. *Northern Pac. R. Co. v. Dustin*, 142 U. S. 492, 498, 35 L. Ed. 1092. See post, "Compelling Action," VIII, K, 1.

**Refusal of performance** amounts to breach. *Hagood v. Southern*, 117 U. S. 52, 69, 29 L. Ed. 805; *Commissioner of Patents v. Whiteley*, 4 Wall. 522, 534, 18 L. Ed. 335; *Smith v. Bourbon County*, 127 U. S. 105, 110, 32 L. Ed. 73.

**Injunction proper remedy.**—Injunction is the proper remedy prior to an actual breach of duty. *Noble v. Union River Logging R. Co.*, 147 U. S. 165, 172, 37 L. Ed. 123. See the title **INJUNCTIONS**, vol. 6, p. 1022.

**49. As dependent upon existence of other remedy.**—*McClung v. Silliman*, 6 Wheat. 598, 605, 5 L. Ed. 340; *Ex parte Crane*, 5 Pet. 190, 192, 210, 8 L. Ed. 92; *Kendall v. United States*, 12 Pet. 524, 614, 620, 9 L. Ed. 1181; *Kendall v. Stokes*, 3 How. 87, 98, 100, 11 L. Ed. 506; *United States v. Seaman*, 17 How. 225, 230, 15 L. Ed. 226; *United States v. Guthrie*, 17 How. 284, 304, 15 L. Ed. 102; *United States v. Addison*, 22 How. 174, 183, 16 L. Ed. 304; *Board of Comm'rs v. Aspinwall*, 24 How. 376, 16 L. Ed. 735; *Commissioner of Patents v. Whiteley*, 4 Wall. 522, 18 L. Ed. 335; *United States v. The Commissioner*, 5 Wall. 563, 18 L. Ed. 692; *The Secretary v. McGarrahan*, 9 Wall. 298, 312, 19 L. Ed. 579; *Board of Liquidation v. McComb*, 93 U. S. 531, 541, 23 L. Ed. 623; *Ex parte Cutting*, 94 U. S. 14, 20, 24 L. Ed. 49; *Tennessee v. Sneed*, 96 U. S. 69, 24 L. Ed. 610; *Virginia v. Rives*, 100 U. S. 313, 329, 25 L. Ed. 667; *Ex parte R. Co.*, 103 U. S. 794, 26 L. Ed. 461; *Ex parte Rowland*, 104 U. S. 604, 617, 26 L. Ed. 861; *Antoni v. Greenhow*, 107 U. S. 769, 27 L. Ed. 468; *Ex parte Baltimore, etc., R. Co.*, 108 U. S. 566, 27 L. Ed. 812; *Clough v. Curtis*, 134 U. S. 361, 371, 33 L. Ed. 945; *In re Pennsylvania Co.*, 137 U. S. 451, 453, 34 L. Ed. 738; *Redfield v. Windom*, 137 U. S. 636, 641, 34 L. Ed. 811; *In re Washington, etc., R. Co.*, 140 U. S. 91, 95, 35 L. Ed. 339; *In re Morrison*, 147 U. S. 14, 26, 37 L. Ed. 60; *In re Atlantic City*

*Railroad*, 164 U. S. 633, 635, 41 L. Ed. 579; *In re Blake*, 175 U. S. 114, 117, 119, 44 L. Ed. 94; *Ex parte The Union Steamboat Co.*, 178 U. S. 317, 319, 44 L. Ed. 1084; *In re The Huguley Mfg. Co.*, 184 U. S. 297, 301, 46 L. Ed. 549; *In re Key*, 189 U. S. 84, 85, 47 L. Ed. 720; *Marbury v. Madison*, 1 Cranch 137, 171, 2 L. Ed. 60; *Decatur v. Paulding*, 14 Pet. 497, 518, 10 L. Ed. 559; *Duke v. Turner*, 204 U. S. 623, 630, 631, 51 L. Ed. 652; *Labette County Comm'rs v. Molton*, 112 U. S. 217, 225, 28 L. Ed. 698; *Smith v. Bourbon County*, 127 U. S. 105, 110, 32 L. Ed. 73; *United States v. Keokuk*, 6 Wall. 514, 517, 18 L. Ed. 933; *Ex parte Bradley*, 7 Wall. 364, 376, 19 L. Ed. 214; *Riggs v. Johnson County*, 6 Wall. 166, 187, 18 L. Ed. 768; *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 8 L. Ed. 949; *Ex parte Virginia Comm'rs*, 112 U. S. 177, 178, 28 L. Ed. 691; *Connecticut Mut. Life Ins. Co., Petitioner*, 131 U. S., appx. clxxx, clxxxi, 26 L. Ed. 561.

"The person applying for it must be without any other specific and legal remedy." *Marbury v. Madison*, 1 Cranch 137, 169, 2 L. Ed. 60; *Ex parte Rowland*, 104 U. S. 604, 617, 26 L. Ed. 861.

"The familiar law in respect to mandamus, reinforced by statutory provisions in New Mexico, is that mandamus shall not issue in any case where there is a plain, speedy and adequate remedy at law." *In re Delgado*, 140 U. S. 586, 590, 35 L. Ed. 578.

**50. Where there should be remedy.**—

*Marbury v. Madison*, 1 Cranch 137, 168, 2 L. Ed. 60.

The writ lies only in cases where there is a legal right without an existing legal remedy. *Ex parte Bradley*, 7 Wall. 364, 376, 19 L. Ed. 214; *Virginia v. Rives*, 100 U. S. 313, 329, 25 L. Ed. 667; *Ex parte Rowland*, 104 U. S. 604, 617, 26 L. Ed. 861.

**51. Statutory changes.**—The revised statutes of Illinois of 1874, p. 691, provide "that the writ of mandamus shall not be denied because the petitioner may have another specific legal remedy, when such writ will afford a proper and sufficient remedy." *Lower v. United States*, 91 U. S. 536, 538, 23 L. Ed. 420.

**52. Lower v. United States**, 91 U. S. 536, 538, 23 L. Ed. 420.



vent the issuance of a writ of mandamus must be legal,<sup>53</sup> specific, adequate and existing.<sup>54</sup> By the remedies which will supersede the right to mandamus is not meant unusual and extraordinary remedies,<sup>55</sup> though the mere fact that such other remedies involve delay does not necessitate the issuance of mandamus.<sup>56</sup>

b. *Action for Damages*.—It is seldom that an adequate remedy is afforded by a private action at law.<sup>57</sup>

c. *Suit in Equity*.—It seems that the mere fact that there may be relief by bill in equity does not furnish ground for refusal of mandamus.<sup>58</sup>

d. *Appeal or Error*.—The writ of mandamus will not be granted where there is a remedy by appeal or writ of error.<sup>59</sup> Mandamus will not lie to compel a circuit court to dismiss a suit for want of jurisdiction where the defendant contends that by pleading the suit he will be estopped from denying the court's jurisdiction, where there is a right to appeal from the court's decision on such question.<sup>60</sup>

**53. What remedies sufficient.**—*Marbury v. Madison*, 1 Cranch 137, 169, 2 L. Ed. 60; *Ex parte Bradley*, 7 Wall. 364, 376, 19 L. Ed. 214; *United States v. Duell*, 172 U. S. 576, 582, 43 L. Ed. 559.

**54. Ex parte Bradley**, 7 Wall. 364, 376, 19 L. Ed. 214.

**55. Unusual remedies.**—*Kendall v. United States*, 12 Pet. 524, 614, 9 L. Ed. 1181; *Gaines v. Rugg*, 148 U. S. 228, 243, 37 L. Ed. 432.

There is no other adequate remedy to enforce the postmaster general to credit certain claims in favor of persons carrying the United States mails. There is no adequate remedy in an application to congress, for the removal of postmaster general from office or an action against him for damages. Such extraordinary measures are not the remedies which in law will supersede the right of resorting to a mandamus. *Kendall v. United States*, 12 Pet. 524, 614, 9 L. Ed. 1181.

**56. Remedies involving delay.**—*Ex parte Perry*, 102 U. S. 183, 186, 26 L. Ed. 43.

But in a case where there is no discretion to be exercised by the court, and, although it might have been admissible for the petitioner to avail himself of the grounds sought to be availed of in this writ by a new appeal to the proper court, yet in view of the delay to be caused thereby, such remedy would not be fully adequate. The writ of mandamus is proper in such case. *Gaines v. Rugg*, 148 U. S. 228, 243, 37 L. Ed. 432.

**57. Action for damages.**—"It is seldom that a private action at law will afford an adequate remedy. If the denial of the right be considered as a continuing injury, to be redressed by a series of successive actions, as long as the right is denied; it would avail nothing, and never furnish a complete remedy. Or, if the whole amount of the award claimed should be considered the measure of damages, it might, and generally would, be an inadequate remedy, where the damages were large. The language of this court, in the case of *Osborn v. United States Bank*, 9 Wheat. 738, 844, 6 L. Ed. 204, is that the remedy by action in such cases would have nothing real in it. It would be a remedy in name only, and not in sub-

stance; especially, where the amount of damages is beyond the capacity of a party to pay." *Kendall v. United States*, 12 Pet. 524, 614, 9 L. Ed. 1181.

**58. Suit in equity.**—*Ex parte Bradley*, 7 Wall. 364, 376, 19 L. Ed. 214; *United States v. Duell*, 172 U. S. 576, 582, 43 L. Ed. 559.

In *Butterworth v. Hoe*, 112 U. S. 50, 28 L. Ed. 656, the writ was issued to the commissioner of patents, the remedy by bill in equity under Rev. Stat., § 4915, being held inapplicable; but the question, of its adequacy to afford such relief as would defeat the right to mandamus, was not passed upon. See post, "Matters Subsequent to Hearing," VIII, L, 6, d, (3), (d).

**59. Where there is remedy by appeal.**—*United States v. Duell*, 172 U. S. 576, 582, 43 L. Ed. 559; *Ex parte Newman*, 14 Wall. 152, 168, 20 L. Ed. 877; *Ex parte Baltimore, etc., R. Co.*, 108 U. S. 566, 567, 27 L. Ed. 812; *Connecticut Mut. Life Ins. Co., Petitioner*, 131 U. S., appx. clxxx, 26 L. Ed. 561; *Alexander v. Crollott*, 199 U. S. 580, 50 L. Ed. 317.

"After a case has proceeded to the filing of a declaration and a plea to the jurisdiction, or its equivalent, and a judgment is rendered in favor of the plea and a consequent dismissal of the action, this court has held that the plaintiff is confined to his remedy by writ of error, and cannot have a mandamus, which only lies, as a general rule, where there is no other adequate remedy." In re *Pennsylvania Co.*, 137 U. S. 451, 453, 34 L. Ed. 738.

**60.** In this case the petitioner of the Atlantic City Railroad, the defendant in a suit for an infringement of patents, appeared especially for the purpose of objecting to the jurisdiction of the court, and filed a demurrer raising that question. The demurrer was overruled. At this stage of the case the defendant believed that he was required to enter a general appearance and thereby waive objection to the jurisdiction of the court, and that it had no remedy by appeal. Prayer for a writ of mandamus is that it be directed to the circuit court commanding such court to dismiss the complaint and vacate the order overruling the demurrer. Held, the petitioner has a remedy by appeal if the decree should be against it, and it is

Nor will the writ be granted in all cases where there is no right to a writ of error or appeal.<sup>61</sup>

e. *Supersedeas*.—Mandamus does not lie in a case, in which a writ of supersedeas may be granted to serve the same purpose.<sup>62</sup>

f. *Statutory Remedy*.—A remedy afforded by a statutory proceeding, which is not less efficient than by mandamus, will furnish sufficient ground for its refusal.<sup>63</sup>

g. *Removal of Officer*.—A proceeding for the removal from office of a contumacious officer is not such a remedy as will prevent the issuance of a writ of mandamus.<sup>64</sup>

**H. As Dependent upon Object of Writ**—1. AS WRIT OF ERROR.—The writ cannot be used to perform the office of an appeal or writ of error, even if no appeal or writ of error is given by law.<sup>65</sup>

2. AS WRIT OF EXECUTION.—See elsewhere in this title.<sup>66</sup>

3. TO ENFORCE CONTRACT.—See elsewhere in this title.<sup>67</sup>

4. TO SET ASIDE CONTRACT.—The writ of mandamus cannot be used to set aside a contract which has been voluntarily entered into.<sup>68</sup>

**I. As Dependent upon Operation and Effect of Writ**—1. UNAVAILING.—The writ will not be issued in cases where its issuance will be useless.<sup>69</sup>

2. SUBJECTION OF RESPONDENT TO INJURY.—The writ probably does not lie, where it would expose the person obeying its directions to imprisonment or other serious damage;<sup>70</sup> but it does lie, where its directions may be pleaded in defense of an action for damages.<sup>71</sup>

not proper that the mandate not to exercise jurisdiction should be interposed at this stage of the case and in the manner desired. In re Atlantic City Railroad, 164 U. S. 633, 41 L. Ed. 579.

61. **Where there is no remedy by appeal**.—Ex parte Newman, 14 Wall. 152, 168, 20 L. Ed. 877. See post, "Review," VIII, K, 5, o.

62. **Supersedeas**.—Where application was made for a writ of mandamus to compel a lower court to approve an appeal bond, this court said: "The case being properly in this court by appeal, we have, by the fourteenth section of the judiciary act, a right to issue any writ which may be necessary to render our appellate jurisdiction effectual. For this purpose the writ of supersedeas is eminently proper in a case where the circumstances justify it, as we think they do in the present instance." Ex parte The Milwaukee R. Co., 5 Wall. 188, 190, 18 L. Ed. 676. See the title SUPERSEDEAS AND STAY OF PROCEEDINGS.

63. **Statutory remedy**.—In this case the remedy by statute is the equivalent of that by mandamus. Antoni v. Greenhow, 107 U. S. 769, 782, 27 L. Ed. 468.

Mandamus will not lie to compel the officers of the state of Virginia to accept coupons from state bonds issued under the act of the state of Virginia, March 30, 1871, in payment of taxes, on the ground that another remedy is provided by the act of January 14, 1882, which provides for enforcing their acceptance upon proof of genuineness. Antoni v. Greenhow, 107 U. S. 769, 27 L. Ed. 468, followed in Virginia Coupon Cases, 114 U. S. 269, 338, 29 L. Ed. 185. See the title IMPAIRMENT

OF OBLIGATION OF CONTRACTS, vol. 6, p. 758.

64. **Removal of officer**.—This remedy would depend on the arbitrary discretion of the appointing power, and is not such a remedy as a citizen of the United States is entitled to demand. United States v. Black, 128 U. S. 40, 52, 32 L. Ed. 354; Kendall v. United States, 12 Pet. 524, 614, 9 L. Ed. 1181. But see Reeside v. Walker, 11 How. 272, 291, 13 L. Ed. 693.

65. **As dependent upon object of writ—As writ of error**.—See the title APPEAL AND ERROR, vol. 1, p. 395.

66. **As writ of execution**.—See ante, "Original or Final Process," II, E; post, "Necessity for," VIII, M, 4, d, (2), (a).

67. **To enforce contract**.—See post, "Contracts," VIII, M, 3, b; "To Compel Performance of Contract," VIII, N, 3.

68. **To set aside contract**.—International Contracting Co. v. Lamont, 155 U. S. 303, 309, 39 L. Ed. 160.

69. **Dependent upon effect—Unavailing**.—Ex parte Secombe, 19 How. 9, 16, 15 L. Ed. 565; Ex parte Ralston, 119 U. S. 613, 30 L. Ed. 506.

70. **Subjection of respondent to injury**.—"The writ is never issued to a party whom it would expose to imprisonment or other serious damage for obeying it. I have not time to quote from the authorities on this subject, but they are numerous and without contradiction." Riggs v. Johnson County, 6 Wall. 166, 209, 18 L. Ed. 768, Miller, J., the Chief Justice, and Grier, J., dissenting.

71. In this case it was suggested by the defendants that if the writ were issued, and they obeyed its commands, they might be exposed to a suit for damages or to at-



**J. As Dependent upon Office of Person to Whom Directed.**—Whether or not the writ will issue is not to be determined by the nature of office or the person to whom directed, but upon the nature of the duty sought to be enforced.<sup>72</sup>

**K. Mandamus to Courts.**—1. **COMPELLING ACTION.**—a. *In General.*—Mandamus is the proper remedy to oblige subordinate courts and magistrates<sup>73</sup> to perform such acts and duties as they are, in justice and by virtue of their office,<sup>74</sup> bound to do,<sup>75</sup> but which they refuse.<sup>76</sup> The duty may be either ministerial or discretionary, as regards the mere compelling its performance.<sup>77</sup>

b. *To Exercise Jurisdiction.*—The writ lies to compel a lower court to take jurisdiction in cases where it ought to do so,<sup>78</sup> or where, having taken jurisdic-

tachment for contempt and imprisonment. This was held not sufficient ground to prevent the issuance of the writ on the ground that in case they were sued for damages, they might plead the writ in bar of the suit, and if their defense were overruled, and judgment rendered against them, a writ of error would lie to the judgment, under the twenty-fifth section of the judiciary act. *Riggs v. Johnson County*, 6 Wall. 166, 198, 199, 18 L. Ed. 768.

**72. As dependent upon office of person to whom directed.**—*Marbury v. Madison*, 1 Cranch 137, 170, 2 L. Ed. 60; *Louisiana v. Jumel*, 107 U. S. 711, 762, 27 L. Ed. 448, Harlan, J., dissenting.

Nothing growing out of the official character of the person to whom the writ is directed will exempt him from obedience thereto if the duty directed to be performed is purely ministerial. *Kendall v. United States*, 12 Pet. 524, 618, 9 L. Ed. 1181.

**73. Mandamus to courts.**—In England a writ of mandamus may be issued to an inferior court. *Kendall v. United States*, 12 Pet. 524, 614, 9 L. Ed. 1181.

Some of the opinions, as that in *Kendall v. United States*, 12 Pet. 524, 622, 9 L. Ed. 1181, use the expression "inferior" court; while others make use of the term "lower" court, as to which see *Saltmarsh v. Tuthill*, 12 How. 387, 13 L. Ed. 1034; and others still, make use of the term "subordinate" courts, see *Ex parte Russell*, 13 Wall. 664, 670, 20 L. Ed. 632.

**74.** Mandamus properly issues to enforce the exercise of the powers conferred upon inferior courts by the legislature. *Ex parte Bradley*, 7 Wall. 364, 377, 19 L. Ed. 214.

The duties may be conferred by crown or legislature in England. *Ex parte Bradley*, 7 Wall. 364, 377, 19 L. Ed. 214.

**75. To do what court is bound to do.**—"Its use has been very much extended in modern times, and now it may be said to be an established remedy to oblige inferior courts and magistrates to do that justice which they are in duty, and by virtue of their office, bound to do." *Virginia v. Rives*, 100 U. S. 313, 323, 25 L. Ed. 667; *Litchfield v. Railroad Co.*, 7 Wall. 270, 19 L. Ed. 150; *United States v. Peters*, 5 Cranch 115, 3 L. Ed. 53.

**76. Refusal to act.**—*The Life, etc., Ins. Co. v. Adams*, 9 Pet. 573, 9 L. Ed. 234; *Ex parte Bradstreet*, 8 Pet. 588, 590, 8 L. Ed. 1054; *Ex parte Russell*, 13 Wall. 664, 670, 20 L. Ed. 632; *Ex parte Perry*, 102 U. S. 183, 186, 26 L. Ed. 43; *Ex parte Brown*, 116 U. S. 401, 402, 29 L. Ed. 676; *Ex parte Morgan*, 114 U. S. 174, 29 L. Ed. 135; *Ex parte Burtis*, 103 U. S. 238, 26 L. Ed. 392; *Ex parte Newman*, 14 Wall. 152, 165, 20 L. Ed. 877; *Parker, Petitioner*, 131 U. S. 221, 226, 33 L. Ed. 123. See ante, "As Dependent upon Breach of Duty," VIII, F.

The writ will not be granted against a lower court in anticipation of a refusal to act, as it is presumed such court will do its duty without coercion. *Saltmarsh v. Tuthill*, 12 How. 387, 13 L. Ed. 1034.

If a judge declines to exercise his discretion, or to act at all, when it is his duty to do so, a writ of mandamus may be issued to compel him to act. *Hudson v. Parker*, 156 U. S. 277, 288, 39 L. Ed. 424.

"It is the only adequate mode of relief, where an inferior tribunal refuses to act upon a subject brought properly before it." *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 303, 8 L. Ed. 949.

**77. Whether duty discretionary or ministerial immaterial.**—"Superior tribunals may by mandamus command an inferior court to perform a legal duty where there is no other remedy, and the rule applies to judicial as well as to ministerial acts, but it does not apply to all to a judicial act to correct an error, as where the act has been erroneously performed." *Ex parte Newman*, 14 Wall. 152, 169, 20 L. Ed. 877. See, ante, "To Compel Action," VIII, E, 8, b.

**78. To exercise jurisdiction.**—In *re Christensen Engineering Co.*, 194 U. S. 458, 48 L. Ed. 1072; *Ex parte Brown*, 116 U. S. 401, 402, 29 L. Ed. 676; *Ex parte Morgan*, 114 U. S. 174, 29 L. Ed. 135; *Ex parte Newman*, 14 Wall. 152, 165, 20 L. Ed. 877; In *re Atlantic City Railroad*, 164 U. S. 633, 635, 41 L. Ed. 579; *Ex parte Parker*, 120 U. S. 737, 743, 30 L. Ed. 818; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853; In *re Pennsylvania Co.*, 137 U. S. 451, 452, 453, 34 L. Ed. 738; *American Const. Co. v. Jacksonville, etc., R. Co.*, 148 U. S. 372, 379, 37 L. Ed. 486; In *re Hohorst*, 150 U. S. 653, 658, 664, 37 L. Ed. 1211; *Railroad Co. v. Wiswall*, 23 Wall.



tion, it refuses to proceed<sup>79</sup> to final judgment;<sup>80</sup> otherwise, its action could not be reviewed,<sup>81</sup> in the absence of a statute to the contrary.<sup>82</sup> The writ lies although the lower court has decided against its own jurisdiction, if such decision is erroneous.<sup>83</sup> The writ lies to compel a court to exercise an appellate

507, 23 L. Ed. 103; *In re Grossmayer*, 177 U. S. 48, 49, 44 L. Ed. 665; *In re Glaser*, 198 U. S. 171, 49 L. Ed. 1000; *In re Connaway*, 178 U. S. 421, 425, 44 L. Ed. 1134; *Ex parte Bradstreet*, 7 Pet. 634, 648, 8 L. Ed. 810; *Insurance Co. v. Comstock*, 16 Wall. 258, 270, 21 L. Ed. 493; *Marbury v. Madison*, 1 Cranch 137, 175, 2 L. Ed. 60; *Kendall v. United States*, 12 Pet. 524, 622, 9 L. Ed. 1181; *United States v. Gomez*, 3 Wall. 752, 18 L. Ed. 212; *Ex parte Roberts*, 15 Wall. 384, 21 L. Ed. 131; *Ex parte United States*, 16 Wall. 699, 702, 21 L. Ed. 507; *Parker, Petitioner*, 131 U. S. 221, 33 L. Ed. 123; *Ex parte Many*, 14 How. 24, 25, 14 L. Ed. 311; *Ex parte Flippin*, 94 U. S. 348, 350, 24 L. Ed. 194; *Ex parte Loring*, 94 U. S. 418, 419, 24 L. Ed. 165; *United States v. Addison*, 22 How. 174, 183, 16 L. Ed. 304; *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 304, 8 L. Ed. 949; *In re Pollitz*, 206 U. S. 323, 331, 51 L. Ed. 1081; *Harrington v. Holler*, 111 U. S. 796, 797, 28 L. Ed. 602.

"It is an elementary rule that a writ of mandamus may be used to require an inferior court to decide a matter within its jurisdiction and pending before it for judicial determination." *Ex parte Morgan*, 114 U. S. 174, 175, 29 L. Ed. 135.

Mandamus is the proper remedy to compel a lower court to entertain a case and proceed to its determination. *Harrington v. Holler*, 111 U. S. 796, 797, 28 L. Ed. 602.

Mandamus is the only available remedy. *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 8 L. Ed. 949.

**Where court refuses to take jurisdiction.**—"That writ properly lies in cases where the inferior court refuses to take jurisdiction where by law it ought so to do, or where, having obtained jurisdiction in a cause, it refuses to proceed in the due exercise thereof." *Ex parte Parker*, 120 U. S. 737, 743, 30 L. Ed. 818.

"In *In re Hohorst*, 150 U. S. 653, 37 L. Ed. 1211, the bill was filed in the circuit court of the United States for the southern district of New York against a corporation and certain other defendants, and was dismissed against the corporation for want of jurisdiction. From that order complainant took an appeal to this court, which was dismissed for want of jurisdiction because the order, not disposing of the case as to all the defendants, was not a final decree from which an appeal would lie. *Hohorst v. Hamburg-American Packet Co.*, 148 U. S. 262, 37 L. Ed. 443. Thereupon an application was made to this court for leave to file a petition for a writ of mandamus to the judges of the circuit court to take jurisdiction and to proceed against the company in the suit. Leave

was granted and a rule to show cause entered thereon, upon the return to which the writ of mandamus was awarded." *In re Atlantic City Railroad*, 164 U. S. 633, 635, 41 L. Ed. 579.

A circuit court may be compelled to take jurisdiction of a cause instituted by service of process upon an agent of a foreign corporation, under a state statute requiring consent to being sued as a condition to doing business in the state. *In re Schollenberger*, 96 U. S. 369, 24 L. Ed. 853.

**To court of claims.**—The court of claims has power to grant a new trial within two years after the final disposition of the suit and this power is not taken away by the affirmance of the judgment on appeal to the supreme court and the filing in the lower court of the mandate of affirmance. Where a motion for a new trial is argued before and submitted to four of the five judges of the court, the finding by two of the judges that the motion be denied does not decide the question involved nor take away the jurisdiction of the court to hear and decide the motion on reargument, and a peremptory mandamus may issue to compel the court to proceed to hear and decide the motion. *Ex parte United States*, 16 Wall. 699, 21 L. Ed. 507.

**79. Where court refuses to proceed to final judgment.**—*Parker, Petitioner*, 131 U. S. 221, 226, 33 L. Ed. 123.

A superior court may, by the writ of mandamus, set the machinery of a lower court in action. *Ex parte Sawyer*, 21 Wall. 235, 238, 22 L. Ed. 617. See cases cited above.

**80. Proceed to final judgment.**—*Ex parte United States*, 16 Wall. 699, 21 L. Ed. 507; *Ex parte Russell*, 13 Wall. 664, 20 L. Ed. 632. See the title APPEAL AND ERROR, vol. 1, p. 489.

**81.** "And it is under this power, that this court issues the writ to the circuit courts, to compel them to proceed to a final judgment or decree in a cause, in order that we may exercise the jurisdiction of review given by the law; and the same power is exercised by the circuit courts over the district courts, where a writ of error or appeal lies to the circuit court. But this power is not exercised, as in England, by the king's bench, as having a general supervising power over inferior courts; but only for the purpose of bringing the case to a final judgment or decree, so that it may be reviewed." *Kendall v. United States*, 12 Pet. 524, 622, 9 L. Ed. 1181.

**82. In absence of statute.**—*In re Grossmayer*, 177 U. S. 48, 49, 44 L. Ed. 665; *In re Pollitz*, 206 U. S. 323, 331, 51 L. Ed. 1081.

**83. Where court decides against its ju-**

jurisdiction.<sup>84</sup>

2. **CONTROLLING ACTION**—a. *In General*.—A superior court may by mandamus set the machinery of an inferior court in motion, but when that has been done, its power under that form of proceeding is at an end. The inferior court is supreme within its own jurisdiction so long as it is acting.<sup>85</sup>

b. *To Control Discretion*—(1) *In General*.—The writ of mandamus cannot be used to control the discretion and judgment of an inferior court in the exercise of its legitimate jurisdiction,<sup>86</sup> although exercised oppressively.<sup>87</sup>

(2) *To Decide in Particular Way*.—The lower court is to be left free to exercise its judgment and discretion in its own way.<sup>88</sup> It cannot be compelled

**jurisdiction**.—Ex parte Russell, 13 Wall. 664, 670, 20 L. Ed. 632.

The writ lies where its object is to require the court to proceed in a matter properly cognizable by it, but upon which, from a mistaken view of the law as to its jurisdiction, it has refused to act. Parker, Petitioner, 131 U. S. 221, 226, 33 L. Ed. 123.

**To reinstate action wrongfully dismissed**.—Where a court has wrongfully dismissed a cause for want of jurisdiction, mandamus lies to compel it to dissolve the order of dismissal and proceed with the cause. In re Hohorst, 150 U. S. 653, 37 L. Ed. 1211.

**Circuit court to entertain jurisdiction from district court**.—Mandamus will not lie to compel the circuit court to entertain jurisdiction from the district court in a case arising out of the controversy between the captain and crew of a vessel of the Prussian government, which the district court had taken jurisdiction of over the protest of the Prussian consul, and which had been dismissed for want of jurisdiction on an appeal to the circuit court. Ex parte Newman, 14 Wall. 152, 165, 20 L. Ed. 877.

**84. To exercise appellate jurisdiction**.—A supreme court of a territory may be compelled to entertain an appeal from a district court. Harrington v. Holler, 111 U. S. 796, 797, 28 L. Ed. 602.

**85. Controlling action**.—Ex parte Sawyer, 21 Wall. 235, 238, 22 L. Ed. 617.

**86. Discretion**.—Ex parte Secombe, 19 How. 9, 15, 15 L. Ed. 565; Ex parte Railway Co., 101 U. S. 711, 720, 25 L. Ed. 872; Ex parte Flippin, 94 U. S. 348, 24 L. Ed. 194; Life & Fire Ins. Co. v. Wilson, 8 Pet. 291, 304, 8 L. Ed. 949; In re Parsons, 150 U. S. 150, 156, 37 L. Ed. 1034; Ex parte Bradley, 7 Wall. 364, 377, 19 L. Ed. 214; Ex parte Many, 14 How. 24, 25, 14 L. Ed. 311; United States v. Addison, 22 How. 174, 183, 16 L. Ed. 304; Ex parte Loring, 94 U. S. 418, 419, 24 L. Ed. 165; Ex parte Newman, 14 Wall. 152, 169, 20 L. Ed. 877; Ex parte Brown, 116 U. S. 401, 402, 29 L. Ed. 676; In re Pollitz, 206 U. S. 323, 331, 51 L. Ed. 1081; Kendall v. United States, 12 Pet. 524, 622, 9 L. Ed. 1181; Ex parte Russell, 13 Wall. 664, 670, 20 L. Ed. 632; Ex parte Sawyer, 21 Wall. 235, 238, 22 L. Ed. 617; United States v. Lawrence, 3 Dall. 42, 53, 1 L. Ed. 502; Ex parte Perry, 102 U. S. 183, 186, 26 L. Ed. 43; In re At-

lantic City Railroad, 164 U. S. 633, 635, 41 L. Ed. 579; Ex parte Railway Co., 101 U. S. 711, 720, 25 L. Ed. 872; In re Hawkins, 147 U. S. 486, 490, 37 L. Ed. 251; Ex parte Morgan, 114 U. S. 174, 175, 29 L. Ed. 135; Ex parte Burtis, 103 U. S. 238, 26 L. Ed. 392; Ex parte Schwab, 98 U. S. 240, 25 L. Ed. 105; Life & Fire Ins. Co. v. Adams, 9 Pet. 573, 602, 9 L. Ed. 234; Ex parte Roberts, 6 Pet. 216, 217, 8 L. Ed. 375; In re Haberman Mfg. Co., 147 U. S. 525, 530, 37 L. Ed. 266; Virginia v. Paul, 148 U. S. 107, 124, 37 L. Ed. 386; Ex parte Morrison, 147 U. S. 14, 26, 37 L. Ed. 60; American Const. Co. v. Jacksonville, etc., R. Co., 148 U. S. 372, 379, 386, 37 L. Ed. 486; In re Humes, 149 U. S. 192, 37 L. Ed. 698; Ex parte Cutting, 94 U. S. 14, 22, 24 L. Ed. 49; Ex parte Taylor, 14 How. 3, 14 L. Ed. 302; Ex parte Hoyt, 13 Pet. 279, 10 L. Ed. 161; Ex parte Whitney, 13 Pet. 404, 10 L. Ed. 221; Hudson v. Parker, 156 U. S. 277, 288, 39 L. Ed. 424; Ex parte Crane, 5 Pet. 190, 8 L. Ed. 92; The Chateaugay, etc., Iron Co., Petitioner, 128 U. S. 544, 557, 32 L. Ed. 508; Ex parte Parker, 120 U. S. 737, 742, 30 L. Ed. 818; Parker, Petitioner, 131 U. S. 221, 226, 33 L. Ed. 123; Ex parte The Milwaukee R. Co., 5 Wall. 188, 190, 18 L. Ed. 676; Clough v. Curtis, 134 U. S. 361, 371, 33 L. Ed. 945. See ante, "To Control Discretion," VIII, K, 2, b.

"The writ has never been extended so far, nor ever used to control the discretion and judgment of an inferior court of record acting within the scope of its judicial authority." Ex parte Taylor, 14 How. 3, 13, 14 L. Ed. 302.

**87. Exercised oppressively**.—In the case Ex parte Whitney, 13 Pet. 404, 10 L. Ed. 221, it was held that a writ of mandamus was not the appropriate remedy for any orders which may be made in a cause by a judge, in the exercise of his authority, although they may seem to bear harshly or oppressively upon the party; but that the appropriate redress, if any, was to be obtained by an appeal, after a final decree in the cause. Gaines v. Relf, 15 Pet. 9, 16, 10 L. Ed. 642. See also, Ex parte Perry, 102 U. S. 183, 186, 26 L. Ed. 43.

**88. To decide in particular way**.—United States v. Lawrence, 3 Dall. 42, 43, 45, 1 L. Ed. 502; Ex parte Crane, 5 Pet. 190, 207, 8 L. Ed. 92; In re Morrison, 147 U. S. 14, 26, 37 L. Ed. 60; Ex parte Morgan, 114 U. S. 174, 29 L. Ed. 135; Ex parte



to decide a case in a particular way.<sup>89</sup>

(3) *Abuse of Discretion*.—Where the court exceeds or abuses its discretion, the writ will issue.<sup>90</sup>

c. *To Control Ministerial Acts*.—A writ of mandamus may be granted specifically directing how a ministerial duty shall be performed.<sup>91</sup>

3. REVIEWING ACTION.—For treatment of this subject, see elsewhere.<sup>92</sup>

4. RESTRAINING ACTION.—One of the peculiar and more common uses of the writ is to restrain inferior courts and to keep them within their lawful bounds.<sup>93</sup>

5. MATTERS OF PLEADING AND PRACTICE.—a. *General Rules of Practice*.—The supreme court has no power by mandamus to compel a circuit court to proceed according to established rules in chancery cases.<sup>94</sup> Mandamus does not lie to compel a federal court in the state of Louisiana to conform to the chancery practice prescribed by the supreme court of the United States, instead of the rules prescribed by the courts of the state.<sup>95</sup>

Brown, 116 U. S. 401, 29 L. Ed. 676; Ex parte Flippin, 94 U. S. 348, 350, 24 L. Ed. 194; Kendall v. United States, 12 Pet. 524, 622, 9 L. Ed. 1181.

The mandate of the writ granted for the enforcement of the exercise of a judicial discretion or judgment simply directs the court to act and contains no direction as to the manner of acting. Ex parte Newman, 14 Wall. 152, 169, 20 L. Ed. 877; United States v. Addison, 22 How. 174, 183, 16 L. Ed. 304; Life & Fire Ins. Co. v. Wilson, 8 Pet. 291, 294, 8 L. Ed. 949.

"On a mandamus, a superior court will never direct in what manner the discretion of an inferior tribunal shall be exercised." Life & Fire Ins. Co. v. Wilson, 8 Pet. 291, 304, 8 L. Ed. 949.

89. In re Pollitz, 206 U. S. 323, 331, 51 L. Ed. 1081; Ex parte Newman, 14 Wall. 152, 165, 20 L. Ed. 877; In re Parsons, 150 U. S. 150, 156, 37 L. Ed. 1034; The Life, etc., Ins. Co. v. Adams, 9 Pet. 573, 9 L. Ed. 234.

"The writ of mandamus cannot be issued to compel a judicial tribunal to decide a matter within its discretion in a particular way." In re Blake, 175 U. S. 114, 117, 44 L. Ed. 94.

It is never the office of a writ of mandamus to compel a court to decide in a particular way the matter heard before it. In re Morrison, 147 U. S. 14, 26, 37 L. Ed. 60; Ex parte Morgan, 114 U. S. 174, 29 L. Ed. 135; Ex parte Brown, 116 U. S. 401, 29 L. Ed. 676.

A district court cannot be mandamusd to enter an order declaring that the commission by the president during a vacation of the senate to a person as United States attorney is invalid. In re Parsons, 150 U. S. 150, 37 L. Ed. 1034.

90. *Abuse of discretion*.—"The proceeding is admitted to be the recognized remedy when the case is outside of the exercise of this discretion, and is one of irregularity, or against law, or of flagrant injustice, or without jurisdiction." Ex parte Bradley, 7 Wall. 364, 379, 19 L. Ed. 214.

"It does not lie to control judicial dis-

cretion, except when that discretion has been abused; but it is a remedy when the case is outside of the exercise of this discretion, and outside the jurisdiction of the court or officer to which or to whom the writ is addressed." Virginia v. Rives, 100 U. S. 313, 323, 25 L. Ed. 667.

91. *To control ministerial acts*.—Ex parte Newman, 14 Wall. 152, 169, 20 L. Ed. 877; In re Washington, etc., R. Co., 140 U. S. 91, 95, 35 L. Ed. 339; The Life, etc., Ins. Co. v. Adams, 9 Pet. 573, 603, 9 L. Ed. 234. See cases cited above.

92. *Reviewing action*.—See the title APPEAL AND ERROR, vol. 1, p. 395.

93. *Restraining action*.—Ex parte Bradley, 7 Wall. 364, 377, 19 L. Ed. 214; Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667; In re Baiz, 135 U. S. 403, 34 L. Ed. 222.

Mandamus will lie where the court assumes to exercise jurisdiction on removal, when, on the face of the record, absolutely no jurisdiction has attached. In re Pollitz, 206 U. S. 323, 331, 51 L. Ed. 1081; Virginia v. Paul, 148 U. S. 107, 37 L. Ed. 386; Ex parte Wisner, 203 U. S. 449, 51 L. Ed. 264. But see In re Atlantic City Railroad, 164 U. S. 633, 635, 41 L. Ed. 579. See the title INJUNCTIONS, vol. 6, p. 1026.

94. *General rules of practice*.—All that the court can do is to prevent proceedings otherwise, by reversing them, when brought here on appeal. Gaines v. Relf, 15 Pet. 9, 10 L. Ed. 642.

"This case comes before us upon a motion on the part of the complainants, for a rule upon the judges of the circuit court for the eastern district of Louisiana, to show cause why a mandamus, in the nature of a writ of procedendo, should not issue from this court; commanding the circuit court to 'remand this suit to the rule docket of the court, so that the complainants may proceed therein according to chancery practice.' \* \* \* We perceive nothing in the proceedings of the circuit court to warrant the rule to show cause which has been asked for in behalf of the complainants." Poultney v. La Fayette, 12 Pet. 472, 473, 9 L. Ed. 1161.

95. In Ex parte Whitney, 13 Pet. 404,



b. *Preliminary Matters*—(1) *In General*.—A judge must exercise his discretion in the intermediate proceedings which take place between the institution and trial of a suit; and, if, in the performance of this duty, he acts oppressively, mandamus cannot be resorted to.<sup>96</sup>

(2) *Summons and Process*.—Where a lower court disbars an attorney without notice, upon a decision that notice was not necessary, its action cannot be revised or annulled by mandamus.<sup>97</sup>

(3) *Admission to Bail*.—For treatment of this subject, see elsewhere.<sup>98</sup>

c. *Parties*—(1) *In General*.—Mandamus is the proper remedy to compel a court to proceed with a cause which it refused to hear on the ground of incompetency of the party seeking relief;<sup>99</sup> but not to command it to adjudicate upon the rights of parties not before it, by directing it to cause securities which may have been deposited to be returned to their owners, and to restore the parties to their original positions.<sup>1</sup>

(2) *By Intervention*.—The federal supreme court will not award a mandamus to the judge of the district court, commanding him to permit the intervention of one claimant in a proceeding instituted by another for the confirmation of a land title under a Mexican grant.<sup>2</sup>

d. *Abatement and Revival*.—If the lower court has jurisdiction to continue an action against the executor of the original defendant, it may be mandamusd to do so.<sup>3</sup>

e. *Dismissal and Nonsuit*—(1) *In General*.—Mandamus is the proper remedy to compel an inferior court to reinstate and proceed to try and adjudge a case which it had wrongfully dismissed;<sup>4</sup> but not to reinstate a case dismissed in the proper exercise of the court's discretion.<sup>5</sup>

(2) *For Want of Jurisdiction*.—Mandamus will not lie to compel a circuit

10 L. Ed. 221, "application was made to this court for a mandamus to compel the district judge to proceed in this case according to the course of chancery practice, upon a petition to the court representing that he had refused so to do, but had entered an order that all further proceedings should be conformable to the provisions of the code of practice in Louisiana, and the acts of the legislature of that state. Upon this application, this court again declared, that it is the duty of the court to proceed in the suit according to the rules prescribed by the supreme court for proceedings in equity causes, at the February term, 1822. That the proceedings of the district judge, and the orders made by him in this cause (the very order now in question), were not in conformity with those rules, and with chancery practice; but that it was not a case in which a mandamus ought to issue, because the district judge was proceeding in the cause; and however irregular that proceeding might be, the appropriate redress, if any, was to be obtained by an appeal, after a final decree shall be made in the cause." *Gaines v. Relf*, 15 Pet. 9, 16, 10 L. Ed. 642.

96. *Preliminary matters*.—Ex parte Bradstreet, 8 Pet. 588, 590, 8 L. Ed. 1054.

97. *Summons and process*.—Ex parte Secombe, 19 How. 9, 15, 15 L. Ed. 565.

98. *Bail in civil cases*.—See the title BAIL AND RECOGNIZANCE, vol. 2, p. 768.

*Bail in criminal cases*.—See the title BAIL AND RECOGNIZANCE, vol. 2, p. 775.

99. *Parties*.—Ex parte Russell, 13 Wall. 664, 670, 20 L. Ed. 632.

1. *In re Rice*, 155 U. S. 396, 403, 39 L. Ed. 198.

2. *By intervention*.—White v. United States, 1 Black 501, 17 L. Ed. 227.

3. *Abatement and revival*.—The petition for a writ of mandamus alleges that the ground upon which said court set aside the service of summons was that the action had abated by the death of O. P. Overton before the service of process upon him; and prays that a writ of mandamus be issued to the judges of the circuit court of the United States aforesaid to take jurisdiction and proceed against John P. Overton as executor as aforesaid. The court declined to make him a party on the ground that it had no jurisdiction to do so. If it has jurisdiction, mandamus is the proper remedy. *In re Connaway*, 178 U. S. 421, 424, 44 L. Ed. 1134. *In re Grossmayer*, 177 U. S. 48, 44 L. Ed. 665. See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 42.

4. *Wrongful dismissal*.—Ex parte Bradstreet, 7 Pet. 634, 648, 8 L. Ed. 810. See the title DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 5, p. 366.

*Motion for new trial*.—See post, "New Trial," VIII, K, 5, 1. And see the title MANDATE AND PROCEEDINGS THEREON.

*Dismissal of appeal*.—See the title APPEAL AND ERROR, vol. 2, p. 320.

*Proceedings in bankruptcy*.—See post, "Bankruptcy," VIII, K, 6, b.

5. *Dismissal at discretion*.—In this case

court to dismiss a suit for want of jurisdiction where the defendant contends that by pleading the suit he will be estopped from denying the court's jurisdiction, if there is an appeal from the court's decision on such question.<sup>6</sup> The writ will issue for the reinstatement of a case dismissed for want of jurisdiction, only where it is shown that a sufficient cause was presented by the pleadings to give jurisdiction.<sup>7</sup>

(3) *For Want of Prosecution*.—It does not lie to compel the reinstatement of a case dismissed for want of due prosecution.<sup>8</sup>

(4) *Nonsuit*.—It will not be granted to compel an inferior court to grant a motion to vacate an order setting aside a judgment of nonsuit.<sup>9</sup>

(5) *Dismissal by Predecessor*.—Mandamus will lie to compel the judges of a court to reinstate a case dismissed by their predecessors, who consist of other judges than those at present constituting the court.<sup>10</sup>

f. *Pleadings*—(1) *Amendment of*.—The allowance or refusal of amendments to pleadings will not be controlled by mandamus.<sup>11</sup>

(2) *Striking Out*.—Mandamus will not be granted to compel the court to strike out a pleading, which the opposite party deems improper;<sup>12</sup> nor to restore a pleading stricken out because double, where allowance of double pleas and defenses is not a matter of absolute right.<sup>13</sup>

there was a motion made for a writ of mandamus against the judge of the northern district of New York, to compel him to reinstate certain suits which he had dismissed from the docket of that court, and to proceed to adjudicate them according to law. The writ was refused on the ground that "a judge must exercise his discretion in those intermediate proceedings which take place between the institution and trial of a suit; and if, in the performance of his duty, he acts oppressively, it is not to this court that application is to be made." *Ex parte Bradstreet*, 8 Pet. 588, 8 L. Ed. 1054.

**Dismissal of libel in admiralty**.—See post, "Admiralty," VIII, K, 6, a.

**6. For want of jurisdiction—Dismissal**.—In this case the petitioner, the Atlantic City Railroad, the defendant in a suit for an infringement of patents, appeared specially for the purpose of objecting to the jurisdiction of the court, and filed a demurrer raising that question. The demurrer was overruled. At this stage of the case the defendant believed that it was required to enter a general appearance and thereby waive objection to the jurisdiction of the court, and that it had no remedy by appeal. Prayer for a writ of mandamus is that it be directed to the circuit court, commanding such court to dismiss the complaint and vacate the order overruling the demurrer. Held, the petitioner has a remedy by appeal if the decree should be against it, and it is not proper that the mandate not to exercise jurisdiction should be interposed at this stage of the case and in the manner desired. *In re Atlantic City Railroad*, 164 U. S. 633, 41 L. Ed. 579.

**7. Reinstatement**.—*In re Hohorst*, 150 U. S. 653, 37 L. Ed. 1211; *Bradstreet v. Thomas*, 12 Pet. 59, 64, 9 L. Ed. 999.

The writ will not lie to compel reinstatement when libel dismissed for want

of jurisdiction. *In re Morrison*, 147 U. S. 14, 26, 37 L. Ed. 60. See the title DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 5, p. 371.

**8. For want of prosecution**.—*In Ex parte Brown*, 116 U. S. 401, 29 L. Ed. 696, it is stated: "The motion for the writ was denied because the court below, having entertained jurisdiction of the cause, had dismissed it for want of due prosecution. That is to say, because errors had not been assigned in accordance with the rules of practice applicable to the form of the action; although the statement in the report does not sufficiently recite the facts from the record on which the opinion is based." *Ex parte Parker*, 120 U. S. 737, 743, 30 L. Ed. 818.

**9. Nonsuit**.—*Ex parte Loring*, 94 U. S. 418, 24 L. Ed. 165. See the title DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 5, p. 389.

**10. Reinstatement**.—*Parker, Petitioner*, 131 U. S. 221, 226, 33 L. Ed. 123.

**11. Pleadings—Amendments of**.—*Ex parte Bradstreet*, 7 Pet. 634, 647, 8 L. Ed. 810. See the title AMENDMENTS, vol. 1, p. 303.

**12. Striking out**.—The court refused to issue a mandamus to the circuit court for the county of Washington, commanding the court to strike off a plea which the court had permitted the defendant to put in, and to compel the defendant to enter another plea, which the plaintiff's counsel deemed the proper plea, under the provisions of an act of the legislature of Maryland, upon which the proceedings were founded, incorporating the Bank of Columbia. *Bank v. Sweeny*, 1 Pet. 567, 7 L. Ed. 265. See post, "Directing Issue," VIII, K, 5, h.

**13. To restore pleading stricken out**.—"This is a motion for a mandamus to the district judge for the southern district of New York, directing him to restore to the



g. *Motions and Summary Proceedings*.—The decision of a court upon a motion cannot be reviewed by mandamus.<sup>14</sup> If the court does not exceed its jurisdiction, the mere fact that a summary proceeding is resorted to does not constitute ground for mandamus.<sup>15</sup> The writ has, however, frequently been used to correct the abuses of the inferior courts in summary proceedings against their officers, and especially against the attorneys and counsellors of the courts.<sup>16</sup>

h. *Directing Issue*.—Where a court refuses to direct an issue to be made up, a mandamus is the proper process to compel it to be done, as required by a statute, but where the court did direct an issue to be made up, it will not be compelled to direct issue to accord with a construction put upon the statute by one of the counsel.<sup>17</sup>

i. *Evidence*—(1) *Admissibility*.—The writ does not lie to compel a circuit court to receive further proofs in an admiralty proceeding.<sup>18</sup>

(2) *Sufficiency*.—The decision of a court in regard to the sufficiency of evidence cannot be controlled by mandamus.<sup>19</sup>

j. *Argument of Counsel*.—Mandamus does not lie to compel the hearing of further argument, because one of the counsel may consider that the opportunity for the expression of his views and the presentation of objections has not been as ample as in his opinion should have been afforded.<sup>20</sup>

k. *Judgment*—(1) *Rendition*—(a) *In General*.—Where it has jurisdiction, a court may be compelled by mandamus to render a judgment or enter a decree,<sup>21</sup> but it is necessary that the case be ripe for judgment in the court before which it is pending, and there must be a plain case of refusing to proceed in the inferior court.<sup>22</sup>

(b) *Particular Judgment*.—The writ of mandamus cannot be issued to compel

record a plea of tender, which had been filed, together with a plea of non est factum, by Davenport, in a suit on a custom house bond for the payment of duties, brought against him in that court, and which had been ordered by the court to be stricken from the docket as a nullity. As the allowance of double pleas and defenses is a matter not of absolute right, but of discretion in the court, and as the courts constantly exercise a control over this privilege, and will disallow incompatible and sham pleas, no mandamus will lie to the court for the exercise of its authority in such case, it being a matter of sound discretion, exclusively appertaining to its own practice." *Ex parte Davenport*, 6 Pet. 661, 663, 8 L. Ed. 537.

14. *Motions*.—*Ex parte Loring*, 94 U. S. 418, 419, 24 L. Ed. 165.

15. *Summary proceedings*.—"The mere fact that, in the administration of the assets of an insolvent corporation in the custody of receivers, summary proceedings are resorted to, does not in itself affect the jurisdiction of the circuit court as having proceeded in excess of its powers, and, where notice has been given and hearing had, the result cannot properly be interfered with by mandamus." *In re Rice*, 155 U. S. 396, 403, 39 L. Ed. 198.

16. "The remedy has been applied from an early day, indeed, since the organization of courts and the admission of attorneys to practice therein down to the present time, to correct the abuses of the inferior courts in summary proceedings against their officers, and especially against the attorneys and counsellors of

the courts." *Ex parte Bradley*, 7 Wall. 364, 376, 19 L. Ed. 214.

Relief will be granted by the writ where the court exceeds its jurisdiction. *Ex parte Bradley*, 7 Wall. 364, 377, 19 L. Ed. 214. See post, "Disbarment of Attorneys," VIII, K, 6, g.

17. *Directing issue*.—"The application now is that the circuit court be ordered to withdraw that issue, and to direct a different issue to be made up, according to what the counsel for the bank supposes to be the proper construction of the act. We think this is not a proper case for a mandamus." *Bank v. Sweeny*, 1 Pet. 567, 569, 7 L. Ed. 265. See ante, "Striking Out," VIII, K, 5, f, (2).

18. *Evidence—Admissibility*.—See the title ADMIRALTY, vol. 1, p. 194.

19. *Sufficiency*.—In this case, the district judge acted in a judicial capacity when he determined that the evidence was not sufficient to authorize his issuing a warrant for the apprehension of the defendant in a criminal case. *United States v. Lawrence*, 3 Dall. 42, 53, 1 L. Ed. 502.

20. *Argument of counsel*.—*In re Rice*, 155 U. S. 396, 403, 39 L. Ed. 198.

21. *Judgment — Rendition*.—*Ex parte Newman*, 14 Wall. 152, 165, 20 L. Ed. 877; *Ex parte Hoyt*, 13 Pet. 279, 10 L. Ed. 161. See ante, "Compelling Action," VIII, K, 1.

22. *Life & Fire Ins. Co. v. Adams*, 9 Pet. 573, 604, 9 L. Ed. 231.

In *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 304, 8 L. Ed. 949, mandamus issued to compel the rendition of a judgment on a verdict.

"A mandamus, or a rule to show cause



the court below to render a particular judgment in a case before it in a particular way.<sup>23</sup> The inferior tribunal will not be compelled to render judgment for or against either party.<sup>24</sup>

(c) *On Confession*.—A judge cannot be mandamusd to enter a judgment on confession, where in his discretion there has not been given the proper notice to the defendant and his assignees,<sup>25</sup> nor where he is asked to enter a judgment upon the confession by an agent whose power he does not consider adequate and legal.<sup>26</sup>

(d) *On Mandate*.—See elsewhere in this title.<sup>27</sup>

(2) *Signing*.—By the law of Louisiana and the rule adopted by the district court in that state, it is the duty of a judge to either sign the judgment, that subsequent proceeding thereon may be had, or to set the same aside and grant a new trial. Where the judge refuses to grant the new trial, it is his duty to sign the judgment, which act is merely ministerial and may be enforced by mandamus.<sup>28</sup> He may be mandamusd to sign a judgment rendered by his predecessor.<sup>29</sup> The fact that the judgment is erroneous is immaterial.<sup>30</sup>

(3) *Amendment*.—In this regard, the court acts judicially to the same extent

why a mandamus should not issue, is asked in a case in which a verdict has been given, for the purpose of ordering the judge to enter up judgment upon the verdict; the affidavit itself shows that judgment is suspended for the purpose of considering a motion which has been made for a new trial; the verdict was given at the last term, and we understand it is not unusual in the state of New York, for a judge to hold a motion for a new trial under advisement till the succeeding term. There is then nothing extraordinary in the fact, that the judge should take time till the next term, to decide on the motion for a new trial; this court entertains no doubt of his power to grant it." *Ex parte Bradstreet*, 8 Pet. 588, 8 L. Ed. 1054.

23. *Particular judgment*.—In *re Rice*, 155 U. S. 396, 403, 39 L. Ed. 198; *Ex parte Newman*, 14 Wall. 152, 165, 20 L. Ed. 877; *Life & Fire Ins. Co. v. Adams*, 9 Pet. 573, 602, 9 L. Ed. 234; In *re Parsons*, 150 U. S. 150, 156, 37 L. Ed. 1034; *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 8 L. Ed. 949; *Ex parte Hoyt*, 13 Pet. 279, 290, 10 L. Ed. 161.

A district court cannot be mandamusd to rule that the commission to a United States attorney issued by the president during a vacation in the senate is invalid. In *re Parsons*, 150 U. S. 150, 37 L. Ed. 1034; *Life & Fire Ins. Co. v. Adams*, 9 Pet. 573, 604, 9 L. Ed. 234.

24. *Judgment for particular party*.—To order a court to give judgment for the plaintiffs, is in effect to direct in what manner its discretion shall be exercised, which is not the function of a writ of mandamus. *Life & Fire Ins. Co. v. Adams*, 9 Pet. 573, 602, 9 L. Ed. 234. See ante, "To Decide in Particular Way," VIII, K, 2, b, (2).

25. *On confession*.—Mandamus will not be issued to compel a court to enter judgment on confession, in pursuance to an agreement between the creditor and debtor that judgment should be so entered upon the nonpayment of certain installments,

where there has been no notice given the debtor and his syndics into whose hands the property had passed under the insolvency laws of Louisiana, subsequent to the agreement of the parties and the entry of a judgment for part of the installment. *Life & Fire Ins. Co. v. Adams*, 9 Pet. 573, 9 L. Ed. 234.

26. *Life & Fire Ins. Co. v. Adams*, 9 Pet. 573, 9 L. Ed. 234.

27. *On mandate*.—See post, "Proceedings on Mandate," VIII, K, 5, o, (1), (h).

28. *Signing judgment*.—*Life & Fire Ins. Co. v. Adams*, 9 Pet. 573, 593, 9 L. Ed. 234; *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 298, 303, 8 L. Ed. 949.

"So far as it regards the case under consideration, the signature of the judge was not a matter of discretion. It followed as a necessary consequence of the judgment, unless the judgment had been set aside by a new trial." *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 304, 8 L. Ed. 949.

*United States v. Daniel*, 6 Wheat. 542, 5 L. Ed. 326, asserts nothing in opposition to this principle. *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 303, 8 L. Ed. 949.

29. *Judgment rendered by predecessor*.—The district judge of Louisiana refused to sign the record of a judgment rendered in a case by his predecessor in office; by the law of Louisiana, and the rule adopted by the district court, the judgment, without the signature of the judge, cannot be enforced; it is not a final judgment, on which a writ of error may issue, for its reversal; without the action of the judge, the plaintiffs can take no step in the case; they can neither issue execution on the judgment, nor reverse the proceedings by writ of error. The court directed that a writ of mandamus be issued directing the district judge to sign the judgment. *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 8 L. Ed. 949.

30. *Erroneous judgment*.—*Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 296, 303, 8 L. Ed. 949.

that it does in entering the original judgment,<sup>31</sup> and the overruling of a motion by a court to amend its judgment cannot be reviewed by mandamus;<sup>32</sup> nor will mandamus lie to compel the court to extend a judgment to embrace debts becoming due after its entry.<sup>33</sup>

(4) *Opening*.—Where there was a blank in the record of the circuit court in the taxation of costs recovered by the plaintiff, judgment affirmed by the federal supreme court, a mandate with the same blank sent down to the circuit court; a motion was there made to open the original judgment for the purpose of taxing the costs, and refused by the court, such refusal cannot be reviewed by a writ of mandamus from the federal court.<sup>34</sup>

(5) *Vacating*.—(a) *In General*.—A lower court, acting within its jurisdiction, will not be compelled to vacate its judgments or decrees, although erroneous.<sup>35</sup> A writ of mandamus will not be granted requiring a circuit court to set aside an order vacating a judgment, when it appears that its action in vacating the same was correct,<sup>36</sup> or consented to.<sup>37</sup>

(b) *Judgment by Default*.—The application to set aside a judgment entered by default is made to the discretion of the court, which cannot be controlled by mandamus.<sup>38</sup>

(6) *Enforcing Judgment*.—(a) *In General*.—A court may be mandamus to carry its judgments into effect by issuing an attachment or other process.<sup>39</sup>

(b) *Execution*.—aa. *Compelling Issuance*.—(aa) *In General*.—The practice of the supreme court upon applications for a mandamus to compel the issuance of execution does not appear to be settled.<sup>40</sup> The writ has been granted to compel a lower court to issue a writ of execution to carry its judgment into effect,<sup>41</sup>

**31. Amendment.**—Ex parte Morgan, 114 U. S. 174, 195, 29 L. Ed. 135. See ante, "Rendition," VIII, K, 5, k, (1).

**32.** Where a motion was made to amend the judgment on the ground that the judgment recorded did not conform to the finding and a motion overruled on the ground that in the opinion of the court judgment had been correctly recorded, the action of the court cannot be reviewed by mandamus. Ex parte Morgan, 114 U. S. 174, 175, 29 L. Ed. 135. See the titles AMENDMENTS, vol. 1, p. 303; JUDGMENTS AND DECREES, vol. 7, p. 544.

**33.** Mandamus will not lie from the federal supreme court to the United States district court of Louisiana to compel it to extend a judgment previously entered so as to cover certain installments due the plaintiff which became due after the entry of the original judgment. Life & Fire Ins. Co. v. Adams, 9 Pet. 573, 9 L. Ed. 234.

**34. Opening.**—Ex parte Many, 14 How. 24, 14 L. Ed. 311. See post, "Costs," VIII, K, 5, p.

**35. Vacation of judgment.**—Ex parte Burtis, 103 U. S. 238, 26 L. Ed. 392.

Upon the rendition of a decree in admiralty, an appeal was taken by the claimant to the federal supreme court, the petitioners signing a supersedeas bond as sureties. The petitioners being seised of real estate in the district, applied to the circuit court to vacate the decree against them, on the ground that it was inadvertently entered and caused a cloud on the titles to their property. The court declined to make the order, and an application was presented for a mandamus requiring it to be done. Held, if the court

had jurisdiction, any error that may have been committed cannot be corrected by mandamus. The Belgenland, 108 U. S. 153, 154, 156, 27 L. Ed. 685.

**36. Setting aside order of vacation.**—Ransom v. New York City, 20 How. 581, 15 L. Ed. 1000.

**37.** Mandamus will not lie to compel an inferior court to set aside an order vacating a judgment when it appears that the order was made by the consent of both parties. Ransom v. New York City, 20 How. 581, 15 L. Ed. 1000.

**38. Judgment by default.**—This was a motion for a mandamus to the district judge of the United States for the southern district of New York, to set aside a judgment entered by default, on an inquest finding a forfeiture of goods to the United States, against which an information had been filed for a violation of the revenue laws. This is not a proper case for the interposition of the federal supreme court, by way of mandamus; the application to the district court to set aside the default and inquest was an application to the discretion of the court. Ex parte Roberts, 6 Pet. 216, 8 L. Ed. 375.

**39. Enforcing judgment.**—United States v. Peters, 5 Cranch 115, 141, 3 L. Ed. 53. See ante, "Appellate Jurisdiction," VII, F, 5, c.

**40. To compel issuance of execution.**—Postmaster-General v. Trigg, 11 Pet. 173, 174, 9 L. Ed. 676.

**41. When granted.**—Stafford v. Union Bank, 17 How. 275, 15 L. Ed. 101; Stafford v. New Orleans Canal, etc., Co., 17 How. 283, 15 L. Ed. 102; Life & Fire Ins. Co. v.



but refused in the case where the record does not show mistake, misconduct or omission of duty on the part of the court.<sup>42</sup> It will not be granted unless the court has refused to do so, as it is presumed that it will do its duty without any coercive process.<sup>43</sup>

(bb) *Pending Appeal*.—The issuance of an execution will not be compelled by mandamus while an appeal or writ of error is pending.<sup>44</sup>

bb. *Compelling Quashing*.—See elsewhere for treatment of this subject.<sup>45</sup>

cc. *Sales under Execution*.—A lower court will not be compelled by mandamus to oblige a marshal to execute a writ of execution, where the plaintiff refuses to indemnify the officer,<sup>46</sup> or where the property subject thereto has been transferred by law out of the defendant.<sup>47</sup>

(c) *After Reversal*.—The supreme court will not compel a circuit court by mandamus to take property out of the hands of a receiver and deliver it to the petitioners in pursuance to a decree entered in the circuit court, where the supreme court has decided, since the presentation of the petition, upon an appeal between the parties, that the possession of the property does not belong to the petitioners.<sup>48</sup>

Wilson, 8 Pet. 291, 305, 8 L. Ed. 949; Life & Fire Ins. Co. v. Adams, 8 Pet. 306, 8 L. Ed. 954; United States v. Peters, 5 Cranch 115, 141, 3 L. Ed. 53; Life & Fire Ins. Co. v. Adams, 9 Pet. 573, 595, 9 L. Ed. 234.

42. *When refused*.—A prima facie case of such mistake must be made out, supported by affidavit, before the writ will be granted. Postmaster-General v. Trigg, 11 Pet. 173, 174, 9 L. Ed. 676.

Motion was made for a rule on the district judge of the district court of the United States for the Missouri district, to show cause why a mandamus should not issue from the federal supreme court, commanding him to order an execution to issue on a judgment entered in that court in the case of the postmaster-general of the United States v. Rector's administrator; the motion was founded on an attested copy of the record of the proceedings in the district court, by which it appeared, that the district judge, on a motion of the district attorney of the United States for an order for an execution on this judgment, "after mature deliberation thereon," overruled the motion. The rule to show cause was refused. Postmaster-General v. Trigg, 11 Pet. 173, 9 L. Ed. 676.

43. *Saltmarsh v. Tuthill*, 12 How. 387, 13 L. Ed. 1034.

44. *Pending appeal*.—Mandamus was refused to compel the court to execute a judgment of ouster, where the defendant had sued out a writ of error. United States v. Addison, 22 How. 174, 16 L. Ed. 304.

A writ of error was sued out by all the defendants. A. and B., to render it a supersedeas of the judgment against them, severally gave a bond, which was duly approved and accepted. The court below thereupon ordered that the proceedings on the judgment as to A. and B. be stayed, and that a writ of restitution and execution be issued against the remaining defendants. Held, that a mandamus directing that the judgment be carried into ex-

ecution against all the defendants would not lie. Ex parte French, 100 U. S. 1, 25 L. Ed. 529.

45. *Compelling quashing*.—See the title EXECUTIONS, vol. 6, p. 108.

46. *Execution sales—Indemnity*.—A district judge will not be compelled by mandamus to oblige a marshal to execute an execution on the property of a defendant and his syndics under the insolvency laws of Louisiana, where the plaintiff refuses to indemnify such execution. Life & Fire Ins. Co. v. Adams, 9 Pet. 573, 9 L. Ed. 234.

47. *Property transferred from defendant*.—The creditor asks for a mandamus to the district judge, to compel the officer to seize and sell the property mentioned in the writ; that property is no longer in possession of the debtor against whom the process is directed; but has been transferred, by law, to other persons, who are directed, by the same law, in what manner they are to dispose of it. The federal supreme court cannot, in the present condition of the case, construe judicially the laws which govern it, nor decide in whom the property is vested. In so doing, it would intrude itself into the management of a case requiring all the discretion of the district judge, and usurp his powers. The mandamus cannot be granted as prayed. Life & Fire Ins. Co. v. Adams, 9 Pet. 573, 603, 9 L. Ed. 234.

The prayer asks a mandamus requiring the judge to compel the marshal to execute the writ of execution heretofore issued, on the 30th of April, 1834, on the said judgment, for the amount of the notes of the said Adams, due on the 16th of May, 1826, notwithstanding the cession and other matters mentioned by the marshal in the return thereof not granted. Life & Fire Ins. Co. v. Adams, 9 Pet. 573, 604, 9 L. Ed. 234.

48. *After reversal*.—Ex parte Milwaukee, etc., R. Co., 154 U. S., appx., 554, 18 L. Ed. 887.



1. *New Trial*—(1) *In General*.—A motion for a new trial is always addressed to the sound discretion of the court, and the exercise of that discretion cannot be controlled by the writ of mandamus;<sup>49</sup> but the writ lies to compel a hearing on the motion.<sup>50</sup> If the court erroneously decides against its own jurisdiction to grant a new trial, it may be compelled to take jurisdiction and proceed with the case.<sup>51</sup> The lower court may be mandamusd to vacate an order granting a new trial and to render judgment in accordance with a mandate of a supreme court.<sup>52</sup>

(2) *In Court of Claims*—(a) *In General*.—Where a motion for a new trial is argued before and submitted to four of the five judges of the court, the finding by two of the judges that the motion be denied does not decide the question involved nor take away the jurisdiction of the court to hear and decide the motion on reargument, and a peremptory mandamus may issue to compel the court to proceed to hear and decide the motion.<sup>53</sup>

(b) *Pending Appeal*.—The allowance of an appeal to the supreme court by the court of claims, does not absolutely and of itself remove the cause from the jurisdiction of the latter court. A mandamus may be awarded requiring the court of claims to hear, entertain, and decide a motion for a new trial.<sup>54</sup>

(c) *After Affirmance*.—The court of claims has power to grant a new trial within two years after the final disposition of the suit and this power is not taken away by the affirmance of the judgment on appeal to the supreme court and the filing in the lower court of the mandate of affirmance.<sup>55</sup>

49. *New trial—Granting*.—Life & Fire Ins. Co. v. Wilson, 8 Pet. 291, 303, 8 L. Ed. 949.

"This court has always considered such applications as resting in the sound discretion of the court where the cause is depending, and not a matter for a mandamus or writ of error." Ex parte Roberts, 6 Pet. 216, 217, 8 L. Ed. 375. See ante, "After Exhaustion of Discretion," VIII, E, 8, d. And see the titles APPEAL AND ERROR, vol. 1, p. 997; NEW TRIAL.

50. *Hearing on motion*.—Ex parte United States, 16 Wall. 699, 21 L. Ed. 507.

51. *Where court decides against jurisdiction*.—"The court of claims did not reach the consideration of the motion for a new trial on its merits; but stopped short of that point by reaching the conclusion that, under the circumstances, they had no jurisdiction to entertain the motion, and therefore they dismissed it. The only proper remedy, therefore, which was left to the United States was to move for a mandamus to direct the court to proceed with the motion." Ex parte Russell, 13 Wall. 664, 669, 20 L. Ed. 632.

When the court of claims on a motion for a new trial under the 2d section of the act of June 25th, 1868, has not reached the consideration of the motion on its merits, but has dismissed it under an assumption that they had no jurisdiction to grant it, mandamus directing the court to proceed with the motion is the proper remedy. Appeal is not a proper one. Ex parte Russell, 13 Wall. 664, 20 L. Ed. 632.

52. *To vacate order granting new trial*.—Litchfield v. Railroad Co., 7 Wall. 270, 19 L. Ed. 150. See post, "Granting New Trial," VIII, K, 5, o, (1), (h), kk, (bb).

53. *In court of claims*.—Where a court

is, like the court of claims, composed of five judges, and a motion for a new trial of a case is argued before, and submitted to, four of them, who, in conference, are equally divided in opinion; but the majority do not order any judgment to be announced in open court based upon such equal division, and none is so announced; and afterwards a majority of the whole court remand the motion to the law docket for reargument; the fact that two of the judges, at the time of such remanding, file their decision that the motion be denied upon the merits, does not decide the question involved in the motion, nor take away the jurisdiction of the court to hear and decide the motion upon reargument. In such a case a peremptory mandamus issues, commanding the court to proceed to hear and decide the motion. Ex parte United States, 16 Wall. 699, 21 L. Ed. 507.

54. *Pending appeal*.—Ex parte Roberts, 15 Wall. 384, 387, 21 L. Ed. 131.

The proper course in a case where the court of claims, improperly, from supposed want of jurisdiction refused to grant to the United States a motion for a new trial, made under the second section of the act of June 25th, 1868, and the United States appealed, stated to be, for one or the other party to move to dismiss the appeal, and then for the United States to ask for a distinct mandamus on the court of claims to proceed. Ex parte Russell, 13 Wall. 664, 20 L. Ed. 632. See the titles APPEAL AND ERROR, vol. 1, p. 936; MANDATE AND PROCEEDINGS THEREON.

55. *After affirmance*.—The power of the court of claims, under the second section of the act of June 25th, 1868, to grant a new trial in favor of the United States, if moved for within two years next after the

m. *Correction of Record*.—Where the correction of a record requires the exercise of no discretion, it may be compelled by mandamus.<sup>56</sup>

n. *Stay of Proceedings*.—A writ of error does not lie to an order of the court below granting an indefinite stay of proceedings, upon suggestion of the attorney for the United States, in a case to which the United States are not parties; but the court will award a mandamus nisi, in the nature of a *procedendo*.<sup>57</sup>

o. *Review*—(1) *Proceedings in Lower Court*—(a) *Allowance of Appeal*.—For treatment of this subject, see elsewhere.<sup>58</sup>

(b) *Service and Return of Appeal*.—See elsewhere.<sup>59</sup>

(c) *Signing Citation*.—See elsewhere.<sup>60</sup>

(d) *Approval of Appeal Bond*.—See elsewhere.<sup>61</sup>

(e) *Filing Transcript of Record*.—See elsewhere.<sup>62</sup>

(f) *Certification of Transcript of Record*.—See elsewhere.<sup>63</sup>

(g) *Settlement of Bill of Exceptions*.—See elsewhere.<sup>64</sup>

(h) *Proceedings on Mandate*—aa. *In General*.—Mandamus lies from an appellate court to a lower court to compel compliance with its mandate, where nothing is left to the judgment or discretion of the lower court.<sup>65</sup>

final disposition of the suit, is not taken away by the affirmance of the judgment on appeal, and the filing in that court of the mandate of affirmance. In such a case a peremptory mandamus issues, commanding the court to proceed to hear and decide the motion. *Ex parte United States*, 16 Wall. 699, 21 L. Ed. 507.

56. *Correction of record*.—*Ex parte Morgan*, 114 U. S. 174, 29 L. Ed. 135.

In *Ex parte Roberts*, 15 Wall. 384, 387, 21 L. Ed. 131, it is stated that such correction could be compelled during the pendency of an appeal.

57. *Stay of proceedings*.—*Livingston v. Dorgenois*, 7 Cranch 577, 3 L. Ed. 444.

58. *Allowance of appeal*.—See the title APPEAL AND ERROR, vol. 2, p. 129.

59. *Service and return of appeal*.—See the title APPEAL AND ERROR, vol. 2, p. 147.

60. *Signing citation*.—See the title APPEAL AND ERROR, vol. 2, p. 163.

61. *Approval of appeal bond*.—See the title APPEAL AND ERROR, vol. 2, p. 181.

62. *Filing transcript of record*.—See the title APPEAL AND ERROR, vol. 2, p. 242.

63. *Certification of transcript*.—See the title APPEAL AND ERROR, vol. 2, p. 244.

64. *Settlement of bill of exceptions*.—See the title EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL, vol. 6, p. 70.

65. *Proceedings on mandate*.—*Gaines v. Rugg*, 148 U. S. 228, 37 L. Ed. 432; *Ex parte Dubuque & Pac. Railroad*, 1 Wall. 69, 73, 17 L. Ed. 514; *In re Washington, etc., R. Co.*, 140 U. S. 91, 92, 95, 35 L. Ed. 339; *Durant v. Essex Company*, 101 U. S. 555, 556, 25 L. Ed. 961; *In re Sandford Fork, etc., Co.*, 160 U. S. 247, 255, 40 L. Ed. 414; *Perkins v. Fourniquet*, 14 How. 313, 328, 330, 14 L. Ed. 435; *City Bank v. Hunter*, 152 U. S. 512, 515, 38 L. Ed. 534; *In re City Nat. Bank*, 153 U. S. 246, 251,

38 L. Ed. 705; *In re Blake*, 175 U. S. 114, 117, 44 L. Ed. 94; *Ex parte The Union Steamboat Co.*, 178 U. S. 317, 319, 44 L. Ed. 1084; *Ex parte Story*, 12 Pet. 339, 9 L. Ed. 1108; *Sibbald v. United States*, 12 Pet. 488, 492, 9 L. Ed. 1167; *West v. Bra-shear*, 14 Pet. 51, 10 L. Ed. 350; *United States Bank v. Moss*, 6 How. 31, 40, 12 L. Ed. 331; *Corning v. Troy Iron Nail Factory*, 15 How. 451, 14 L. Ed. 768; *Noonan v. Bradley*, 12 Wall. 121, 129, 20 L. Ed. 279; *Tyler v. Magwire*, 17 Wall. 253, 283, 21 L. Ed. 576; *Stewart v. Salamon*, 97 U. S. 361, 24 L. Ed. 1044; *Mackall v. Richards*, 112 U. S. 369, 28 L. Ed. 737; *Mackall v. Richards*, 116 U. S. 45, 29 L. Ed. 558; *Hickman v. Fort Scott*, 141 U. S. 415, 35 L. Ed. 775; *United States v. Fossatt*, 21 How. 445, 450, 16 L. Ed. 186; *Ex parte Sawyer*, 21 Wall. 235, 22 L. Ed. 617; *In re Potts*, 166 U. S. 263, 41 L. Ed. 994; *Martin v. Hunter*, 1 Wheat. 304, 361, 4 L. Ed. 97; *In re Humes*, 149 U. S. 192, 194, 37 L. Ed. 698; *Stafford v. Union Bank*, 17 How. 275, 15 L. Ed. 101; *Stafford v. New Orleans Canal, etc., Co.*, 17 How. 283, 15 L. Ed. 102; *Supervisors v. Kennicott*, 94 U. S. 498, 24 L. Ed. 260; *Litchfield v. Railroad Co.*, 7 Wall. 270, 19 L. Ed. 150; *Milwaukie, etc., R. Co. v. Soutter*, 2 Wall. 440, 443, 17 L. Ed. 860. See, also, *Boyce v. Grundy*, 9 Pet. 275, 9 L. Ed. 127.

The lower court may be compelled by mandamus to give full effect to the mandate of the superior court. *In re Sandford Fork, etc., Co.*, 160 U. S. 247, 40 L. Ed. 414.

A mandamus was awarded in a branch of the railroad controversies between the Milwaukee and Minnesota Railroad Company and the Milwaukee and St. Paul Railway Company, compelling the latter, and its receivers, to deliver to the former certain rolling stock in compliance with a mandate of the court made July 18, 1865. *Ex parte The Milwaukee R. Co.*, 5 Wall. 188, 18 L. Ed. 676.

Mandamus will lie to enforce prompt

bb. *Necessity for Final Decision.*—While a new appeal can only be granted to the lower court after it has made a final decision,<sup>66</sup> a writ of mandamus may be issued at any time.<sup>67</sup>

cc. *Necessity for Jurisdictional Amount in Controversy.*—The writ of mandamus may issue regardless of the amount in controversy.<sup>68</sup>

dd. *Where Adequate Remedy by Appeal Exists.*—Mandamus cannot be resorted to where there is an adequate remedy by appeal or writ of error.<sup>69</sup>

ee. *Where Court Has Already Acted.*—Where a lower court has already decided a case in opposition to a mandate of the higher court, the proper remedy is by appeal and not by mandamus.<sup>70</sup>

ff. *Where Cause Has Been Remanded before.*—If a cause has been remanded before, and the lower court decline or refuse to carry into effect the mandate, the supreme court thereon will proceed to a final decision and award execution thereon.<sup>71</sup>

gg. *Where Court Misconstrues Mandate.*—Although an appeal or writ of error will lie, that fact does not prevent the issuance of a writ of mandamus<sup>72</sup> to compel a lower court to comply with the mandate sent to it from a superior court, where the lower court has failed to comply therewith because of a misconstruction of the meaning of the mandate.<sup>73</sup>

compliance with a mandate of the federal supreme court in so far as it does not control the discretion and judgment of the lower court. *Ex parte Railway Co.*, 101 U. S. 711, 720, 25 L. Ed. 872.

**Duty of lower court generally ministerial.**—"As a general rule, when a superior tribunal has rendered a decision binding on an inferior, it becomes the ministerial duty of the latter to obey it and carry it out. So far as respects the matter decided, there is no discretion or exercise of judgment left. This is the constant course in courts of justice. The appellate court will not hesitate to issue a mandamus to compel obedience to its decisions." *United States v. Black*, 128 U. S. 40, 52, 32 L. Ed. 354.

**Where court mistakes its jurisdiction.**—The writ was issued in a case where a district court had refused to comply with the mandate because it wrongfully considered it had no jurisdiction. *United States v. Fossatt*, 21 How. 445, 16 L. Ed. 186.

**Under judiciary act.**—"If the special mandate, directed by the twenty-fourth section (of the judiciary act) is not obeyed or executed, then the general power given to all courts of the United States to issue any writs which are necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law, by the fourteenth section of the judiciary act, fairly arises, and a mandamus or other appropriate writs will go, although an appeal will also sometimes lie." *Ex parte The Union Steamboat Co.*, 178 U. S. 317, 318, 319, 44 L. Ed. 1084.

**66. Necessity for final decision.**—See the titles APPEAL AND ERROR, vol. 2, p. 412; MANDATE AND PROCEEDINGS THEREON.

**67.** If the court does not proceed to execute the mandate, or disobeys and mistakes its meaning, the party aggrieved may, by motion for a mandamus, at any

time, bring the errors or omissions of the inferior court before the federal supreme court for correction. *United States v. Fossatt*, 21 How. 445, 16 L. Ed. 186.

**68. Necessity for jurisdictional amount in controversy.**—*City Bank v. Hunter*, 152 U. S. 512, 515, 38 L. Ed. 534.

**69. Where adequate remedy by appeal.**—*In re Blake*, 175 U. S. 114, 44 L. Ed. 94. Compare *Ex parte The Union Steamboat Co.*, 178 U. S. 317, 318, 319, 44 L. Ed. 1084. See ante, "Appeal or Error," VIII, G, 3, d; post, "Where Court Misconstrues Mandate," VIII, M, 5, o, (1), (h), gg.

**70. Where court has already acted.**—*Ex parte Railway Co.*, 101 U. S. 711, 720, 25 L. Ed. 872.

**71. Where cause has been remanded before.**—See the title APPEAL AND ERROR, vol. 1, p. 795.

**72. Where court misconstrues mandate.**—"Although it might have been admissible to raise the question by a new appeal to the proper court, yet in view of the delay to be caused thereby, we do not consider that such remedy would have been, or would be, fully adequate, or that a writ of mandamus is now improper." *Gaines v. Rugg*, 148 U. S. 228, 243, 37 L. Ed. 432.

**73.** *In re Potts*, 166 U. S. 263, 267, 41 L. Ed. 994; *Fuller v. United States*, 182 U. S. 562, 568, 45 L. Ed. 1230; *In re Blake*, 175 U. S. 114, 117, 118, 44 L. Ed. 94; *Milwaukie, etc., R. Co. v. Soutter*, 2 Wall. 440, 443, 17 L. Ed. 860; *Boffinger v. Tuyes*, 120 U. S. 198, 204, 30 L. Ed. 649; *In re Washington, etc., R. Co.*, 140 U. S. 91, 95, 35 L. Ed. 339; *Gaines v. Rugg*, 148 U. S. 228, 243, 37 L. Ed. 432; *City Bank v. Hunter*, 152 U. S. 512, 514, 38 L. Ed. 543; *In re Sandford Fork, etc., Co.*, 160 U. S. 247, 255, 40 L. Ed. 414; *Ex parte The Union Steamboat Co.*, 178 U. S. 317, 319, 44 L. Ed. 1084; *Mason v. Pewabic Min. Co.*, 153 U. S. 361, 38 L. Ed. 746; *Perkins v. Fourniquet*, 14 How. 328, 14 L. Ed. 441; *United*



hh. *Where Mandate Contains Specific Directions.*—Where the directions contained in the mandate are precise and unambiguous, it is the duty of the subordinate court to carry it into execution, and not to look elsewhere to change its meaning.<sup>74</sup> The principle has been well established, in numerous cases, that, on a mandate from the federal supreme court, containing a specific direction to the inferior court to enter a specific judgment, the latter court has no authority to do anything but to execute the mandate.<sup>75</sup>

ii. *Where Mandate Directs Proceedings According to Justice.*—Where the mandate directs proceedings according to right and justice, the discretion of the lower court in proceeding thereon cannot be controlled by mandamus;<sup>76</sup>

*States v. Fossatt*, 21 How. 445, 16 L. Ed. 186, which is a continuation of *United States v. Fossat*, 20 How. 413, 15 L. Ed. 944.

The party injured by the misconstruction may apply for a mandamus. *Perkins v. Fourniquet*, 14 How. 328, 14 L. Ed. 441; *Cook v. Burnley*, 11 Wall. 672, 20 L. Ed. 84.

"If the circuit court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount) or by a writ of mandamus to execute the mandate of this court." In *re Potts*, 166 U. S. 263, 265, 41 L. Ed. 994.

**Matter of discretion of appellate court.**—The construction of the meaning and intent of the mandate is matter for the judicial discretion of the appellate court, and not for the lower. The lower court possesses no discretion in such case which cannot be reviewed by mandamus. *Gaines v. Rugg*, 148 U. S. 228, 243, 37 L. Ed. 432.

**Under direction for modification of decree.**—Where a federal court, acting under a mandate from the federal supreme court on the modification of its decree in respect to taking accounts, directed further proceedings in conformity with the supreme court's decree in regard to the passing of title from the defendants to the plaintiffs, which mandate also contained a proposed decree, mandamus will lie to compel the entry of the proposed decree, where the circuit court, under a misconstruction of the mandates, permitted the defendant to introduce evidence in his defense in regard to the title to the land. *Gaines v. Rugg*, 148 U. S. 228, 37 L. Ed. 432. See, also, *Latta v. Granger*, 167 U. S. 81, 84, 42 L. Ed. 85.

**Since act of July 1, 1891.**—"If it could be contended that our mandate had been misconstrued or disregarded, this would not give complainants the right of appeal after July 1, 1891, but the remedy would be by mandamus." *Mason v. Pewabic Min. Co.*, 153 U. S. 361, 366, 38 L. Ed. 746; *City Bank v. Hunter*, 152 U. S. 512, 38 L. Ed. 534.

**74. Where mandate contains specific directions.**—*Skilern v. May*, 6 Cranch 267, 3 L. Ed. 220; *Ex parte Story*, 12 Pet. 339, 9 L. Ed. 1108; *West v. Brashear*, 14 Pet. 51, 10 L. Ed. 350; *Cook v. Burnley*, 11

Wall. 672, 674, 20 L. Ed. 84; *Curtis's Commentaries*, § 405.

**75.** A writ of mandamus was granted, commanding the general term of the supreme court of the District of Columbia to vacate its judgment of June 9, 1890, in favor of McDade against the railroad company, so far as the same relates to interest upon the judgment of the special term of December 18, 1885, and to enter a judgment on the mandate of the federal supreme court of May 27, 1890, in accordance with its terms, that is to say, a judgment affirming the judgment of the general term of June 28, 1886, with costs, without more. In *re Washington, etc., R. Co.*, 140 U. S. 91, 97, 35 L. Ed. 339.

"In *re Washington, etc., R. Co.*, 140 U. S. 91, 35 L. Ed. 339, this court held that it was the duty of the court below to have entered a judgment strictly in accordance with the judgment of this court, and not to add to it the allowance of interest; and that the language of the mandate of this court, 'that such execution and proceedings be had in said cause as, according to right and justice and the laws of the United States, ought to be had, the said writ of error notwithstanding,' did not authorize the court below to depart in any respect from the judgment of this court. It further held that a mandamus would lie to correct the error, where there was no other adequate remedy, and where there was no discretion to be exercised by the inferior court." *Gaines v. Rugg*, 148 U. S. 328, 343, 37 L. Ed. 432.

**76. Where mandate directs proceedings according to justice.**—"The decree of this court simply affirmed what had been done by the circuit court; it gave no instructions as to what remained to be done, except that it should be as right and justice and the laws of the United States should require. The circuit court was left free to determine for itself what was thus required. If, in its opinion, the order in respect to the judgment and execution against the sureties on an appeal bond should be carried into effect, it might so adjudge, but if, upon further consideration, right and justice should seem to require a revocation of that order, there was nothing in the mandate to prevent it from so deciding. The circuit court, under this power, has acted and has decided that execution ought not to issue against these

but the lower court may be compelled to act.<sup>77</sup>

jj. *Where Mandate Leaves Matters Open to Discretion.*—Matters left by the mandate to the discretion of the lower court cannot be controlled or reviewed by mandamus.<sup>78</sup>

kk. *Particular Acts of Lower Court*—(aa) *Entering Judgment.*—The lower court may be mandamusd to enter judgment in conformity to the mandate of a supreme court.<sup>79</sup>

(bb) *Granting New Trial.*—If the lower court grants a new trial in defiance of the mandate of the appellate court, mandamus will lie to compel it to vacate such order.<sup>80</sup> Mandamus lies to set aside an order granting a rehearing on the

parties. This decision cannot be reviewed by us upon an application for mandamus." Ex parte Sawyer, 21 Wall. 235, 239, 240, 22 L. Ed. 617.

77. Where the federal supreme court by its mandate requires the circuit court to proceed with the execution of its decree in such manner as right and justice shall require, if that court refuses to proceed under that order the supreme court may, by mandamus, compel it to do so. Ex parte Sawyer, 21 Wall. 235, 22 L. Ed. 617.

78. *Where mandate leaves matters open to discretion.*—In re Blake, 175 U. S. 114, 117, 44 L. Ed. 94.

"The inferior court is justified in considering and deciding any question left open by the mandate and opinion of this court, and its decision upon such matter can only be reviewed upon a new appeal to the proper court." It was so held where in a collision case the lower court refused to allow one of the vessels to recoup. Ex parte The Union Steamboat Co., 178 U. S. 317, 319, 44 L. Ed. 1084. See the titles COLLISION, vol. 3, p. 937; MANDATE AND PROCEEDINGS THEREON.

This is an entirely new question, quite unaffected by the case of The New York, 175 U. S. 187, 44 L. Ed. 126, and if the court erred in refusing to allow such recoupment, the remedy is by appeal and not by mandamus. Ex parte The Union Steamboat Co., 178 U. S. 317, 320, 44 L. Ed. 1084.

"We recognize, in its fullest extent, the power of this court, by mandamus, to enforce prompt compliance with its mandates; but it is not consistent with the principles and usages of law that we should, in that summary mode, revise the action of inferior courts, as to any matters about which they must or may exercise judicial discretion." Ex parte Railway Co., 101 U. S. 711, 720, 25 L. Ed. 872.

This is an application, by petition, for a writ of mandamus to the judges of the circuit court of the United States for the district of Colorado, commanding them to proceed and give final decree, in accordance with the opinion and mandate of the federal supreme court, in the suit of the Canon City and San Juan Railroad Company against the Denver and Rio Grande Railway Company. The main contention

of the relator was that the court below had failed and refused to comply with the mandate of the supreme court; that, upon filing the mandate, the relator became entitled absolutely, and beyond the discretion of the circuit court, to a decree restoring it, at once and unconditionally, to the possession of the Grand Canon of the Arkansas River. Many matters growing out of this litigation were left undisposed of, and were remitted to the circuit court for such determination as the rights and equities of the parties required under the circumstances existing at the time its action was invoked. Held, mandamus denied. The supreme court will not by mandamus revise the action of inferior courts acting within the scope of their authority touching any matter about which they must exercise their judicial discretion. Ex parte Railway Co., 101 U. S. 711, 25 L. Ed. 872.

79. *Particular acts—Entry of judgment.*—Litchfield v. Railroad Co., 7 Wall. 270, 19 L. Ed. 150. See ante, "Rendition," VIII, K, 5, k, (1). And see the title MANDATE AND PROCEEDINGS THEREON.

The supreme court refused to award a mandamus to the district judge of the district of Louisiana, commanding him to have inscribed by the clerk, on the order book of the court, an order passed by him, in a case which was before him under a mandate from the supreme court of the United States, requiring him to do and to have done certain matters to carry into effect the decree of the supreme court, in a case which had been brought before the court by appeal from the district of Louisiana. Ex parte Story, 12 Pet. 339, 9 L. Ed. 1108.

80. *Granting new trial.*—Ex parte Du-buque & Pac. Railroad, 1 Wall. 69, 73, 17 L. Ed. 514, "a case where this court had reversed a judgment of a circuit court and remanded the cause with a mandate to that court to enter judgment for the other party, and the court below had thereafter received affidavits showing new facts and granted a new trial, this court, by mandamus, ordered it to vacate the rule for a new trial, saying that the court below had no power to set aside the judgment of this court, 'its authority extending only to executing the mandate.'"



ground of newly discovered evidence in the lower court, when the appellate court has decided the case upon its merits.<sup>81</sup>

(cc) *Issuing Execution*.—Where the case is remanded to the lower court to proceed as right and justice require, the court cannot be mandamusd to issue execution.<sup>82</sup>

(dd) *Admitting to Bail*.—The lower court may be mandamusd to admit a defendant in a criminal case to bail in accordance with the mandate.<sup>83</sup>

(2) *Proceedings in Appellate Court*—(a) *Entertainment of Appeal*.—An appellate court may be mandamusd to entertain an appeal.<sup>84</sup>

(b) *Dismissal of Appeal*.—See elsewhere.<sup>85</sup>

(c) *Reinstatement of Appeal*.—See elsewhere.<sup>86</sup>

p. *Costs*.—Where there was a blank in the record of the circuit court in the taxation of the costs recovered by the plaintiff, and the judgment being affirmed by the federal supreme court, a mandate with the same blank went down to the circuit court; and a motion was there made to open the original judgment for the purpose of taxing the costs, which motion was refused by the court, such refusal cannot be reached by a mandamus from the federal court.<sup>87</sup> Mandamus was properly refused where sought to compel the taxation of costs when the demand therefor upon the court was made in a manner not authorized by law.<sup>88</sup>

6. IN PARTICULAR PROCEEDINGS—a. *Admiralty*.—A court of admiralty will not be compelled to reinstate a cause on a libel which it had dismissed because not properly filed.<sup>89</sup> A circuit court of appeals will not be mandamusd to receive further proofs in an admiralty cause pending before it on appeal.<sup>90</sup>

b. *Bankruptcy*.—A bankruptcy court may be compelled to hear a petition in bankruptcy.<sup>91</sup>

Gaines v. Rugg, 148 U. S. 228, 242, 37 L. Ed. 432.

81. Before such rehearing can be granted leave of the appellate court must be obtained. In re Potts, 166 U. S. 263, 41 L. Ed. 994.

82. *Issuing execution*.—Ex parte Sawyer, 21 Wall. 235, 22 L. Ed. 617.

83. *Admitting to bail*.—In this case a justice of the supreme court granted a writ of error and directed that the defendant be admitted to bail. It was held that such direction amounted to a command and could be enforced by mandamus. Hudson v. Parker, 156 U. S. 277, 39 L. Ed. 424.

84. *Proceedings in appellate court*.—Craig v. Leitensdorfer, 123 U. S. 189, 208, 31 L. Ed. 114; Harrington v. Holler, 111 U. S. 796, 797, 28 L. Ed. 602. See ante, "To Exercise Jurisdiction," VIII, K, 1, b.

85. *Dismissal of appeal*.—See the title APPEAL AND ERROR, vol. 2, p. 289.

86. *Reinstatement of appeal*.—See the title APPEAL AND ERROR, vol. 2, p. 320.

87. *Costs*.—Ex parte Many, 14 How. 24, 14 L. Ed. 311.

88. "The bill of costs had not been taxed, nor had it been examined and certified by the circuit court, nor by the attorney general or district attorney, and it contained the costs of the defendant, for which the state is not liable. Though, therefore, the costs of the prosecution are undoubtedly a debt of the state, for which the comptroller may be compelled to draw a warrant upon the state treasurer, the demand made upon him by the relators

was unauthorized by law; and, consequently, the mandamus was properly refused." Phillips v. Gaines, 131 U. S., appx. clxix, clxxii, 25 L. Ed. 733.

89. *Admiralty—Dismissal of libel*.—The owners of a vessel which had collided with and sunk another vessel instituted proceedings for limitation of liability by libel in admiralty in the district court and an order issued from that court restrained the defendant from suing for damages "except in these proceedings." The owners of the sunken vessel libelled the owners of the other vessel and the court dismissed the libel. Held, mandamus will not issue to compel the lower court to vacate the order of dismissal and reinstate the cause on the ground that it was improperly filed. In re Morrison, 147 U. S. 14, 26, 37 L. Ed. 60.

90. *Hearing further proofs*.—See the title ADMIRALTY, vol. 1, p. 194.

91. *Bankruptcy—Voluntary petition*.—See ante, "Of District Court," VII, F, 8. And see the title BANKRUPTCY, vol. 2, p. 841.

*Involuntary petition*.—Where, under the 41st section of the bankrupt act of 1867, a trial by jury is had in the district court in a case of application for involuntary bankruptcy, and exceptions are taken in the ordinary and proper way, to the rulings of the court on the subject of evidence and to its charge to the jury, a writ of error lies from the circuit court when the debt or damages claimed amount to more than \$500; and if that court dismiss or decline to hear the matter, a mandamus will lie to compel it to proceed to final



c. *Habeas Corpus*.—For treatment of this subject, see elsewhere.<sup>92</sup>

d. *Injunction*—(1) *Granting*.—See elsewhere.<sup>93</sup>

(2) *Dissolution*.—See elsewhere.<sup>94</sup>

(3) *Stay*.—Under the act of March 3, 1891, ch. 517, § 7, providing for an appeal from an injunction in a district or circuit court to a circuit court of appeals, pending such appeal the circuit court has a discretion to grant or refuse a supersedeas of the injunction, which discretion cannot be controlled by mandamus.<sup>95</sup>

e. *Mandamus*.—Mandamus will not lie from a superior court to compel a lower court to issue a mandamus.<sup>96</sup>

f. *Foreclosure*.—Where money has been deposited in the registry of a court by the purchaser at a foreclosure sale, mandamus will not lie to compel the court to order it paid to the plaintiff under the decree, where the court has decided that the litigation is not ended and ordered the money to remain in the court until the final determination of the cause.<sup>97</sup>

g. *Disbarment of Attorneys*.—A mandamus will lie to restore an attorney who has been disbarred, where the court below has exceeded its jurisdiction in removing him.<sup>98</sup> The court exceeds its jurisdiction in disbaring an attorney, for a contempt of another distinct court, though held by the same judges.<sup>99</sup> The writ will not lie where the order of disbarment was made for a cause within the acknowledged judicial discretion of the court,<sup>1</sup> unless that discretion has been abused.<sup>2</sup> If the proceeding is not void, no question arising as to its form will

judgment. *Insurance Co. v. Comstock*, 16 Wall. 258, 21 L. Ed. 493. See the title *BANKRUPTCY*, vol. 2, p. 845.

92. *Habeas corpus*.—See the title *HABEAS CORPUS*, vol. 6, pp. 632, 662.

93. *Injunction—Granting*.—See the title *INJUNCTIONS*, vol. 6, p. 1031.

94. *Dissolution*.—See the title *INJUNCTIONS*, vol. 6, p. 1062.

95. *Stay*.—In this case there was a perpetual injunction granted against the defendant in a circuit court in the United States. The defendant perfected an appeal to the circuit court of appeals, and applied to the circuit court for a stay of proceedings pending the appeal, including a stay of injunction. The court denied the application. The defendant then applied to the federal supreme court for a writ of mandamus to issue to the judges of the circuit court to compel them to supersede the injunction, on the ground that under § 7 of the act of March 3, 1891, ch. 517, the defendant has an absolute right to a supersedeas of the injunction pending the appeal. Held, the statute contains no express provision that the operation of the injunction must be stayed, and the circuit court has a discretion to grant or refuse the supersedeas, which discretion cannot be controlled by mandamus. In re *Haberman Mfg. Co.*, 147 U. S. 525, 530, 37 L. Ed. 266. See the titles *APPEAL AND ERROR*, vol. 2, p. 277; *INJUNCTIONS*, vol. 6, p. 1062.

96. *Mandamus*.—Mandamus from the federal supreme court will not lie to reverse a judgment of a court below, refusing a mandamus against the secretary of the treasury, commanding him to pay a sum of money awarded to the relator by the secretary of war, in pursuance of a joint resolution of congress, and to compel such court below to issue one. "The

party has mistaken his remedy, if he has any, which is by writ of error to the court below to reverse the judgment there rendered in the case. The authorities are uniform on the question." Ex parte *DeGroot*, 6 Wall. 497, 18 L. Ed. 887. Mr. Justice Nelson delivered the opinion of the court.

97. *Foreclosure*.—Ex parte *Hughes*, 114 U. S. 147, 29 L. Ed. 134. See the title *MORTGAGES AND DEEDS OF TRUST*.

98. *Disbarment of attorneys*.—See the title *ATTORNEY AND CLIENT*, vol. 2, p. 737. And see ante, "In General," VII, F, 5, a; "Motions and Summary Proceedings," VIII, K, 5, g; "Summons and Process," VIII, M, 5, b, (2).

99. *Where court exceeds jurisdiction*.—Ex parte *Burr*, 9 Wheat. 529, 6 L. Ed. 152; Ex parte *Robinson*, 19 Wall. 505, 513, 514, 22 L. Ed. 205; Ex parte *Bradley*, 7 Wall. 364, 19 L. Ed. 214. See the title *ATTORNEY AND CLIENT*, vol. 2, p. 732.

1. Ex parte *Secombe*, 19 How. 9, 15 L. Ed. 565; Ex parte *Garland*, 4 Wall. 333, 379, 18 L. Ed. 366; Ex parte *Wall*, 107 U. S. 265, 27 L. Ed. 552. See the title *ATTORNEY AND CLIENT*, vol. 2, p. 737.

It seems the *Bradley* and *Secombe* cases are distinguishable on the ground of jurisdiction, but see the dissenting opinion of Miller, J., in the former case, Ex parte *Bradley*, 7 Wall. 364, 380, 19 L. Ed. 214, where it is said the court had jurisdiction of the offense, person and of the particular punishment.

2. *Where court abuses discretion*.—This discretion is not unlimited and cannot be exercised with manifest injustice. It must be a sound discretion, and according to law. Ex parte *Bradley*, 7 Wall. 364, 376, 19 L. Ed. 214.

furnish ground for mandamus.<sup>3</sup>

h. *Receivership Proceedings*.—See elsewhere.<sup>4</sup>

i. *Contempt*.—A court exercises a discretion in deciding to punish for contempt, which cannot be controlled by mandamus.<sup>5</sup>

j. *Removal of Causes*—(1) *To State Court*.—Whether a mandamus lies to compel a state court to remove a cause into a federal court, has not been decided.<sup>6</sup>

(2) *To Federal Court*—(a) *To Proceed with Cause*—aa. *Before Act of 1875*.—In the absence of statute, the writ of mandamus lies to compel a circuit court to take jurisdiction of and proceed with a case which it had wrongfully remanded to the state court.<sup>7</sup> The reason is that an order to remand is not a final judgment, and no writ of error lies.<sup>8</sup>

bb. *Since Act of 1875*.—This has been the subject of statutory regulation. The fifth section of the act of March 3, 1875, provided that the order of a circuit court dismissing or remanding a cause to a state court should be reviewable by the supreme court on writ of error or appeal, as the case might be. This act remained in force until the passage of the act of March 3, 1887, re-enacted August 3, 1883, by which it was superseded, and a writ of error or appeal upon orders to remand causes to a state court, was abrogated.<sup>9</sup>

3. *Form of proceeding*.—Where the proceedings though not strictly regular are not void, and no substantial right of the petitioner is involved, the mere form of the proceeding does not require the court to interfere by the extraordinary remedy of mandamus. Ex parte Wall, 107 U. S. 265, 27 L. Ed. 552.

4. *Receivership proceedings*.—See ante, "Where Writ Issues from State Court," VII, J, 3; "Motions and Summary Proceedings," VIII, K, 5, g. And see the title RECEIVERS.

5. *Contempt*.—Ex parte Bradley, 7 Wall. 364, 19 L. Ed. 214; Cuddy, Petitioner, 131 U. S. 280, 284, 33 L. Ed. 154.

In inflicting a punishment for contempt, the court may have done wrong, but mandamus does not lie to compel it to undo what has thus been done in the exercise of legitimate jurisdiction. It was asked to punish a person for contempt in disobeying a process. It decided not to do so. The action of it is beyond the reach of a writ of mandamus. Ex parte Burtis, 103 U. S. 238, 26 L. Ed. 392. See ante, "Disbarment of Attorneys," VIII, K, 6, g. And see the title CONTEMPT, vol. 4, p. 531.

6. *Removal of causes*.—"In Gordon v. Longest, 16 Pet. 97, 10 L. Ed. 900, which was a writ of error to review the action of a state court wrongfully refusing to remove a case into the circuit court. Mr. Justice McLean intimated that mandamus might lie to compel action by the state court, but the remark was purely obiter and cannot be regarded as authoritative." In re Blake, 175 U. S. 114, 118, 44 L. Ed. 94. See, also, the title REMOVAL OF CAUSES.

7. *To compel federal court to proceed*.—Ex parte Bradstreet, 7 Pet. 634, 8 L. Ed. 810; Railroad Co. v. Wiswall, 23 Wall. 507, 23 L. Ed. 103; In re Pennsylvania Co., 137 U. S. 451, 453, 34 L. Ed. 738.

"The order of the circuit court remanding the cause to the state court is not a 'final judgment' in the action, but a refusal to hear and decide. The remedy in such a case is by mandamus to compel action, and not by writ of error to review what has been done." Railroad Co. v. Wiswall, 23 Wall. 507, 508, 23 L. Ed. 103; Ex parte Bradstreet, 7 Pet. 634, 647, 8 L. Ed. 810; Ex parte Newman, 14 Wall. 152, 165, 20 L. Ed. 877.

Prior to the act of March 3, 1873, the district court for the middle district of Alabama was empowered to hear and decide cases on removal from the state courts within its limits. The state court within those limits ordered the removal of a cause into the circuit court of the southern district of Alabama. The latter court was right in refusing to proceed in a cause, and mandamus will not lie to compel it to do so. Ex parte State Ins. Co., 18 Wall. 417, 21 L. Ed. 904.

Prior to the act of 1875, a circuit court refused to take jurisdiction of a suit properly removed from a state court; the remedy was by mandamus and not writ of error or appeal from the federal supreme court, to compel the lower court to proceed to final judgment. Insurance Co. v. Comstock, 16 Wall. 258, 21 L. Ed. 493.

8. *Reason for rule*.—In re Pennsylvania Co., 137 U. S. 451, 453, 34 L. Ed. 738; Ex parte Hoard, 105 U. S. 578, 579, 26 L. Ed. 1176. See the title APPEAL AND ERROR, vol. 1, p. 959.

9. *Since act of 1875*.—Under the 5th section of the act of March 3, 1875, but not under the act of March 3, 1887, re-enacted August 3, 1888, a circuit court of the United States could be compelled by mandamus to take jurisdiction of and proceed with a case which it had wrongfully remanded to a state court. In re Pennsylvania Co., 137 U. S. 451, 453,

(b) *To Remand Cause*.—aa. *In General*.—Mandamus will lie to compel a federal court to remand a cause to a state court where it assumes to exercise jurisdiction on removal, when on the face of the record absolutely no jurisdiction has attached.<sup>10</sup> A previous demand by way of a motion to remand is not necessary.<sup>11</sup>

bb. *After Refusal*.—No case can be found in which mandamus has been used to compel a court to remand a cause after it has once refused a motion to that effect.<sup>12</sup>

(c) *To Grant Rehearing*.—If the court in granting a motion to remand a cause to the state court, has not before it, by mistake, the complaint in the action, it is within its discretion upon a showing to that effect, to grant a rehearing; but the federal supreme court has no power to require that court by mandamus to do so.<sup>13</sup>

k. *Removal and Reinstatement of Officer*.—See elsewhere.<sup>14</sup>

34 L. Ed. 738. See ante, "Appellate Jurisdiction," VII, F, 5, c; "Removed to Federal Court," VII, F, 7, b, (4), (b). And see the title APPEAL AND ERROR, vol. 1, p. 959.

10. *To remand cause*.—In re Pollitz, 206 U. S. 323, 331, 51 L. Ed. 1081; Virginia v. Paul, 148 U. S. 107, 37 L. Ed. 386; Ex parte Wisner, 203 U. S. 449, 51 L. Ed. 264; Virginia v. Rives, 100 U. S. 313, 324, 25 L. Ed. 667.

The writ of mandamus is the proper proceeding to enforce the return of persons indicted by a state to the custody of its authorities, when the federal court exceeds its authority. Virginia v. Rives, 100 U. S. 313, 323, 25 L. Ed. 667.

"The circuit court, in taking the prisoners from the custody of her authorities, transcended its jurisdiction." Virginia v. Rives, 100 U. S. 313, 329, 25 L. Ed. 667. Separate opinion of Mr. Justice Field, in which Mr. Justice Clifford concurred.

A criminal prosecution against one Carrico was commenced in a court of the state of Virginia. At the instigation of Carrico a circuit court of the United States assumed jurisdiction upon a removal without proper proceedings. Upon these facts, the court said: "The necessary conclusion is that the state of Virginia is entitled to a writ of mandamus to compel the respondent to remand the indictment and prosecution against Carrico to the county court in which the indictment was found." Virginia v. Paul, 148 U. S. 107, 123, 37 L. Ed. 386.

"A stronger case for issuing a writ of mandamus can hardly be imagined. The writ may be directed to the judge who has unlawfully assumed jurisdiction of the prosecution; and no previous motion to him to remand the case was necessary. The case is governed in every particular by Virginia v. Rives, 100 U. S. 313, 316, 323, 324, 25 L. Ed. 667." Virginia v. Paul, 148 U. S. 107, 123, 37 L. Ed. 386.

"Our conclusion is that the case should have been remanded, and as the circuit court had no jurisdiction to proceed, that mandamus is the proper remedy." Ex

parte Wisner, 203 U. S. 449, 461, 51 L. Ed. 264.

Mandamus and not prohibition is the proper remedy. Ex parte Wisner, 203 U. S. 449, 51 L. Ed. 264.

11. *Necessity for motion to remand*.—Virginia v. Rives, 100 U. S. 313, 330, 25 L. Ed. 667. Separate opinion of Mr. Justice Field, in which Mr. Justice Clifford concurred.

12. *After refusal to remand*.—The distinction in this connection between the case in which the federal court remands the cause and the one in which it orders it retained is obvious. An order remanding a cause is not a final judgment or decree, from which ordinarily an appeal or a writ of error can be taken; but, if the cause be retained, it may go to final judgment or decree, and the reason assigned for the mandamus in case of dismissal does not exist. "If it be improperly retained and the objection presented on the record, the question may be brought here for review after final judgment, if the amount involved is sufficient to give us jurisdiction. We so held at this term in Railroad Co. v. Koontz, 104 U. S. 5, 26 L. Ed. 643." Ex parte Hoard, 105 U. S. 578, 579, 26 L. Ed. 1176.

The court will not be compelled to remand a cause for want of proper citizenship to give jurisdiction, in that parties necessary to federal jurisdiction were not necessary parties to the suit, after it has decided in favor of its own jurisdiction on motion to remand. In re Pollitz, 206 U. S. 323, 51 L. Ed. 1081.

13. *To grant rehearing*.—"If, in point of fact, the complaint was not included among those papers, and it had been omitted by mistake, a rehearing might have been granted in the discretion of the court upon a showing to that effect, but this court has no power to require that court to do so by mandamus." In re Sherman, 124 U. S. 364, 369, 31 L. Ed. 423.

14. *Removal and reinstatement of officer*.—See the title PUBLIC OFFICERS.

Of clerks of court.—See the title CLERKS OF COURT, vol. 3, p. 852.



7. TO PARTICULAR COURTS AND OFFICERS.—See elsewhere in this title.<sup>15</sup>

**L. Executive and Ministerial Officers of Government**—1. IN GENERAL.—See elsewhere in this title.<sup>16</sup>

2. OFFICIAL CHARACTER.—It has been held that the official character of a person will not exempt him from a writ of mandamus if his duty is purely ministerial.<sup>17</sup>

3. SUBORDINATE OFFICERS.—Where a subordinate officer is overruled by his superior, having appellate jurisdiction over him, his duty to obey the decision of such superior is a ministerial duty, which he can be compelled by mandamus to perform;<sup>18</sup> but the writ does not lie where the subordinate is directed by statute to perform judicial acts.<sup>19</sup> Mandamus will not lie to compel a public officer to do a particular thing which his superior in authority has lawfully ordered him not to do.<sup>20</sup> A direction, given by a superior officer without authority, not to do a certain act, is no defense to mandamus to compel such act.<sup>21</sup>

4. AFTER RESIGNATION.—Under the laws of Michigan, the resignation of an officer does not become effective until accepted or his successor appointed. And it is not a sufficient answer to a writ of mandamus for him to assert that he has resigned his office.<sup>22</sup>

5. IN INTERPRETATION OF LAWS.—The judgment and discretion of a governmental officer in the interpretation of a statute cannot be controlled by mandamus, although the court may interpret the law differently;<sup>23</sup> but the writ does

**15. To particular courts and officers.**—See ante, "To Particular Officers and Courts," VII, F, 7, b, (5); "Proceedings in Lower Court," VIII, K, 5, o, (1); "Proceedings in Appellate Court," VIII, K, 5, o, (2).

**16. Governmental officers.**—For general rules governing the issuance of a writ of mandamus, see the first part of this division of this title. See, also, ante, "Nature of," VII, B; "Original Jurisdiction," VII, F, 5, b; "In District of Columbia," VII, F, 7, c.

**17. Official character.**—Kendall v. United States, 12 Pet. 524, 618, 9 L. Ed. 1181.

"To render the mandamus a proper remedy, the officer to whom it is to be directed must be one to whom, on legal principles, such writ may be directed." Marbury v. Madison, 1 Cranch 137, 169, 2 L. Ed. 60.

The amenability of an executive officer to the writ of mandamus to compel him to perform a duty required of him by law was discussed by Chief Justice Marshall in his great opinion in the case of Marbury v. Madison, 1 Cranch 137, 2 L. Ed. 60; and the radical distinction was there pointed out between acts performed by such officers in the exercise of their executive functions, which the chief justice calls political acts, and those of a mere ministerial character; and the rule was distinctly laid down that the writ will not be issued in the former class of cases, but will be issued in the latter. United States v. Black, 128 U. S. 40, 44, 32 L. Ed. 354. See ante, "Personal," VIII, E, 4.

**18. Subordinate officers.**—Miller v. Raum, 135 U. S. 200, 204, 34 L. Ed. 105. See post, "Delivering Patent," VIII, L, 6, d, (4), (c).

**19. Butterworth v. Hoe**, 112 U. S. 50, 54, 28 L. Ed. 656; *United States v. Black*, 128 U. S. 40, 32 L. Ed. 354. See post, "Commissioner of Patents," VIII, L, 6, d, (3).

**20. Butterworth v. Hoe**, 112 U. S. 50, 54, 28 L. Ed. 656.

**21. In American School v. McAnnulty**, 187 U. S. 94, 47 L. Ed. 90, it was held that the order of the postmaster-general to the postmaster in the city of Nevada, not to deliver the mail to the relator, was not a justification for such refusal, because the order was given without authority of law and the postmaster could, notwithstanding such order, be compelled by mandamus to do his duty and deliver the mail. *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 325, 47 L. Ed. 1074. See post, "Subordinate Officers," VIII, L, 6, d.

**22. After resignation.**—*Edwards v. United States*, 103 U. S. 471, 26 L. Ed. 314; *Thompson v. United States*, 103 U. S. 480, 26 L. Ed. 521.

**23. In interpretation of laws.**—*United States v. Black*, 128 U. S. 40, 48, 32 L. Ed. 354, Mr. Justice Bradley; *Redfield v. Windom*, 137 U. S. 636, 644, 34 L. Ed. 811; *Decatur v. Paulding*, 14 Pet. 497, 515, 10 L. Ed. 559; *United States v. Lynch*, 137 U. S. 280, 286, 34 L. Ed. 700; *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 324, 47 L. Ed. 1074.

But the court will not interfere with the executive officers of the government in the exercise of their ordinary official duties, even when those duties require an interpretation of the law, the court having no appellate power for that purpose. On this last ground the court denied the writ. *Roberts v. United States*, 176 U. S. 221, 230, 44 L. Ed. 443.

"In *United States v. Black*, 128 U. S.

lie to compel performance of a duty imposed by a statute, although the officer must construe it to determine to the nature of the duty.<sup>24</sup>

6. OFFICERS OF UNITED STATES—*a. In General.*—A claim which cannot be enforced against the United States by reason that its sovereignty protects it against such suits,<sup>25</sup> cannot be enforced circuitously by a mandamus proceeding against one of its officers.<sup>26</sup>

*b. President.*—By the constitution of the United States, the president is invested with certain political power in the exercise of which he is to use his own discretion, and mandamus is not a proper remedy to compel the performance thereof.<sup>27</sup>

*c. Heads of Departments.*—(1) *In General.*—The duties to be performed by the heads of the different departments of the government of the United States, whether imposed by act of congress or by resolution, are not, in general, purely ministerial, but are executive in their nature.<sup>28</sup> The writ of mandamus cannot

40, 32 L. Ed. 354, we held that the courts will not interfere with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, inasmuch as no appellate power is given them for that purpose; but that when such officers refuse to act at all in a case in which the law requires them to do so, or when by special statute, or otherwise, a mere ministerial duty is imposed upon them, and they refuse to perform it, a mandamus lies to compel them to act or to perform such ministerial duty." *Miller v. Raum*, 135 U. S. 200, 201, 204, 34 L. Ed. 105.

24. "Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired." *Roberts v. United States*, 176 U. S. 221, 231, 44 L. Ed. 443.

25. *Officers of United States.*—See the title UNITED STATES.

26. "Such being the settled principle in our system of jurisprudence, it would be derogatory to the courts to allow the principle to be evaded or circumvented. They could not, therefore, permit the claim to be enforced circuitously by mandamus against the secretary of the treasury, when it could not be directly against the United States; and when no judgment on and for it had been obtained against the United States." *Reeside v. Walker*, 11 How. 272, 290, 13 L. Ed. 693.

See, also, *Brashear v. Mason*, 6 How. 92, 102, 12 L. Ed. 357. And see ante, "United States Officers," VII, F, 7, b, (5), (b); "To United States Officers," VII, G, 2.

27. *President.*—*Marbury v. Madison*, 1 Cranch 137, 165, 2 L. Ed. 60; *Noble v. Union River Logging R. Co.*, 147 U. S. 165, 171, 37 L. Ed. 123.

An attempt on the part of the judicial department of the government to enforce the performance of executive duties by the president might be justly characterized, in the language of Chief Justice Marshall, in *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60, as "an absurd and excessive extravagance." *Mississippi v. Johnson*, 4 Wall. 475, 499, 18 L. Ed. 437.

"But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." *Marbury v. Madison*, 1 Cranch 137, 166, 2 L. Ed. 60. See *Gaines v. Thompson*, 7 Wall. 347, 19 L. Ed. 62.

The duties of the president are, in general, discretionary. *Decatur v. Paulding*, 14 Pet. 497, 10 L. Ed. 559.

28. *Heads of departments.*—*Decatur v. Paulding*, 14 Pet. 497, 515, 10 L. Ed. 559; *United States v. Lynch*, 137 U. S. 280, 286, 34 L. Ed. 700; *New Orleans v. Paine*, 147 U. S. 261, 37 L. Ed. 162; *Reeside v. Walker*, 11 How. 272, 290, 13 L. Ed. 693.

In general, the official duties of the head of one of the executive departments, whether imposed by act of congress or by resolution, are not mere ministerial duties; the head of an executive department of the government in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion; he must exercise his judgment in expounding the laws and resolutions of congress, under which he is, from time to time, required to act; if he doubts, he has a right to call on the attorney general to assist him with his counsel; and it would be difficult to imagine why a legal adviser

issue in a case where its effect is to direct or control the head of an executive department in the discharge of an executive duty involving the exercise of judgment or discretion,<sup>29</sup> or where they act as the political or confidential agency of the executive,<sup>30</sup> but it does to enforce a ministerial duty.<sup>31</sup>

was provided by law for the heads of departments, as well as for the president, unless their duties were regarded as executive, in which judgment and discretion were to be exercised. *Decatur v. Paulding*, 14 Pet. 497, 10 L. Ed. 559. See, also, *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 324, 47 L. Ed. 1074; *Brashear v. Mason*, 6 How. 92, 101, 12 L. Ed. 357.

**29. Discretionary duties.**—*Boynton v. Blaine*, 139 U. S. 306, 319, 35 L. Ed. 183; *Redfield v. Windom*, 137 U. S. 636, 643, 644, 34 L. Ed. 811; *United States v. Black*, 128 U. S. 40, 32 L. Ed. 354; *United States v. Schurz*, 102 U. S. 378, 396, 26 L. Ed. 167; *Keim v. United States*, 177 U. S. 290, 292, 44 L. Ed. 774; *The Secretary v. McGarrahan*, 9 Wall. 298, 312, 19 L. Ed. 579; *Gaines v. Thompson*, 7 Wall. 347, 352, 353, 19 L. Ed. 62; *Reeside v. Walker*, 11 How. 272, 289, 290, 13 L. Ed. 693; *Litchfield v. The Register & Receiver*, 9 Wall. 575, 19 L. Ed. 681; *Bates, etc., Co. v. Payne*, 194 U. S. 106, 109, 48 L. Ed. 893; *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 324, 47 L. Ed. 1074; *Decatur v. Paulding*, 14 Pet. 497, 499, 10 L. Ed. 559; *Brashear v. Mason*, 6 How. 92, 12 L. Ed. 357; *United States v. Seaman*, 17 How. 225, 230, 15 L. Ed. 226; *United States v. Guthrie*, 17 How. 284, 303, 304, 15 L. Ed. 102; *Wilkes v. Dinsman*, 7 How. 89, 129, 12 L. Ed. 618; *United States v. The Commissioner*, 5 Wall. 563, 18 L. Ed. 692; *Carrick v. Lamar*, 116 U. S. 423, 426, 29 L. Ed. 677; *Miller v. Raum*, 135 U. S. 200, 201, 204, 34 L. Ed. 105; *United States v. Black*, 128 U. S. 40, 47, 32 L. Ed. 354.

A court cannot substitute its own discretion for that of an executive officer of a state. *Board of Liquidation v. McComb*, 92 U. S. 531, 541, 23 L. Ed. 623.

In *Wyman v. Halstead*, 109 U. S. 654, 658, 27 L. Ed. 1068, it was held that the discretion resting in officers of the United States to pay a claim of a decedent either to his domiciliary or ancillary administrator cannot be controlled by mandamus. See, also, the title **EXECUTORS AND ADMINISTRATORS**, vol. 6, p. 185.

**30. Political duties.**—*Marbury v. Madison*, 1 Cranch 137, 166, 2 L. Ed. 60.

"In *Marbury v. Madison*, 1 Cranch 137, 171, 2 L. Ed. 60, where the head of a department acts in a case in which executive discretion is to be exercised, in which he is the mere organ of executive will, it is again repeated that any application to control in any respect his conduct would be rejected, without hesitation." *Ex parte Crane*, 5 Pet. 190, 207, 8 L. Ed. 92.

"But where he is directed by law to

do a certain act, affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the president, and the performance of which the president cannot lawfully forbid, and therefore, is never presumed to have forbidden; as, for example, to record a commission or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived, on what ground the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department." *Marbury v. Madison*, 1 Cranch 137, 170, 2 L. Ed. 60.

**31. Ministerial duty.**—*United States v. Black*, 128 U. S. 40, 42, 32 L. Ed. 354; *Miller v. Raum*, 135 U. S. 200, 201, 204, 34 L. Ed. 105; *The Secretary v. McGarrahan*, 9 Wall. 298, 312, 19 L. Ed. 579.

"A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law." *Mississippi v. Johnson*, 4 Wall. 475, 498, 18 L. Ed. 437, quoted in *Gaines v. Thompson*, 7 Wall. 347, 353, 19 L. Ed. 62.

The writ will not lie against a head of a department, even for the enforcement of a ministerial duty, where the relative right is not clear. In this case, as no judgment of indebtedness existed against the United States, the whole superstructure built on that must fall. *Reeside v. Walker*, 11 How. 272, 289, 13 L. Ed. 693.

If the facts in any particular case show the refusal to perform a purely ministerial duty, the officer cannot raise any further question, and mandamus will lie to compel him to perform his duty. *Roberts v. United States*, 176 U. S. 221, 230, 44 L. Ed. 443.

Whether the duty is ministerial or discretionary is to be determined by the facts of each particular case. *Roberts v. United States*, 176 U. S. 221, 229, 44 L. Ed. 443.

"When by special statute, or otherwise, a mere ministerial duty is imposed upon the executive officers of the government; that is, a service which they are bound to perform without further question, then if they refuse, the mandamus may be issued to compel them." *Boynton v. Blaine*, 139 U. S. 306, 319, 35 L. Ed. 183; *United States v. Black*, 128 U. S. 40, 48,



(2) *Secretary of State*.—A writ of mandamus is the proper remedy to compel the secretary of a state to deliver a commission of office to an appointee of the president, where the appointee has a legal right thereto;<sup>32</sup> but not to compel him to pay an award made under the joint convention between the United States and Mexico where the validity of the award is subject to the judgment and discretion of the president,<sup>33</sup> nor to pay an award under such convention to an assignee whose right is the subject of pending litigation.<sup>34</sup>

(3) *Secretary of Treasury*.—A mandamus will not lie against the secretary of the treasury, unless the laws require him to do some particular ministerial act.<sup>35</sup> He may be mandamusd to pay a claim which involves the exercise of

<sup>32</sup> L. Ed. 354; *Redfield v. Windom*, 137 U. S. 636, 644, 34 L. Ed. 811.

**32. Secretary of state.—To deliver commission to office.**—Mandamus will lie against the secretary of state of the United States to compel him to deliver a commission to a justice of the peace, whose appointment was made and commission signed by the president of the United States under seal of the United States affixed thereto by the secretary of state. The subsequent duty of the secretary of state is prescribed by law, and not guided by the will of the president. All discretion possessed by the president in regard to the appointment is exhausted and the appointment made complete by his signing the commission. *Marbury v. Madison*, 1 Cranch 137, 167, 2 L. Ed. 60. See ante, "After Exhaustion of Discretion," VIII, E, 8, d.

The case of *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60, is stated and commented upon in *United States v. Black*, 128 U. S. 40, 44, 32 L. Ed. 354, in the following language: "President Adams had nominated, and the senate had confirmed, Marbury as a justice of the peace of the District of Columbia; and a commission in due form was signed by the president appointing him such justice, and the seal of the United States was duly affixed thereto by the secretary of state; but the commission had not been handed to Marbury when the offices of the government were transferred to the administration of President Jefferson. Mr. Madison, the new secretary of state, refused to deliver the commission, and a mandamus was applied for to this court to compel him to do so. The court held that the appointment had been made and completed, and that Marbury was entitled to his commission, and that the delivery of it to him was a mere ministerial act, which involved no further official discretion on the part of the secretary, and could be enforced by mandamus. But the court did not issue the writ, because it would have been an exercise of original jurisdiction which it did not possess. Whilst this opinion will always be read by the student with interest and profit, it has not been considered as invested with absolute judicial authority except on the question of the original jurisdiction of this court." *United States v. Black*, 128 U. S. 40, 44, 32 L. Ed. 354. See, also,

*Mississippi v. Johnson*, 4 Wall. 475, 498, 18 L. Ed. 437.

As to the jurisdiction of the supreme court to issue a mandamus to the secretary of state, see ante, "Original Jurisdiction," VII, F, 5, b.

**33. To pay award.**—The claim sought to be recovered in the case arose upon an award by the joint convention of the United States and Mexico which was made July 4, 1868, and concerned the Weil and La Abra awards. On the 13th of July, 1882, the American government complained that the claims were fraudulent. Congress had previously, by the act of June 18, 1878, submitted the determination of the fraudulency of the claims to the president. It was held that the writ would not issue to the secretary of state. *Boynton v. Blaine*, 139 U. S. 306, 35 L. Ed. 183.

**34.** This was a proceeding by mandamus against T. F. Bayard, secretary of state, to compel him to pay the petitioner certain sums of money on account of awards made under the joint convention between the United States and Mexico which concluded July 4, 1868. The petitioner was assignee of the claim. A part of a claim, consisting of installments, had been paid by the respondent's predecessor in office. The respondent answered, admitting the validity of the awards and that the payments had been made by his predecessor, but that to acknowledge the claims of the respondent would be to ignore the conflicting claims of another, between whom and the respondent litigation in regard to the claims is pending. Held, the answer is sufficient, a demurrer thereto should be overruled and the petition dismissed. *Bayard v. White*, 127 U. S. 246, 249, 32 L. Ed. 116, cited in *Boynton v. Blaine*, 139 U. S. 306, 324, 35 L. Ed. 183.

**35. Secretary of treasury.**—Where the United States were the plaintiffs, and a verdict was rendered that they were indebted to the defendant, and an application was made for a mandamus to compel the secretary of the treasury to credit the defendant upon the books of the treasury with the amount of the verdict, and to pay the same, the mandamus was properly refused by the circuit court. For a mandamus will only lie against a ministerial officer to do some ministerial act where the laws require him to do it

a merely ministerial,<sup>36</sup> and not a discretionary duty,<sup>37</sup> where an appropriation, therefore, has been made.<sup>38</sup>

(4) *Secretary of War*.—Mandamus will lie to the secretary of war, directing him to perform an act, enjoined by law, in the performance of which an individual has a vested interest.<sup>39</sup> The writ will not lie to compel him to sign a contract with a contractor concerning a subject matter in regard to which there

and he improperly refuses to do so. *Reeside v. Walker*, 11 How. 272, 13 L. Ed. 693.

The secretary will not be compelled to act under a repealed law. *Commonwealth v. Boutwell*, 13 Wall. 526, 531, 20 L. Ed. 631.

**36. To pay claim involving ministerial duty.**—In *Roberts v. United States*, 176 U. S. 221, 44 L. Ed. 443, it was simply decided that the duty of the treasurer to pay the money in question in that case was ministerial in its nature and should have been performed by him on demand, and that, therefore, mandamus was the proper remedy for his failure to do it. *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 325, 47 L. Ed. 1074.

Where the court below awarded a writ of mandamus to compel the treasurer of the United States to pay relator a residue of unpaid interest upon certain certificates issued by the board of audit of the District of Columbia pursuant to act of congress, 1874, 18 Stat. 116, upon the ground that the act of congress of 1894, 25 Stat. 227-229, which provided that the treasurer of the United States should pay to the owners of such certificates redeemed by him such residue of unpaid interest required him to do so, it was held that the awarding of the writ of mandamus by the lower court was correct as the act required to be performed was a ministerial duty although the statute required construction by him to some extent. *Roberts v. United States*, 176 U. S. 221, 44 L. Ed. 443.

**37. Involving discretionary duty.**—This was a proceeding by mandamus against the respondent Windom, secretary of the treasury. The petition alleged that one Mitchell, the immediate assignor of the petitioner, had furnished labor and material in building life-saving stations, under the acts of June 18, 1878, and May 4, 1842, and that his account had been adjusted by the department, which adjustment is evidenced by a letter from the commissioner of customs to Mitchell stating the amount due, and adding that the draft would be remitted. It also alleged, that, as the account had been adjusted, nothing remained to be done by the treasury officials but the ministerial duty of issuing a warrant and remitting a draft to Mitchell. Such a draft was issued but delivered to an official with instructions that it be not delivered to Mitchell until the latter had paid certain claims presented against him

at the treasury department for labor and material furnished by the persons presenting the claims. The officer to whom the draft was sent did not deliver it to Mitchell but returned it to the treasury department. The return set up that a part of the contract price should be paid to the satisfaction of the claim of mechanics, laborers and materialmen and that the work was to be completed by a certain time or a penalty incurred, and that such penalty was incurred. Held, that mandamus should not issue. *Redfield v. Windom*, 137 U. S. 636, 34 L. Ed. 811.

Debts due from the United States are not local assets at the seat of government only. The treasurer of the United States cannot be compelled by writ of mandamus to pay to an administrator, appointed in the District of Columbia, of an inhabitant of one of the states of the Union, the amount of a draft payable to the intestate at the treasury out of an appropriation made by congress, and held by such administrator. He possesses a discretion to make payment to either the domiciliary or ancillary administrator. *Wyman v. Halstead*, 109 U. S. 654, 27 L. Ed. 1068.

**38. Necessity for appropriation.**—In *Reeside v. Walker*, 11 How. 272, 13 L. Ed. 693, a mandamus to the secretary of the treasury, to compel the payment of a debt due by the United States, was refused, because no appropriation had been made. *Brashear v. Mason*, 6 How. 92, 12 L. Ed. 357. See, also, *Commonwealth v. Boutwell*, 13 How. 526, 20 L. Ed. 631.

"It will not do to say that the result of the proceeding by mandamus would show the title of the relator to his pay, the amount, and whether there were any moneys in the treasury applicable to the demand; for, upon this ground, any creditor of the government would be enabled to enforce his claim against it, through the head of the proper department, by means of this writ, and the proceeding by mandamus would become as common, in the enforcement of demands upon the government, as the action of assumpsit to enforce like demands against individuals." *Brashear v. Mason*, 6 How. 92, 102, 12 L. Ed. 357.

**39. Secretary of war.**—*Marbury v. Madison*, 1 Cranch 137, 172, 2 L. Ed. 60; *Hayburn's Case*, 2 Dall. 409, 410n, 1 L. Ed. 436; *United States v. Todd*, Note, 13 How. 52, 52n, 14 L. Ed. 47.



is an existing contract between the parties.<sup>40</sup>

(5) *Secretary of Navy*.—A mandamus will not lie to the secretary of the navy to compel him to pay a sum of money claimed to be due a claimant as a pension under a resolution of congress.<sup>41</sup> He cannot be mandamusd to pay a salary to an officer of the navy of Texas, as such officer did not become an officer of the United States upon the annexation of the state,<sup>42</sup> and there had been no appropriation for the purpose.<sup>43</sup>

(6) *Postmaster General*.—The official character of the postmaster general as an officer in the executive department of the government is not an objection to the issuance of the writs of mandamus against him,<sup>44</sup> and it may issue to com-

40. The secretary of war cannot be mandamusd to sign a contract with a contractor for the removal of dirt in the construction of a canal at the price \$.197 per cubic yard, when there is an existing contract between the parties to perform the work at \$.137 per cubic yard. *International Contracting Co. v. Lamont*, 155 U. S. 303, 308, 39 L. Ed. 160.

41. *Secretary of navy—To pay pension*.—On the 3d of March, 1837, congress passed an act giving to the widow of any officer who had died in the service of the United States authority to receive, out of the navy pension fund, half the monthly pay to which the deceased officer would have been entitled, under the acts regulating the pay in the navy, in force on the 1st day of January, 1835; on the same day, a resolution was adopted by congress, giving to Mrs. Decatur, widow of Captain Stephen Decatur, a pension for five years, out of the navy pension fund, and in conformity with the act of June 30th, 1834, and the arrearages of the half pay of a post captain, from the death of Commodore Decatur to the 30th of June, 1834; the arrearages to be vested in trust for her by the secretary of the treasury. The pension and arrearages, under the act of March 3d, 1837, were paid to Mrs. Decatur, on her application to Mr. Dickerson, the secretary of the navy, under a protest by her, that by receiving the same she did not prejudice her claim under the resolution of the same date; she applied to the secretary of the navy for the pension and arrears, under the resolution, which were refused by him; afterwards, she applied to Mr. Paulding, who succeeded Mr. Dickerson as secretary of the navy, for the pension and arrears, which were refused by him. The circuit court of the county of Washington, in the District of Columbia, refused to grant a mandamus to the secretary of the navy, commanding him to pay the arrears, and to allow the pension under the resolution of March 3d, 1837: Held, that the judgment of the circuit court was correct. *Decatur v. Paulding*, 14 Pet. 497, 10 L. Ed. 559, cited in *Gaines v. Thompson*, 7 Wall. 347, 350, 19 L. Ed. 62, and *Commissioner of Patents v. Whiteley*, 4 Wall. 522, 534, 18 L. Ed. 335.

In *Decatur v. Paulding*, 14 Pet. 497, 10 L. Ed. 559, a mandamus was refused

upon the principle of *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60, to compel the secretary of the navy to allow to the widow of Commodore Decatur a certain pension and arrearages. *Noble v. Union River Logging R. Co.*, 147 U. S. 165, 171, 37 L. Ed. 123. See ante, "*In District of Columbia*," VII, F, 7, c.

42. *To pay salary of officer of Texas navy*.—Under the joint resolutions of congress, providing for the annexation of Texas to the United States, the officers of the navy of Texas did not pass into the naval service of the United States. The transfer of the navy of Texas related exclusively to the ships of war and their armaments. A mandamus against the secretary of the navy will not lie at the instance of an officer, to enforce the payment of his pay. *Brashear v. Mason*, 6 How. 92, 12 L. Ed. 357.

43. "Besides the duty of inquiring into and ascertaining the rate of compensation that may be due to the officers, under the laws of congress, no payment can be made unless there has been an appropriation for the purpose. And if made, it may have become already exhausted, or prior requisitions may have been issued sufficient to exhaust it. The secretary is obliged to inquire into the condition of the fund, and the claims already charged upon it, in order to ascertain if there is money enough to pay all the accruing demands, and if not enough, how it shall be apportioned among the parties entitled to it. These are important duties, calling for the exercise of judgment and discretion on the part of the officer." *Brashear v. Mason*, 6 How. 92, 102, 12 L. Ed. 357.

44. *Postmaster general*.—*Kendall v. United States*, 12 Pet. 524, 619, 9 L. Ed. 1181; *Mississippi v. Johnson*, 4 Wall. 475, 499, 18 L. Ed. 437; *Gaines v. Thompson*, 7 Wall. 347, 350, 19 L. Ed. 62.

"The proceeding has been treated as an infringement upon the executive department of the government; which has led to a very extended range of argument on the independence and duties of that department; but which, according to the view taken by the court of the case, is entirely misapplied. We do not think the proceedings in this case interfere, in any respect whatever, with the rights or duties of the executive; or that it involves



pel him to enter certain credits in favor of persons who have rendered services in carrying the mail, the propriety of which has been determined by the solicitor of the treasury acting as an arbitrator under the direction of congress.<sup>45</sup>

(7) *Secretary of Interior*—(a) *In General*.—The action of the secretary of the interior in discharging a subordinate officer, cannot be controlled by mandamus.<sup>46</sup>

(b) *In Regard to Public Lands*.—See elsewhere in this title.<sup>47</sup>

d. *Subordinate Officers*—(1) *In General*.—See elsewhere in this title.<sup>48</sup>

(2) *Commissioner of Pensions*.—If the commissioner of pensions refuses to carry out the decision of his superior officer, there would seem to be prima facie ground for at least calling upon him to show cause why a mandamus should not issue.<sup>49</sup> In the examination and construction of acts of congress, he acts judicially and cannot be controlled by mandamus.<sup>50</sup>

(3) *Commissioner of Patents*—(a) *In General*.—The commissioner of patents cannot be compelled to do an act contrary to the authorization of the secretary of the interior.<sup>51</sup>

(b) *Matters Prior to Hearing*.—Where a primary examiner refuses to allow

any conflict of powers between the executive and judicial departments of the government. The mandamus does not seek to direct or control the postmaster general in the discharge of any official duty, partaking in any respect of an executive character; but to enforce the performance of a mere ministerial act, which neither he nor the president had any authority to deny or control." *Kendall v. United States*, 12 Pet. 524, 610, 9 L. Ed. 1181.

The principle of *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60, was applied in *Kendall v. United States*, 12 Pet. 524, 9 L. Ed. 1181, and the action of the circuit court sustained in a proceeding where it had commanded the postmaster general to credit the relator with a certain sum awarded to him by the solicitor of the treasury under an act of congress authorizing the latter to adjust the claim, this being regarded as purely a ministerial duty. *Noble v. Union River Logging R. Co.*, 147 U. S. 165, 171, 37 L. Ed. 123.

45. It was held that the duty was purely ministerial and that the postmaster general was not subject to direction and control of the president alone. *Kendall v. United States*, 12 Pet. 524, 614, 9 L. Ed. 1181. See ante, "In General," VIII, G, 3, a.

46. Unless there be some specific provision to the contrary the action of the secretary of the interior in removing the petitioner from office on account of inefficiency is beyond review in the courts, either by mandamus to reinstate him or by compelling payment of salary as though he had not been removed. *Keim v. United States*, 177 U. S. 290, 294, 44 L. Ed. 774.

47. In regard to public lands.—See post, "Land Officers," VIII, L, 6, d, (4).

48. Subordinate officers.—See ante, "Subordinate Officers," VIII, L, 3.

49. Commissioner of pensions.—*United States v. Black*, 128 U. S. 40, 51, 32 L.

Ed. 354; *Miller v. Raum*, 135 U. S. 200, 204, 34 L. Ed. 105.

The commissioner of pensions may be compelled by mandamus to obey the decision of the secretary of the interior. *Miller v. Raum*, 135 U. S. 200, 207, 34 L. Ed. 105.

50. In construction of laws.—"The writ was refused in *United States v. Black*, 128 U. S. 40, 32 L. Ed. 354 (of which this case is a continuation), because, as the court held, the decision which was demanded from the commissioner of pensions required of him, in the performance of his regular duties as commissioner, the examination of several acts of congress, their construction and the effect which the latter acts had upon the former, all of which required the exercise of judgment to such an extent as to take his decision out of the category of a mere ministerial act. A decision upon such facts, the court said, would not be controlled by mandamus." *Roberts v. United States*, 176 U. S. 221, 230, 44 L. Ed. 443.

"The commissioner of pensions did not refuse to act or decide. He did act and decide. He adopted an interpretation of the law adverse to the relator, and his decision was confirmed by the secretary of the interior, as evidenced by his signature of the certificate. Whether if the law were properly before us for consideration, we should be of the same opinion, or of a different opinion, is of no consequence in the decision of this case. We have no appellate power over the commissioner, and no right to review his decision. That decision and his action taken thereon were made and done in the exercise of his official functions. They were by no means merely ministerial acts." *United States v. Black*, 128 U. S. 40, 48, 32 L. Ed. 354. See ante, "In Interpretation of Laws," VIII, L, 5.

51. Commissioners of patents.—*Butterworth v. Hoe*, 112 U. S. 50, 54, 28 L. Ed. 656.

an appeal from his decision to the board of examiners in chief, the writ of mandamus lies to compel the commissioner of patents to make such order or take such action that the petitioner's appeal might be heard by the board or by the commissioner himself.<sup>52</sup>

(c) *Matters on Hearing*.—In deciding whether or not a patent shall issue, the commissioner acts on evidence, finds the facts, applies the law and decides questions affecting not only public but private interests; and so as to reissue, or extension or on interference between contesting claimants; and in all this he exercises judicial functions.<sup>53</sup>

(d) *Matters Subsequent to Hearing*.—The mere issuance of a patent by the commissioner after he has determined in favor of its issuance is a ministerial act enforceable by mandamus.<sup>54</sup> He may be compelled to prepare it for the signature of the secretary of the interior and to countersign it.<sup>55</sup> The remedy provided for in equity is not applicable where the patent is granted.<sup>56</sup>

**52. Matters prior to hearing.**—*Ex parte Frasch*, 192 U. S. 566, 567, 48 L. Ed. 564.

A petition in mandamus was filed in the court below to compel the commissioner of patents to require the primary examiner to forward an appeal, as provided by § 4909 of the revised statutes, to the board of examiners in chief to review the ruling of the primary examiner refusing, for the second time, to allow petitioner to unite his claims for process and apparatus in one application. The ruling was in violation of the right of the petitioner as the unity of the invention claimed by petitioner was not denied. The court below dismissed the petition. Held, the judgment of the court below refusing to grant the writ of mandamus was erroneous. *Steinmetz v. Allen*, 192 U. S. 543, 48 L. Ed. 555.

**53. Matters on hearing.**—*United States v. Duell*, 172 U. S. 576, 586, 43 L. Ed. 559; *Steinmetz v. Allen*, 192 U. S. 543, 563, 48 L. Ed. 555.

"That it was intended that the commissioner of patents, in issuing or withholding patents, in reissues, interferences and extensions, should exercise quasi judicial functions, is apparent from the nature of the examinations and decisions he is required to make, and the modes provided by law, according to which, exclusively, they may be reviewed." *Butterworth v. Hoe*, 112 U. S. 50, 67, 28 L. Ed. 656.

Where a statute directed the commissioner of patents to grant a reissue of patents in certain cases, to "assignees," it is the duty of the commissioner to decide whether the applicant is an assignee with such an interest as entitled him to a reissue within the meaning of the statutory provision on the subject; and if he has thoroughly examined and decided that the applicant is not so, a mandamus will not lie commanding him to refer the application to "the proper examiner or otherwise examine or cause the same to be examined according to law." The preliminary question was within the scope of his authority. If the mandamus had ordered the commissioner to allow an

appeal, the order under which it issued would have been held correct. *Commissioner of Patents v. Whiteley*, 4 Wall. 522, 18 L. Ed. 335.

**54. Matters subsequent to hearing.**—In the case of *Butterworth v. Hoe*, 112 U. S. 50, 28 L. Ed. 656, the commissioner of patents had decided in favor of the right of one Gill, an applicant for a patent in a case of interference, and adjudged that a patent should issue to his assigns accordingly. An appeal was taken to the secretary of the interior, who reversed the decision of the commissioner. The latter thereupon, and for that reason, refused to issue a patent. It was a question whether an appeal lay to the secretary of the interior, and this court held that it did not, and that he had no jurisdiction in the matter. The court, therefore, held that the patent ought to be issued in accordance with the decision of the commissioner, and that the mere issue of the patent was a ministerial matter for which a mandamus would lie. *United States v. Black*, 128 U. S. 40, 49, 32 L. Ed. 354.

The *Butterworth v. Hoe* case is explained in the case of *United States v. Duell*, 172 U. S. 576, 586, 43 L. Ed. 559.

**55. Preparation for signature of secretary of interior.**—"He had fully exercised his judgment and discretion when he decided that the relators were entitled to a patent. The duty to prepare it, to lay it before the secretary for his signature, and to countersign it, were all that remained, and they were all purely ministerial. These duties he had failed and refused to perform merely out of deference to the claim of the secretary to reverse and set aside the decision on the merits in favor of the relators. This we have held not to be a valid excuse. The case falls clearly within the principles acted upon in *Commissioner of Patents v. Whiteley*, 4 Wall. 522, 18 L. Ed. 335." *Butterworth v. Hoe*, 112 U. S. 50, 68, 28 L. Ed. 656.

**56. Remedy in equity.**—"The remedy by bill in equity under § 4915 is not appropriate, because it applies only when



(4) *Land Officers*—(a) *In General*.—A writ of mandamus will not lie to the secretary of the interior as a writ of error to review his acts, and to draw into the jurisdiction of the courts matters which are within the exclusive cognizance of the land department.<sup>57</sup> The writ will not lie against such officers to control them in the discharge of their official duties requiring the exercise of judgment and discretion.<sup>58</sup> But it may be granted where the department refuses to act at

the commissioner decides to reject an application for a patent, on the ground that the applicant is not, on the merits, entitled to it. So that, if, in such a case, a decree for a patent could be considered, *ex proprio vigore*, as equivalent to a patent, or could be enforced by direct process in execution of it, nevertheless the present is not a case where such a bill would lie." *Butterworth v. Hoe*, 112 U. S. 50, 68, 28 L. Ed. 656.

**57. Land officers.**—*In re Emblem*, 161 U. S. 52, 55, 40 L. Ed. 613.

Congress has constituted the land department under the supervision and control of the secretary of the interior, a special tribunal with judicial functions, to which is confided the execution of the laws which regulate the purchase, selling and care and disposition of the public lands, and neither an injunction nor mandamus will lie against an officer of the land department to control him in discharging an official duty which requires the exercise of his judgment and discretion and so the secretary of the interior having jurisdiction at all, necessarily has jurisdiction, and it is his duty, to decide as he thinks the law is; and courts have no power whatever under such circumstances to review his determination by mandamus or injunction, as a court has no general supervisory power over the officers of the land department, by which to control their decisions upon questions within their jurisdiction. *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 324, 325, 47 L. Ed. 1074. See ante, "Original Jurisdiction," VII, F, 5, b; "United States Officers," VII, F, 7, b, (5), (b); "To United States Officers," VII, G, 2.

**58. Discretional duties.**—*Johnson v. Towsley*, 13 Wall. 72, 20 L. Ed. 485; *Humbird v. Avery*, 195 U. S. 480, 503, 49 L. Ed. 286; *Kirwan v. Murphy*, 189 U. S. 35, 38, 54, 47 L. Ed. 698; *Carrick v. Lamar*, 116 U. S. 423, 29 L. Ed. 677; *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 324, 47 L. Ed. 1074; *Gaines v. Thompson*, 7 Wall. 347, 19 L. Ed. 62; *United States v. Black*, 128 U. S. 40, 32 L. Ed. 354; *Redfield v. Windom*, 137 U. S. 636, 34 L. Ed. 811; *Marquez v. Frisbie*, 101 U. S. 473, 475, 25 L. Ed. 800; *Litchfield v. The Register and Receiver*, 9 Wall. 575, 19 L. Ed. 681; *The Secretary v. McGarrahan*, 9 Wall. 298, 19 L. Ed. 579; *Brown v. Hitchcock*, 173 U. S. 473, 43 L. Ed. 772; *United States v. Schurz*, 102 U. S. 378, 396, 26 L. Ed. 167. See ante, "By Intervention," VIII, M, 5, c, (2).

The rule that the courts will not interfere by mandamus with the exercise by

the executive officers of duties requiring judgment or discretion, affirmed and applied to registers and receivers of land offices, in a case where the plaintiff asserts himself to be the owner of a tract of land, which these officers upon all the facts of the case decide to treat as public and open to pre-emption or sale. *Litchfield v. The Register and Receiver*, 9 Wall. 575, 19 L. Ed. 681.

The determination of a contest between claimants of conflicting rights of pre-emption is within the general jurisdiction and authority of the land department, and cannot be controlled or restrained by mandamus or injunction. *In re Emblem v. U. S. 52, 56, 40 L. Ed. 613*; *Emblem v. Lincoln Land Co.*, 184 U. S. 660, 663, 46 L. Ed. 736; *Bockfinger v. Foster*, 190 U. S. 116, 121, 47 L. Ed. 975.

"Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus." *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 324, 47 L. Ed. 1074.

"Nor does the fact that no writ of error will lie in such a case as this, by which to review the judgment of the secretary, furnish any foundation for the claim that mandamus may therefore be awarded." *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 325, 47 L. Ed. 1074.

**In construing laws.**—The relator filed its petition asking for a writ of mandamus to compel the secretary of the interior, to vacate an order made by him rejecting selections of certain land and to compel him to order such selections passed to patent. The secretary defended on the ground that the duty was imposed upon him by law to construe the acts governing the disposition of the public lands, and in pursuance of such duties he was required to and did construe the term, "vacant land open to settlement," as meaning to exclude land in actual occupation under the local customs or rules of miners; that he decided that, by reason of the failure of relator to show that the lands were at the date of selection "vacant land open to settlement," that attempted selection thereof should be rejected. It was held that the writ of mandamus would not be granted, as the decision of the questions presented to the secretary of the interior was no merely formal or ministerial act. *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 322, 47 L. Ed. 1074.



all.<sup>59</sup>

(b) *Granting Patent.*—The granting of a patent for lands in cases where proofs, hearing and decision are required,<sup>60</sup> and where the exercise of judgment and discretion is necessary,<sup>61</sup> is not a matter wherein the action of the secretary of the interior or the land officers are subject to supervision by mandamus.<sup>62</sup>

**59. Where department refuses to act.**—*Ex parte Parker*, 120 U. S. 737, 30 L. Ed. 818; *Ex parte Brown*, 116 U. S. 401, 29 L. Ed. 676; *Craig v. Leitensdorfer*, 123 U. S. 189, 208, 31 L. Ed. 114; *Brown v. Hitchcock*, 173 U. S. 473, 43 L. Ed. 772. See post, "Delivering Patent," VIII, L. 6, d, (4), (c).

**60. Granting patent—Hearing proofs.**—*Johnson v. Towsley*, 13 Wall. 72, 20 L. Ed. 485.

A mandamus will not be granted to compel the issuance of a patent for land, in a case where numerous questions of law and fact arise, some of them depending upon circumstances which rest in parol proof yet to be obtained, and where the exercise of judicial functions, some of them of a high character, is required. Nor will it be granted where it is reasonable to presume that there are persons at the time in possession under another title, and who therefore should have an opportunity to defend it. *United States v. The Commissioner*, 5 Wall. 563, 18 L. Ed. 692.

Mandamus will not lie to compel the commissioner of the land office to issue a patent founded upon what he considers to be an erroneous survey. *Castro v. Hendricks*, 23 How. 438, 16 L. Ed. 576.

**61. Determining beneficiaries under grant to Indian tribe.**—Where, under an act of congress granting land to the individual members of a band of Indians, it is left to the secretary of the interior to decide who in fact are such members, mandamus will not lie to compel him to declare a particular person to be a member of the tribe. In this case, the relator sought to have himself selected as an adopted member of the tribe of the Wichita band of Indians and entitled to the allotment of 100 acres of land granted by the act of March 2, 1895. *West v. Hitchcock*, 205 U. S. 80, 51 L. Ed. 718.

**Making survey for particular purposes.**—He cannot be compelled to cause a survey to be made of land which requires the exercise of his own discretion to determine whether or not it is adaptable to agricultural purposes. Mandamus will not lie to compel the secretary of the interior to cause a survey to be made of an island in the Mississippi River, where it appears that the island is shifting and not appropriate to agricultural purposes, that a survey was made in favor of the city of St. Louis of an island supposed to be that from which the present shifted, and where it also appears that the war department in improving the river was

working upon the island. *Carrick v. Lamar*, 116 U. S. 423, 29 L. Ed. 677, explained in *Kirwan v. Murphy*, 189 U. S. 35, 56, 47 L. Ed. 698.

**Deciding between contesting pre-emption claimants.**—The determination of the contest between the claimants of conflicting rights of pre-emption, as well as the issue of a patent to either, is within the general jurisdiction and authority of the land department, and cannot be controlled by mandamus. In *re Emblen*, 161 U. S. 52, 56, 40 L. Ed. 613.

In a contest between E. and W. the decision of the register and receiver, affirmed by the commissioner of the general land office and by the secretary of the interior, was in favor of W. The secretary of the interior granted a rehearing; on the petition of E., and before the rehearing had been had, congress passed an act confirming W.'s entry, and directing that a patent issue to him for the land in controversy. The secretary of the interior thereupon suspended the pending proceedings, and declined to authorize any further hearing of the contest; and a patent was actually issued to W., before this petition for a writ of mandamus was filed. It was held, that even if the act of congress was unconstitutional, which was not intimated, a writ of mandamus to compel the secretary of the interior to proceed should not be granted. In *re Emblen*, 161 U. S. 52, 56, 40 L. Ed. 613.

The patent in the above case "was a formal, regular patent, designed to pass the title of the United States, and to invest the patentee with all the rights of the United States in the land." *Bockfinger v. Foster*, 190 U. S. 116, 124, 47 L. Ed. 975.

**62. Mandamus will not lie.**—In *re Emblen*, 161 U. S. 52, 56, 40 L. Ed. 613; *United States v. The Commissioner*, 5 Wall. 563, 18 L. Ed. 692; *The Secretary v. McGarrahan*, 9 How. 298, 19 L. Ed. 579; *Brashear v. Mason*, 6 How. 92, 12 L. Ed. 357; *Emblen v. Lincoln Land Co.*, 184 U. S. 660, 663, 46 L. Ed. 736; *Bockfinger v. Foster*, 190 U. S. 116, 121, 47 L. Ed. 975; *New Orleans v. Paine*, 147 U. S. 261, 267, 37 L. Ed. 162; *Litchfield v. The Register & Receiver*, 9 Wall. 575, 19 L. Ed. 681; *Gaines v. Thompson*, 7 Wall. 347, 19 L. Ed. 62.

Mandamus to compel either the commissioner of the general land office, or the secretary of the interior, to issue a patent, cannot be sustained under statutes as now existing. *The Secretary v. McGarrahan*, 9 Wall. 298, 19 L. Ed. 579.

In *Castro v. Hendricks*, 23 How. 438, 16 L. Ed. 576, it is stated to be a proper exercise of the functions of the office to ex-

There is probably no case in which the writ will be granted to compel the issuance of a patent by the land department,<sup>63</sup> and absolutely no case under a statute requiring it to be signed by the president.<sup>64</sup>

(c) *Delivering Patent*.—The acts subsequent to the passage of title to the claimant may be enforced by mandamus.<sup>65</sup> The act of delivering the patent after it has been granted and prepared for delivery can be enforced by mandamus,<sup>66</sup> although the person whose duty it is to make delivery has received instructions not to do so from the land office.<sup>67</sup>

(d) *Canceling Patent*.—The act of the secretary of the interior and commissioner of the land office, in canceling an entry for land, is not a ministerial duty, but is a matter resting in the judgment and discretion of these officers as representing the executive department. Accordingly, the federal supreme court will not interfere by mandamus to control it.<sup>68</sup>

(5) *Superintendent of Printing*.—The writ does not lie to control the judgment and discretion of the superintendent of public printing.<sup>69</sup>

ercise its discretion in granting or refusing a patent.

**While title remains in the United States.**—The writ will not issue to compel any action by the land department as long as title to the land remains in the United States. *Johnson v. Towsley*, 13 Wall. 72, 20 L. Ed. 485; *Bockfinger v. Foster*, 190 U. S. 116, 121, 47 L. Ed. 975.

**63. Probably no case in which writ will be granted.**—"Whether or not a mandamus will lie in any case to compel the issuing of a patent is a question not necessarily involved in this case; we have not, therefore, examined it, and express no opinion upon it. We have found no case in which this power has been exercised." *United States v. The Commissioner*, 5 Wall. 563, 565, 18 L. Ed. 692.

**64. Same—Under present statute.**—"Patents for land are required to be signed by the president in person, or in his name by a secretary under his direction, and they are to be countersigned by the recorder of the general land office. Such patents cannot be issued and delivered to any party without the signature of the president, and no proceeding to compel either the commissioner of the general land office or the secretary of the interior to issue such a patent can be sustained while that provision of law remains unrepealed." *The Secretary v. McGarrahan*, 9 Wall. 298, 314, 19 L. Ed. 579.

**65. Delivering patent.**—*Johnson v. Towsley*, 13 Wall. 72, 20 L. Ed. 485; *Bockfinger v. Foster*, 190 U. S. 116, 121, 47 L. Ed. 975.

**66. Johnson v. Towsley**, 13 Wall. 72, 20 L. Ed. 485; *Humbird v. Avery*, 195 U. S. 480, 502, 49 L. Ed. 286.

When the officers whose actions are rendered by the laws necessary to vest the title in the claimant have decided in the claimant's favor, and the patent to him has been duly signed, sealed, countersigned and recorded, there remains no further authority to consider the case in the land office, the title of the land passes to the claimant and the ministerial duty of delivering the instrument can be enforced

by mandamus. *United States v. Schurz*, 102 U. S. 378, 26 L. Ed. 167. See ante, "After Exhaustion of Discretion," VIII, E, 8, d.

**67. Under instruction from superior.**—In *United States v. Schurz*, 102 U. S. 378, 26 L. Ed. 167, the question related to a patent for land claimed by a pre-emptor. All the proceedings had been gone through, the right of the applicant had been affirmed, the patent had been made out in the land office, signed by the president, sealed with the land office seal, countersigned by the recorder of the land office, recorded in the proper book, and transmitted to the local land officers for delivery; but delivery was refused because instructions had been received from the commissioner to return the patent. The plea was, that it had been discovered that the lands belonged to a town site. The court held that this was an insufficient plea; that the title had passed to the applicant, and he was entitled to his patent, subject to any equity which other parties might have to the land, or to a proceeding for setting the patent aside; and that the duty of the commissioner, or secretary of the interior, had become a mere ministerial duty to deliver the instrument. *United States v. Black*, 128 U. S. 40, 49, 32 L. Ed. 354, cited in *Levey v. Stockslager*, 129 U. S. 470, 477, 32 L. Ed. 785.

"We are of opinion that the relator in the case, as presented to us, is entitled to the possession of the patent which he demanded, and that the writ of mandamus by the supreme court of the District of Columbia is the appropriate remedy to enforce that right." *United States v. Schurz*, 102 U. S. 378, 405, 26 L. Ed. 167.

**68. Canceling patent.**—*Gaines v. Thompson*, 7 Wall. 347, 19 L. Ed. 62, cited in *New Orleans v. Paine*, 147 U. S. 261, 266, 37 L. Ed. 162.

**69. Superintendent of printing.**—A writ of mandamus will not lie from the circuit court of the United States commanding the superintendent of public printing to deliver certain printing to a relator, where the superintendent must exercise discre-



7. OFFICERS OF STATES—*a. Not Suit against State.*—A proceeding in mandamus against the officers of a state to enforce a plain ministerial duty is not a suit against the state within the meaning of the eleventh amendment to the United States constitution.<sup>70</sup>

*b. Governor.*—The governor of the state of refuge cannot be compelled by mandamus from a federal court to deliver up a fugitive from justice under interstate rendition proceedings.<sup>71</sup>

*c. Secretary of State.*—The secretary of state of one of the states may be mandamus to give notice of the election of electors of president and vice president according to the United States constitution, regardless of a void state law.<sup>72</sup>

*d. State Treasurer.*—See elsewhere in this title.<sup>73</sup>

8. OFFICERS OF TERRITORIES—*a. Loan Commissioners.*—The loan commissioners of Arizona may be required to perform public duties vested in them by a proceeding in mandamus.<sup>74</sup>

*b. Legislature.*—The judiciary, by means of writs of mandamus operating upon the officers of legislative bodies, cannot supervise the making up of the record of the proceedings of such bodies, or cause alterations to be made in such records as prepared by the officer whose duty it was to prepare them. Much less do they justify the court, in a case that does not involve the private rights of litigants, to determine whether particular bodies of persons constituted a lawful legislative assembly.<sup>75</sup>

**M. Mandamus to Public Corporations**—1. IN GENERAL.—At English common law, the writ issued to a municipal corporation.<sup>76</sup>

2. GOVERNING OFFICERS AND BODIES—*a. In General.*—The writ of mandamus is the proper remedy to compel municipal officers and boards to perform a ministerial,<sup>77</sup> but not a discretionary duty.<sup>78</sup> A county commissioner of Ala-

tion and judgment in determining whether relator is entitled to such printing. *United States v. Seaman*, 17 How. 225, 15 L. Ed. 226.

70. Officers of states—Not suit against state.—Board of Liquidation *v. McComb*, 92 U. S. 531, 541, 23 L. Ed. 623.

"The courts may, by mandamus, compel a public officer to perform a plain, ministerial duty prescribed by law; and that may be done, although the government itself cannot be made a party of record." *International Postal Supply Co. v. Bruce*, 194 U. S. 601, 616, 48 L. Ed. 1134, Harlan and Peckham, JJ., dissenting. See ante, "Action or Suit," II, D; "Limitations upon," VII, F, 3; "State Officers," VII, F, 7, b, (5), (d).

71. Governor.—*Kentucky v. Dennison*, 24 How. 66, 109, 16 L. Ed. 717. See ante, "In Extradition Cases," VII, F, 4, e.

72. Secretary of state.—The law of the state of Michigan providing for the appointment of electors of president and vice president is repugnant to the laws and constitution of the United States and it is the duty of the secretary of state to disregard it and pursue according to the constitution of the United States. *McPherson v. Blacker*, 146 U. S. 1, 23, 36 L. Ed. 869.

73. State treasurer.—See post, "Created by Statute," VIII, M, 3, b, (2).

74. Officers of territories—Loan commissioners.—Where the loan commissioners of Arizona were not made a corporation by the act constituting the board, but were vested with power, and were re-

quired to perform a public duty, in case of refusal the performance of such duty may be enforced by mandamus, under § 2335 of the revised statutes of Arizona. *Murphy v. Utter*, 186 U. S. 95, 103, 46 L. Ed. 1070. See ante, "Conditional Rights," VIII, D, 4.

75. Legislature.—The writ was refused in this case to compel the secretary of the territory of Idaho to record certain proceedings of the territorial legislature, and to compel the clerk to produce the records of the legislature in court, on the ground of want of interest in the applicant. *Clough v. Curtis*, 134 U. S. 361, 33 L. Ed. 945.

76. Mandamus to public corporations.—*Kendall v. United States*, 12 Pet. 524, 614, 9 L. Ed. 1181.

77. Governing officers and bodies.—*Smith v. Bourbon County*, 127 U. S. 105, 32 L. Ed. 73; *Royall v. Virginia*, 116 U. S. 572, 582, 29 L. Ed. 735; *Ex parte Rowland*, 104 U. S. 604, 613, 26 L. Ed. 861.

Under the acts of the state of Kansas, of February 25, 1870, March 2, 1872 and March 9, 1874, it is the duty of the county commissioners, upon the failure of the township trustee to do so, to levy all taxes required to meet the liabilities of the township not otherwise provided for, and mandamus may issue to compel the performance of such duty. *Cherokee County Comm'rs v. Wilson*, 109 U. S. 621, 625, 27 L. Ed. 1053.

78. *Respublica v. Guardians*, 2 Dall. 224, 1 L. Ed. 358.



bama, though called a "court," is in fact one of a board of officers whose duties are administrative and not judicial, and may be enforced by mandamus.<sup>79</sup>

b. *Title and Possession of Office*.—See elsewhere in this title.<sup>80</sup>

c. *De Facto Officers*.—Mandamus is the proper remedy to compel recognition to the acts of de facto officers, pending the determination of their right to office by quo warranto.<sup>81</sup>

d. *Duties Authorized by Law*.—The duties of municipal officers which may be enforced by mandamus must be authorized by law.<sup>82</sup>

e. *Issuance of License*.—The writ of mandamus may be resorted to to compel a municipal officer to issue a license.<sup>83</sup>

f. *Issuance of Building Permit*.—The proper officer can be compelled by mandamus to issue a permit for a public improvement, after approval by a proper public board.<sup>84</sup>

g. *Auditing Claims*.—Municipal officers may be compelled by mandamus to audit claims against the municipality.<sup>85</sup>

3. ENFORCEMENT OF MUNICIPAL OBLIGATIONS—a. *In General*.—A municipal corporation may be compelled to pay its debts by mandamus.<sup>86</sup>

b. *Contracts*—(1) *In General*.—A municipal corporation may be compelled by mandamus to issue bonds in pursuance of a compromise.<sup>87</sup>

(2) *Created by Statute*.—Mandamus lies to compel a municipal corporation to receive, for their full amount, coupons from bonds, issued by a state under an act which declared that the coupons "should be receivable for taxes, debts,

79. "As commissioner, this probate judge was amenable to the authorized process of the courts of the United States in the same manner and to the same extent that his associates were." *Ex parte Rowland*, 104 U. S. 604, 613, 26 L. Ed. 861.

80. *Title and possession of office*.—See ante, "Title and Possession of Office," VIII, D, 6.

81. *De facto officers*.—In this case there was pending a writ of quo warranto to determine the right of county commissioners to their offices. Until the final determination on that writ, such commissioners were de facto officers. The county clerk refused to recognize them and record their proceedings on the county books. Mandamus is the proper remedy to compel the performance of this duty by the clerk. *In re Delgado*, 140 U. S. 586, 588, 35 L. Ed. 578. See ante, "Title and Possession of Office," VIII, D, 6.

82. *Duties authorized by law*.—A legal duty imposed upon the officers of a municipal corporation may be enforced by mandamus. *County Comm'rs v. Wilson*, 109 U. S. 621, 625, 27 L. Ed. 1053; *United States v. County of Clark*, 95 U. S. 769, 773, 24 L. Ed. 545. See post, "Authorized by Statute," VIII, M, 4, b.

83. *Issuance of license*.—"It is doubtless true, as a general rule, that where the officer, whose duty it is to issue a license, refuses to do so, and that duty is merely ministerial, and the applicant has complied with all the conditions that entitle him to it, the remedy by mandamus would be appropriate to compel the officer to issue it. That rule would apply to cases where the refusal of the officer was willful and contrary to the statute under which he was commissioned to act." *Royall v. Virginia*, 116 U. S. 572, 582, 29 L. Ed. 735.

84. *Issuance of building permit*.—*Laclede Gas Light Co. v. Murphy*, 170 U. S. 78, 42 L. Ed. 955. See ante, "Performable," VIII, E, 5.

85. *Auditing claims*.—Where a statute of Illinois requires the board of town auditors to audit charges, including judgments against the town, in order that provision for paying them may be made by taxation, held, that, where a judgment against the town was rendered by a court having jurisdiction of the parties and the subject matter, auditing it is a mere ministerial act not involving the exercise of official discretion, the performance of which can be coerced by mandamus. *Lower v. United States*, 91 U. S. 536, 23 L. Ed. 420.

86. *Enforcement of obligations—Payment of debts*.—*Memphis v. United States*, 97 U. S. 293, 299, 24 L. Ed. 920; *United States v. County of Clark*, 96 U. S. 211, 24 L. Ed. 628.

Under the laws of Michigan, mandamus is the proper remedy to recover money from a municipal corporation on a liquidated demand. *Chickaming v. Carpenter*, 106 U. S. 663, 665, 27 L. Ed. 307.

87. *Contracts*.—The relator recovered judgment against the city of New Orleans upon contracts for municipal purposes. The city took an appeal. The relator caused a fi. fa. to issue and be levied upon certain moneys due and to become due to the city by street railway companies. During the pendency of these cases in the federal supreme court, the relator and the city entered into a compromise, by which it was agreed that the city should dismiss the appeal, and that the relator should renounce his seizures under the fi. fa., also that the bonus due and to become due by railway companies should be applied to the relator's judgment, and

dues and demands due the state," regardless of a subsequent statute which impairs the obligation of the contract created by the prior act.<sup>88</sup>

(3) *For Municipal Aid*.—The writ will issue to compel a municipal corporation to fulfill the obligations arising from its subscription to stock of a railroad company.<sup>89</sup> The municipality may be compelled to issue bonds in payment of its subscription;<sup>90</sup> and, when such bonds have been issued, the liability of the municipality on them may be enforced by mandamus to compel the levy and collection of taxes.<sup>91</sup>

4. **LEVY AND COLLECTION OF TAXES**.—a. *In General*.—Mandamus is the proper remedy to compel the levy and collection of a tax by a municipal corporation to enable it to discharge its legal obligations.<sup>92</sup> By it the court can compel the municipal officers to do all the different ministerial acts legally imposed upon them.<sup>93</sup> In such case, the writ is in the nature of a writ of execution.<sup>94</sup>

b. *Authorized by Statute*.—(1) *Necessity for*.—The power to levy and collect taxes rests in the legislative branch of government, not in the judicial.<sup>95</sup> The judiciary in issuing the writ of mandamus confer no additional powers upon the

the balance to be funded upon the provisions of act number 67 of 1884. The relator having complied with the terms of the compromise on his part, it was held that mandamus will lie to compel the performance of the compromise by the city. *New Orleans Board of Liquidation v. Hart*, 118 U. S. 136, 30 L. Ed. 65.

88. **Created by statute**.—The bonds and coupons in the case were issued by the state of Virginia, under the act of March 30, 1871, known as the "Funding Act," and the treasurer refused to accept the coupons on the authority of the act of 1876, § 117. *Hartman v. Greenhow*, 102 U. S. 672, 26 L. Ed. 271.

The petitioner, an otherwise duly qualified attorney, tendered certain coupons, receivable in payment of taxes under the act of the state of Virginia March 30, 1871, in payment of his license tax, to the county treasurer of Fauquier County. The treasurer refused to receive the coupons. Mandamus will issue to compel the receipt of the coupons as provided by the act of January 4, 1882. *Sands v. Edmunds*, 116 U. S. 585, 29 L. Ed. 739. See the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 786.

89. **For municipal aid**.—*United States v. New Orleans*, 98 U. S. 381, 25 L. Ed. 225.

90. **To issue bonds**.—In this case the county commissioners subscribed to the stock of a railroad company and thereby became bound to issue county bonds in payment. The bonds were not issued. On the petition of a judgment creditor of the railroad company, it was held that mandamus would lie to compel the issuance of the bonds. *Smith v. Bourbon County*, 127 U. S. 105, 32 L. Ed. 73. See, also, *New Orleans Board of Liquidation v. Hart*, 118 U. S. 136, 30 L. Ed. 65.

91. **To levy taxes to pay bonds**.—See post, "Bonds," VIII. M. 4, e, (1). And see the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 810.

92. **Levy and collection of taxes**.—*Rutz v. Muscatine*, 8 Wall. 575, 582, 19 L. Ed.

490; *Lower v. United States*, 91 U. S. 536, 23 L. Ed. 420; *Board of Comm'rs v. Aspinwall*, 24 How. 376, 16 L. Ed. 735; *Meriwether v. Garrett*, 102 U. S. 472, 518, 26 L. Ed. 197; *Heine v. Levee Comm'rs*, 19 Wall. 655, 22 L. Ed. 223; *Memphis v. United States*, 97 U. S. 293, 300, 24 L. Ed. 920; *United States v. Fort Scott*, 99 U. S. 152, 25 L. Ed. 348; *Cherokee County Comm'rs v. Wilson*, 109 U. S. 621, 625, 27 L. Ed. 1053; *East St. Louis v. Amy*, 120 U. S. 600, 604, 30 L. Ed. 798.

Under the acts of the state of Kansas, of February 25, 1870, March 2, 1872, and March 9, 1874, it is the duty of the county commissioners, upon the failure of the township trustee to do so, to levy all taxes required to meet the liabilities of the township not otherwise provided for, and mandamus may issue to compel the performance of such duty. *Cherokee County Comm'rs v. Wilson*, 109 U. S. 621, 625, 27 L. Ed. 1053. See ante, "State Officers," VII, F, 7, b, (5), (d); "Where Writ Issues from United States Court," VII, J, 2.

93. **All different steps enforceable by**.—*Barkley v. Levee Comm'rs*, 93 U. S. 258, 265, 23 L. Ed. 893.

94. **In nature of execution**.—See ante, "Original or Final Process," II, E; post, "Judgments," VIII, M, 4, e, (2).

95. **Power of legislature**.—*Meriwether v. Garrett*, 102 U. S. 472, 514, 26 L. Ed. 197; *East St. Louis v. Zebley*, 110 U. S. 321, 324, 28 L. Ed. 162; *United States v. County of Clark*, 95 U. S. 769, 24 L. Ed. 545.

"The levying of taxes is not a judicial act. It has no elements of one. It is a high act of sovereignty, to be performed only by the legislature upon considerations of policy, necessity, and the public welfare." *Meriwether v. Garrett*, 102 U. S. 472, 515, 26 L. Ed. 197.

The power to levy and collect taxes is a legislative function in this country and does not belong to a court of equity, and can only be enforced by a court of law, through the officers authorized by the legislature to levy the tax, if a writ of man-



municipal corporation.<sup>96</sup> Where the legislature does not authorize the levy and collection of the tax, it cannot be enforced by mandamus;<sup>97</sup> and where the legislature prescribes a maximum limit to the amount of taxes to be levied and collected by the municipal corporation, it cannot be compelled by mandamus to levy a tax in excess of such amount.<sup>98</sup>

(2) *Repeal of Statute—Impairment of Contract.*—The levy and collection of a tax cannot be enforced by mandamus where the law empowering the municipality to levy and collect it has been repealed;<sup>99</sup> but a law, passed subsequent to the incurring of an obligation, which restricts the taxing power of the corporation, is a law impairing the obligation of contract, and the municipal corporation may be compelled by mandamus to exercise such taxing power as it possessed prior to the passage of such statute.<sup>1</sup>

damus is appropriate to that purpose. *Heine v. Levee Comm'rs*, 19 Wall. 655, 22 L. Ed. 223.

"Nor are they different when levied under writs of mandamus for the payment of judgments, and when levied for the same purpose by statute. The levy in the one case is as much by legislative authority as in the other. The writs of mandamus only require the officers of assessment and collection to obey existing law. In neither case are the taxes liens upon property unless made so by statute." *Meriwether v. Garrett*, 102 U. S. 472, 514, 26 L. Ed. 197.

"The important question in this case is, whether the law of the state empowered the city of Memphis to levy the tax which by the writ of mandamus it was commanded to levy. If it did not, the award of the writ cannot be sustained, for a mandamus will not be granted to compel the levy of a tax not authorized by law." *Memphis v. United States*, 97 U. S. 293, 294, 24 L. Ed. 920.

**96. The writ confers no power.**—*United States v. County of Macon*, 99 U. S. 582, 591, 25 L. Ed. 331.

**97. Where not authorized by legislature.**—*Supervisors v. United States*, 18 Wall. 71, 77, 21 L. Ed. 771; *Lafayette County Comm'rs v. Moulton*, 112 U. S. 217, 28 L. Ed. 698.

**98. Where maximum amount of tax prescribed.**—"We have no power by mandamus to compel a municipal corporation to levy a tax which the law does not authorize. We cannot create new rights or confer new powers. All we can do is to bring existing powers into operation. In this case it appears that the special tax of one-twentieth of one per cent has been regularly levied, collected and applied, and no complaint is made as to the levy of the one-half of one per cent for general purposes. What is wanted is the levy beyond these amounts, and that, we think, under existing laws, we have no power to order." *United States v. County of Macon*, 99 U. S. 582, 591, 25 L. Ed. 331.

Where the statute authorizing a county to subscribe for stock in a railroad company and issue its bonds therefor, limits its power to provide for the payment of them to an annual special tax of one-

twentieth of one per centum, and other laws then and still in force empowered it to levy a tax for general purposes not exceeding one-half of one per centum, upon the assessed value of the taxable property of the county, held, that, in the absence of further legislation, a mandamus will not lie to compel the levy of taxes beyond the amount so authorized. *United States v. County of Macon*, 99 U. S. 582, 25 L. Ed. 331, followed in *United States v. Macon County*, 144 U. S. 568, 36 L. Ed. 544.

Where a county court has no authority by law to levy, in addition to a special tax, a county tax exceeding the maximum rate on the valuation of the taxable property in the county, there was no error in its refusal to order a mandamus to enforce the collection of such tax. *United States v. County of Clark*, 95 U. S. 769, 24 L. Ed. 545.

**By an act of the state of Louisiana of 1869** it is provided that a court, on rendering a judgment against a parish, should order the levy of a tax sufficient to discharge it. The act of 1872 limited the power of the parish tax to an amount not to exceed one hundred per centum of the state tax. The petitioner recovered his judgment after the passage of the latter act. The latter act imposed an absolute limit to the power of taxation; any order of the court should be in subordination thereto; and mandamus will not lie to compel the levy of an amount beyond this limit. *Stewart v. Jefferson Police Jury*, 116 U. S. 135, 29 L. Ed. 588.

**99. Where taxing power has been repealed.**—"So long as the law authorizing the tax continues in force, the courts may, by mandamus, compel the officers empowered to levy it or charged with its collection, if unmindful and neglectful in the matter, to proceed and perform their duty; but when the law is gone, and the office of the collector abolished, there is nothing upon which the courts can act. The courts cannot continue in force the taxes levied, nor levy new taxes for the payment of the debts of the corporation." *Meriwether v. Garrett*, 102 U. S. 472, 514, 26 L. Ed. 197.

**1. Where taxing power restricted after incurring of obligation.**—Where laws



c. *Authorized by Charter*.—The taxing power may be conferred upon the municipal corporation in its charter.<sup>2</sup> Where one section of a city's charter limits its taxing power to a fixed amount, and another section empowers a tax to pay a judgment, mandamus may issue to compel the city to levy a special tax under the latter provision, in addition to the tax provided for in the former.<sup>3</sup>

d. *Prerequisites*—(1) *In General*.—Under the laws of Illinois, it is not a prerequisite to the right to enforce the levy of municipal taxes that a statement of the vote authorizing it be filed with the county clerk.<sup>4</sup>

(2) *Reduction of Claim to Judgment*—(a) *Necessity for*.—The proper proceeding to enforce the liability of a municipal corporation, is to sue and obtain a judgment establishing the validity and amount of the obligation; to cause an execution to issue and be returned nulla bona and then have a mandamus to issue to compel the corporation to levy and collect a tax.<sup>5</sup>

(b) *Impeaching Judgment*.—A judgment against a municipal corporation, on which a mandamus has been issued to compel the levy and collection of a tax for

have been passed restricting the power of a city to levy a tax, which laws are unconstitutional as impairing the obligation of contracts, the city may be compelled by mandamus to exercise such taxing power as she possessed prior to the passage of such statutes. *Wolff v. New Orleans*, 103 U. S. 358, 26 L. Ed. 395. See the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, pp. 781, 848, 862.

**The act of Illinois of January 1st, 1857**, requiring taxes to the requisite amount to be collected, in force when the bonds were issued, is still in force for all the purposes of this case. The act of February 14th, 1863, is, so far as it affects these bonds, a nullity. It is the duty of the city to impose and collect the taxes in all respects as if that act had not been passed. A different result would leave nothing of the contract, but an abstract right—of no practical value—and render the protection of the constitution a shadow and a delusion. The circuit court erred in overruling the application for a mandamus. *Von Hoffman v. Quincy*, 4 Wall. 535, 555, 18 L. Ed. 403. See, also, *Butz v. Muscatine*, 8 Wall. 575, 584, 19 L. Ed. 490.

**2. Authorized by charter**.—Where the charter of a city limits the power to tax to an annual tax not to exceed one per centum per annum upon the assessed value of all taxable property, and further provides for the levy and collection of the tax not to exceed three-tenths per centum for the purpose of paying interest on bonds, and providing a sinking fund for their liquidation, a judgment creditor is entitled to a writ of mandamus to compel the levy of such assessment and the appropriation of the money collected to the judgment. *East St. Louis v. Zebbley*, 110 U. S. 321, 324, 28 L. Ed. 162.

**3. Power conferred by different provisions in charter**.—Section 2 of article 3 of the charter of the city of Louisiana, Missouri, provides that the city council shall have power to levy and collect taxes not to exceed one and one-half per centum per annum upon all taxable property by

the state law. Section 23 of article 7 provides that, if the city council do not provide for the payment of the city's obligations, a city court, before whom a judgment on such liability may be obtained, may order the levy of a tax to pay such judgment, not to exceed one per centum per annum upon the taxable property. Held, that the special tax provided for in the latter section may be levied in addition to that provided for in the former. And also that this case comes within the provision of §§ 2415 and 2416 of the Revised Statutes. *City of Louisiana v. United States*, 103 U. S. 289, 26 L. Ed. 358.

**4. Prerequisites**.—Where the purchasers of bonds, issued by a township in payment of subscription to railroad stock in the state of Illinois, proceeded under §§ 4 and 5 of the act of Illinois of April 16, 1862, providing that when the bonds are registered by the state auditor and transmitted to the county clerk it shall be the duty of the latter to assess a tax to be appropriated in payment of a bond, § 12 of the act of March 24, 1869, providing that it shall be the duty of the county clerk to collect the taxes upon a certification to him by the town clerk of "a transcript or statement" of the vote given, and the amount or vote to be subscribed, and the rate of interest to be paid, does not form a condition precedent to the duty of the county clerk to proceed with the assessment of the taxes to satisfy a judgment recovered by the relators. *Hawley v. Fairbanks*, 108 U. S. 543, 549, 27 L. Ed. 820.

**5. Necessity for judgment**.—*Heine v. Levee Comm'rs*, 19 Wall. 655, 657, 660, 22 L. Ed. 223; *Chickaming v. Carpenter*, 106 U. S. 663, 665, 27 L. Ed. 307; *Meriwether v. Garrett*, 102 U. S. 472, 518, 26 L. Ed. 197; *Davenport v. County of Dodge*, 105 U. S. 237, 242, 26 L. Ed. 1018; *County of Greene v. Daniel*, 102 U. S. 187, 26 L. Ed. 99; *Graham v. Norton*, 15 Wall. 427, 21 L. Ed. 177; *Bath County v. Amy*, 13 Wall. 244, 20 L. Ed. 539; *Riggs v. Johnson County*, 6 Wall. 166, 197, 18 L. Ed. 768; *The Supervisors v. Durant*, 9 Wall. 415,

its satisfaction, cannot be impeached by the answer of the corporation to the writ of mandamus.<sup>6</sup> A judgment is conclusive of the validity of bonds upon which rendered.<sup>7</sup>

e. *To Enforce Particular Obligations*—(1) *Bonds*.—The writ of mandamus may issue to compel a municipal corporation to levy and collect taxes to pay its bonds<sup>8</sup>

417, 19 L. Ed. 732; *McIntire v. Wood*, 7 Cranch 504, 3 L. Ed. 420; *McClung v. Silliman*, 6 Wheat. 598, 601, 5 L. Ed. 340; *Kendall v. United States*, 12 Pet. 524, 526, 9 L. Ed. 1181; *The Secretary v. McGarrahan*, 9 Wall. 298, 311, 19 L. Ed. 579; *Harshman v. Knox County*, 122 U. S. 306, 319, 30 L. Ed. 1152; *Von Hoffman v. Quincy*, 4 Wall. 535, 18 L. Ed. 403; *Supervisors v. United States*, 4 Wall. 435, 18 L. Ed. 419; *Galena v. Amy*, 5 Wall. 705, 18 L. Ed. 560; *Walkley v. Muscatine*, 6 Wall. 481, 18 L. Ed. 930.

**Under laws of Michigan.**—It has been determined in the courts of the state of Michigan, that a judgment is not necessary to lay the foundation for a writ of mandamus to require the officers of a municipal corporation to levy and collect a tax. *Chickaming v. Carpenter*, 106 U. S. 663, 665, 27 L. Ed. 307.

**Under laws of Nebraska.**—In proceedings under the act of 1869 of the state of Nebraska, providing for the issuing of bonds by a precinct of the county, and that such bonds shall be enforced by mandamus, it is necessary in a federal court that the petitioner first obtain a judgment. *Davenport v. County of Dodge*, 105 U. S. 237, 243, 26 L. Ed. 1018.

**6. Impeaching judgment.**—On application by a creditor for mandamus against county officers to levy a tax to pay a judgment, the defendant cannot impeach the judgment by setting up that interest was improperly given in it. This would be to impeach it collaterally. *Supervisors v. United States*, 4 Wall. 435, 18 L. Ed. 419; *Harshman v. Knox County*, 122 U. S. 306, 318, 30 L. Ed. 1152. See the title RES ADJUDICATA.

**7. Impeaching obligation on which rendered.**—When a creditor has a judgment at law for a debt against a city on the city's bonds, the city cannot set up in defense to an application for mandamus that the bonds were not sanctioned by a requisite popular vote. *The Mayor v. Lord*, 9 Wall. 409, 19 L. Ed. 704.

"By the judgment of the circuit court, for the enforcement of which the mandamus is asked, the fact of the issue of the bonds and the liability of the town for the payment of the coupons held by the judgment creditor was judicially determined." *Hawley v. Fairbanks*, 108 U. S. 543, 549, 27 L. Ed. 820.

When the judgments of the circuit court of the United States were presented to the clerk he was officially informed that the liability of the town for the payment of the coupons sued for had been judicially established, and it became his duty, under § 13, to compute the tax necessary to

pay them, and put it in the way of collection. No further certificate from any town officer was necessary. The issue of the bonds, under which the judgment creditor claimed the right to a tax, was conclusively proven, and that was enough. *Hawley v. Fairbanks*, 108 U. S. 543, 550, 27 L. Ed. 820.

**8. To pay bonds.**—*Heine v. Levee Comm'rs*, 19 Wall. 655, 657, 22 L. Ed. 223; *Scotland County Court v. Hill*, 140 U. S. 41, 35 L. Ed. 351; *County of Cass v. Johnston*, 95 U. S. 360, 24 L. Ed. 416; *County of Cass v. Jordan*, 95 U. S. 373, 24 L. Ed. 419; *East St. Louis v. Jebley*, 110 U. S. 321, 23 L. Ed. 162; *Clay County v. McAleer*, 115 U. S. 616, 619, 29 L. Ed. 482; *Hawley v. Fairbanks*, 108 U. S. 543, 551, 27 L. Ed. 820; *Labette County Comm'rs v. Moulton*, 112 U. S. 217, 28 L. Ed. 698.

**Issued under repealed statute.**—Mandamus will not lie to compel the levy of a tax to pay bonds issued under an abrogated statute, and which was consequently void. It was not sought to collect a tax to pay a judgment, but to obtain a remedy pertaining to the bonds. *Commissioners v. Loague*, 129 U. S. 493, 505, 32 L. Ed. 780. See the title RES ADJUDICATA.

**Under Illinois statute.**—A certification of the auditor of public accounts under §§ 4 and 5 of the act of Illinois of April 16, 1869, is not a condition precedent to the duty of a county clerk to assess a tax to pay a judgment recovered by the petitioners on bonds issued by the township in payment of subscription to railroad stock. *Hawley v. Fairbanks*, 108 U. S. 543, 551, 27 L. Ed. 820.

In this case the petitioner purchased bonds of a township of Illinois issued in payment of subscription to railroad stock. The petitioners proceeded under §§ 4 and 5 of the act of Illinois of April 16, 1869, providing that the purchasers of such bonds might have them registered by the state auditor and a record transmitted to the county clerk. It then becomes the duty of the county clerk to assess a tax to pay the judgment. Petitioners obtained a judgment against the township on the bonds. A certification from the town clerk to the county clerk that a judgment had been allowed by the board of auditors in pursuance of §§ 12 and 13 by the act of March 24, 1869, would have been, perhaps, the most appropriate way of informing the county clerk, but it is not the only way, and is not a condition precedent to the duty of the county clerk to assess the tax. *Hawley v. Fairbanks*, 108 U. S. 543, 550, 27 L. Ed. 820.

**Bonds of the city of New Orleans,** issued upon a subscription to the stock or



and the interest, accruing thereon.<sup>9</sup>

(2) *Judgments*—(a) *Where Execution Fails*.—A judgment against a municipal corporation, which cannot be enforced by the ordinary process of execution, may be enforced by a writ of mandamus to compel such corporation to levy and collect a tax, where so empowered by law. In this case, the writ of mandamus is in the nature of a writ of execution or other process to enforce judgment.<sup>10</sup> Mandamus will lie from a federal court to compel a municipal corpora-

a railroad company, under an ordinance which declared that the stock "should remain forever pledged for the payment of the bonds," are an absolute obligation of the city, which may be enforced by mandamus to compel the levy and collection of taxes. *United States v. New Orleans*, 98 U. S. 381, 25 L. Ed. 225.

9. *Interest on bonds*.—*United States v. New Orleans*, 98 U. S. 381, 398, 25 L. Ed. 225.

Where the commissioners of a county have authority by statute to issue bonds, and are required to levy a tax to pay the interest coupons as they become due, and, having issued such bonds, they neglect or refuse to assess the tax or pay the interest, a writ of mandamus is the proper legal remedy. *Board of Comm'rs v. Aspinwall*, 24 How. 376, 16 L. Ed. 735.

Petitioner in *Board of Comm'rs v. Aspinwall*, 24 How. 376, 16 L. Ed. 735, had previously recovered judgment for interest due on bonds issued by the county as material aid in the construction of a railroad, and the report of the case shows that the same legislative act which authorized the subscription made provision that the commissioners should annually "assess a special tax sufficient to realize the amount of interest to be paid for the year." Unanimous decision of the federal supreme court was that the writ of mandamus was the proper legal remedy to enforce that duty in case of neglect and refusal. *Riggs v. Johnson County*, 6 Wall. 166, 193, 18 L. Ed. 768.

Where bonds were not issued prior to January 1, 1874, by a county court in Missouri, in payment of its subscription to the stock of a railroad company, and the special tax of one-twentieth of one per centum, which, after the issue of the bonds, was allowed by law for the specific purpose of providing means to pay the interest on them, was levied for that year, held, that a mandamus to levy and collect such special tax for the years 1872 and 1873 would not lie. *United States v. County of Clark*, 95 U. S. 769, 24 L. Ed. 545.

Mandamus lies to compel payment of coupons on outstanding bonds. *Louisiana v. Pilsbury*, 105 U. S. 278, 26 L. Ed. 1090.

10. *Judgments*.—*Heine v. Levee Comm'rs*, 19 Wall. 655, 22 L. Ed. 223; *Chante City v. Trader*, 132 U. S. 210, 33 L. Ed. 345; *Mobile v. Watson*, 116 U. S. 280, 29 L. Ed. 620; *Rees v. Watertown*, 19 Wall. 107, 124, 22 L. Ed. 72; *Cane Girardeau County Court v. Hill*, 118 U. S. 68, 39 L. Ed. 73; *New Orleans Board of*

*Liquidation v. Hart*, 118 U. S. 136, 30 L. Ed. 65; *Barkley v. Levee Comm'rs*, 93 U. S. 258, 23 L. Ed. 893; *Macon County v. Huidekoper*, 134 U. S. 332, 33 L. Ed. 914; *East St. Louis v. Amy*, 120 U. S. 600, 604, 30 L. Ed. 798; *United States v. Memphis*, 97 U. S. 284, 24 L. Ed. 937; *Morgan v. Town Clerk*, 7 Wall. 610, 19 L. Ed. 202; *Supervisors v. United States*, 18 Wall. 71, 21 L. Ed. 771; *Memphis v. Brown*, 20 Wall. 289, 313, 22 L. Ed. 264; *Riggs v. Johnson County*, 6 Wall. 166, 18 L. Ed. 768; *Galena v. Amy*, 5 Wall. 705, 18 L. Ed. 560; *Walkley v. Muscatine*, 6 Wall. 481, 18 L. Ed. 930; *Von Hoffman v. Quincy*, 4 Wall. 535, 18 L. Ed. 403; *Board of Comm'rs v. Aspinwall*, 24 How. 376, 16 L. Ed. 735; *Supervisors v. United States*, 4 Wall. 435, 18 L. Ed. 419; *Weber v. Lee County*, 6 Wall. 210, 18 L. Ed. 781; *The Mayor v. Lord*, 9 Wall. 409, 19 L. Ed. 704.

It has been decided in numerous cases, founded on the refusal to pay corporation bonds, that the appropriate proceeding is to sue at law and by a judgment of the court establish the validity of the claim and the amount due, and by the return of an ordinary execution ascertain that no property of the corporation could be found liable to such execution and sufficient to satisfy the judgment. Then, if the corporation has authority to levy and collect taxes for the payment of the debt, a mandamus would issue to compel them to raise by taxation the amount necessary to satisfy the debt. *Heine v. Levee Comm'rs*, 19 Wall. 655, 657, 22 L. Ed. 223; *Riggs v. Johnson County*, 6 Wall. 166, 193, 18 L. Ed. 768; *United States v. Council of Keokuk*, 6 Wall. 514, 517, 18 L. Ed. 933.

"It is not now contended that mandamus is not a proper remedy in cases like the present, when a relator has obtained a judgment, which can be satisfied only by the levy of a tax, and when the proper officers of the municipality, against which the judgment has been obtained, refuse, or neglect to levy it. That it is a legitimate remedy has been ruled in very many cases." *The Supervisors v. Durant*, 9 Wall. 415, 417, 19 L. Ed. 732.

**Mandamus not bill in equity.**—After judgment at law for a sum of money against a municipal corporation, and execution returned unsatisfied, mandamus, not bill in equity, is the proper mode to compel the levy of a tax which the corporation was bound to levy to pay the judgment. *Walkley v. Muscatine*, 6 Wall. 481, 18 L. Ed. 930.

In *Walkley v. Muscatine*, 6 Wall. 481,



tion to levy and collect such tax.<sup>11</sup>

(b) *Where Judgment Rendered on Contract.*—Where a judgment, upon a contract stipulating for payment from the proceeds of taxes, is absolute, and the plaintiff therein is entitled at the time to a decree that the assessing and collecting officers of a parish of Louisiana should assess and collect a tax sufficient to pay it, and such decree having been entered, and those officers having failed in their duty, the relator is entitled to a writ of mandamus.<sup>12</sup>

18 L. Ed. 930, the complainant Walkley had procured judgments against the city of Muscatine for interest on bonds of the city, executions had been returned "nulla bona," the mayor and aldermen had refused to levy a tax for the payment of the judgments, and had used the annual tax for other purposes and paid nothing to plaintiff. Walkley then filed his bill in equity praying a decree that the mayor and aldermen be compelled to levy a tax and appropriate so much of its proceeds as might be necessary to pay his judgments. The federal supreme court held that the remedy was by mandamus at law. *Thompson v. Allen County*, 115 U. S. 550, 553, 29 L. Ed. 472.

**Under laws of Iowa.**—The established rule in the supreme court of the state of Iowa is, that, where the debt of a municipal corporation has been reduced to judgment and the judgment creditor has no other means to enforce the payment, mandamus will be issued to compel the proper officers of the municipality to levy and collect a tax for that purpose. *Riggs v. Johnson County*, 6 Wall. 166, 193, 18 L. Ed. 768.

In this case, where the questions presented for decision were the same as those decided in *Riggs v. Johnson County*, 6 Wall. 166, 18 L. Ed. 768, the doctrine of that case was affirmed. *Weber v. Lee County*, 6 Wall. 210, 18 L. Ed. 781.

The case of *Riggs v. Johnson County*, 6 Wall. 166, 18 L. Ed. 768, affirmed. *Riggs v. Johnson County*, 6 Wall. 518, 18 L. Ed. 918.

Bonds to the amount of four hundred and fifty thousand dollars were issued by the proper officers of Lee County in the state of Iowa, in favor of three railroad companies, in equal proportions. The undisputed facts are that the judgment remains unsatisfied; that the county has no property subject to execution; that the property of a private citizen cannot be taken in that state to satisfy a judgment against a municipal corporation; that the general laws of the state provide that where a judgment has been recovered against such a corporation, a tax must be levied to pay the judgment; that the power to levy the special tax, as authorized in the curative act of the general assembly, has been by law transferred from the county judge to the defendants, and that they have neglected and refused to levy and collect any tax to pay the judgment. Proper remedy of the judgment creditor in such a case in the state court, is by

mandamus to compel the proper officers of the county to levy a tax to pay the judgment. Such a creditor having recovered judgment in the circuit court, is entitled to the same remedy under the process acts passed by congress. *Weber v. Lee County*, 6 Wall. 210, 211, 212, 18 L. Ed. 781.

An act of congress passed on the admission of Iowa into the Union in 1845, having provided that the laws of the United States not locally inapplicable should have the same effect within that state as elsewhere—the process act of May 19th, 1828—by which the modes and forms of process in common-law suits were made the same in the circuit courts of the United States as those used in the highest state court of original jurisdiction—became applicable to the federal courts of Iowa. Accordingly, mandamus being, in the supreme court of the state, the remedy to compel a municipal corporation to levy a tax to pay a judgment of which a creditor has no means of obtaining payment, a party having a judgment in a circuit court is entitled to the same remedy in that court. *United States v. Council of Keokuk*, 6 Wall. 514, 18 L. Ed. 933.

**Under laws of Kansas.**—Mandamus is the proper remedy to compel the levy and collection of a tax on property of a township in the state of Kansas to pay a judgment upon a township debt. *Cherokee County Comm'rs v. Wilson*, 109 U. S. 621, 626, 27 L. Ed. 1053; *Labette County Comm'rs v. Moulton*, 112 U. S. 217, 222, 28 L. Ed. 698.

**11. Mandamus from federal court.**—Mandamus will lie from a federal court, to which the cause has been certified from another federal court, under the act of February 28, 1839, to compel a board of county commissioners to levy a tax upon the county property to discharge the judgment against the county. *Supervisors v. Rogers*, 7 Wall. 175, 180, 19 L. Ed. 162.

**12. Where judgment rendered on contract.**—"The position of the court that the relator was not entitled to the writ because the decree accompanying the judgment contemplated a levy of the tax in 1873 according to the assessment roll of that year, is without force. He was entitled, and the party succeeding to his interest is entitled, to a writ commanding the levy and collection of a sufficient tax to pay the judgment, according to the assessment roll of the year in which the levy is made, at any time until the judgment is satisfied; the right to demand the

(c) *Where Judgment Reversed*.—Mandamus cannot issue to compel the levy and collection of a tax to satisfy a judgment which has been reversed.<sup>13</sup>

(3) *Funded Debt*.—Where a municipal corporation is authorized by its charter to levy a tax to discharge its funded debt, mandamus will lie at the suit of a judgment creditor to compel the levy.<sup>14</sup>

f. *Where Statute Provides for Levy by Special Officers*.—Where a statute, empowering a municipal corporation to issue bonds, provides that the requisite tax to discharge them should be levied by special officers, this remedy is not exclusive, and the writ of mandamus will issue to compel a levy.<sup>15</sup>

g. *Where There Are No Officers to Whom Writ May Issue*.—Where there are no existing officers to whom the writ may properly issue, it will not lie to compel a municipal corporation to levy and collect a tax to discharge a judgment.<sup>16</sup> Under the township organization laws of the state of Illinois,

tax not depending upon the valuation of the taxable property for any year for general purposes. Such right was not only assured by the law in force when the contract was made, but was expressly declared in the decree accompanying the judgment and forming part of it." *Louisiana v. Police Jury of St. Martin's Parish*, 111 U. S. 716, 722, 28 L. Ed. 574.

13. *Where judgment reversed*.—In this case, a peremptory writ of mandamus was awarded, commanding the levy of a special tax for the payment of the judgment, rendered in favor of Jacobs and Smith and against the city of Shreveport, just reversed in the preceding case (*Shreveport v. Cole*, 129 U. S. 36, 32 L. Ed. 589, for want of jurisdiction. The judgment awarding the writ must, therefore, be reversed, and the cause remanded with directions to dismiss the petition. *Currie v. Jacobs*, 129 U. S. 44, 32 L. Ed. 592.

14. *To pay funded debt*.—The 4th section of the statute of Illinois, passed June 21, 1852, incorporating the city of Galena, provided that the city council "may, if the said city council believe that the public good and best interest of the city require," annually levy and collect a tax to discharge the city's funded debt. This section of the act was not repealed by the amendatory statutes of June 30, 1857, and February 6, 1865. At the suit of a judgment creditor, the writ of mandamus will issue to compel the levy and collection of the tax. *Galena v. Amy*, 5 Wall. 705, 18 L. Ed. 560.

Where a city has a power, such as the one above given, it is not a sufficient return to an alternative mandamus, commanding it to lay a special tax of one per centum to pay the principal, and one per centum to pay the interest and costs of judgments obtained against it for nonpayment of its funded debt, or show cause, etc., that it did, in one year, levy such a tax, and that the funds raised by it are wholly exhausted. Nor is it an argument against the issuing of a peremptory mandamus, that the city owes a large amount of other debts, and that if these taxes are collected, other creditors will be entitled to share in the distribution of the pro-

ceeds. *Galena v. Amy*, 5 Wall. 705, 18 L. Ed. 560.

15. *Where statute provides for levy by special officers*.—*Morgan v. Town Clerk*, 7 Wall. 610, 613, 19 L. Ed. 202.

Under the laws of Kansas, it is the duty of the county commissioners, when the office of township trustee is vacant, to levy all the taxes upon township property for the payment of township debts. In the present case it does not appear that there was no trustee of the township who could act; but in regard to bonds issued for railroad purposes, and to judgments rendered thereon, for principal or interest, the concurrence of the trustee of the township is not necessary to the levy of the tax necessary for their payment, but the duty is laid upon the commissioners of the county to levy the tax upon the township for that purpose. *Labette County Comm'rs v. Moulton*, 112 U. S. 217, 222, 28 L. Ed. 698.

16. *Where there are no officers to whom the writ may issue*.—*Barkley v. Levee Comm'rs*, 93 U. S. 258, 264, 23 L. Ed. 893; *Graham v. Folsom*, 200 U. S. 248, 252, 50 L. Ed. 464; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197; *Wolff v. New Orleans*, 103 U. S. 358, 368, 26 L. Ed. 395.

"When creditors are unable to obtain payment of their judgments against municipal bodies by execution, they can proceed by mandamus against the municipal authorities to compel them to levy the necessary tax for that purpose, if such authorities are clothed by the legislature with the taxing power; \* \* \* but, if those authorities possess no such power, or their office have been abolished and the power withdrawn, the remedy of the creditors is by an appeal to the legislature, which alone can give them relief." *Meriwether v. Garrett*, 102 U. S. 472, 518, 26 L. Ed. 197.

"The term of office of the commissioners expired in November, 1862, and no provision was made in the laws constituting the board, that the members should hold over until the election of their successors. It is true, a general act (of the state of Louisiana) had been passed in 1856, declaring that all state and parish officers should, after the expiration of their



township officers are liable to be mandamus until the appointment of their successors.<sup>17</sup>

h. *Where Officer Performed Full Duty.*—Where a taxing officer has performed the whole duty, in regard to the levy and collection of a tax, imposed upon him by law, he cannot be mandamus to do more.<sup>18</sup>

i. *Where Duty Rests on Another Officer.*—Under the laws of Alabama, it is the duty of the tax commissioners to levy a tax and order its collection. This duty can be enforced by mandamus; but the commissioners cannot be compelled by the writ to cause a tax collector to collect the tax.<sup>19</sup>

j. *Where Power to Tax Rests in Discretion of Officers.*—Where the law, empowering a municipal corporation to tax property, vests the determination of the propriety of such tax in certain officers, their discretion cannot be controlled by mandamus;<sup>20</sup> but, where it is the positive and absolute duty of such officers to levy the tax, the writ will lie.<sup>21</sup>

k. *Property Subject to Taxation.*—A levy upon all the property of a municipal corporation, taxable for other purposes, may be enforced by mandamus to pay a judgment obtained against the corporation.<sup>22</sup> Where a county contracts a debt

term of service, continue to perform the duties of their office until their successors should be induced into office. But the members of this board were neither state nor parish officers, and the laws for electing others in their stead had ceased to have operation." *Barkley v. Levee Comm'rs*, 93 U. S. 258, 263, 23 L. Ed. 893.

The difficulty is that no power exists in either court to fill the vacancy in the office of tax collector; and the case of *Supervisors v. Rogers*, 7 Wall. 175, 19 L. Ed. 162, where the laws of the state of Iowa expressly authorized the court to enforce its writ of mandamus by making such appointment, the only case in which it has ever been done, shows that without such legislative authority it cannot be done. *Thompson v. Allen County*, 115 U. S. 550, 559, 29 L. Ed. 472.

17. *Resignation of officer.*—*Badger v. United States*, 93 U. S. 599, 601, 23 L. Ed. 991. See ante, "After Resignation," VIII, L. 4.

18. *Where officer performed full duty.*—In this case, the petitioner recovered two judgments against Taylor County, Kentucky, upon coupons for payment of interest on bonds issued by the county in payment of its subscription to stock in a railroad company. The petition prays that the respondent, presiding judge of such county, levy and cause to be collected a tax to pay the judgment. The answer to the petition sets forth that the respondent had caused such tax to be levied by an order to that effect, and that he had also ordered that the county collector do collect such tax. By the acts of the state of Kentucky of 1869, 1871, and 1872, it is made the duty of the judge to levy the tax annually. Held, that as the judge had made the levy and ordered its collection, he had done all required of him by law, and nothing more could be compelled by mandamus. *Bass v. Taft*, 137 U. S. 458, 34 L. Ed. 752.

19. *Where duty rests on another officer.*—For the writ must issue directly against

him, whose duty the petitioner seeks to have performed. *Ex parte Rowland*, 104 U. S. 604, 617, 26 L. Ed. 861.

"If the collector failed to perform his duty, he could be compelled by mandamus to do what was required of him by law." *Ex parte Rowland*, 104 U. S. 604, 615, 26 L. Ed. 861.

20. *Where power to tax rests in the discretion of officers.*—*East St. Louis v. Zebley*, 110 U. S. 321, 28 L. Ed. 162.

21. The act of February 16th, 1863, of the state of Illinois, declares that "the board of supervisors under township organization, in such counties as may be owing debts which their current revenue, under existing laws, is not sufficient to pay, may, if deemed advisable, levy a special tax." The intent of the legislature was not to devolve a mere discretion, but to impose "a positive and absolute duty." The line which separates this class of cases from those which involve the exercise of a discretion, judicial in its nature, which courts cannot control, is too obvious to require remark. This case clearly does not fall within the latter category. *Supervisors v. United States*, 4 Wall. 435, 445, 447, 18 L. Ed. 419.

22. *Property subject to taxation.*—*United States v. Fort Scott*, 99 U. S. 152, 156, 25 L. Ed. 348.

A., having a decree against the city of Memphis for the payment of money, obtained, in March, 1875, a mandamus, commanding her to levy upon all the taxable property of the city a tax sufficient in amount to pay the decree. The city thereupon passed an ordinance levying a special tax, in professed conformity with the writ. A., finding that such special tax did not include merchants' capital, which, under the laws of the state, was taxable for general purposes, and that the required sum would not be raised, moved for a further peremptory mandamus, commanding that such merchants' capital, as assessed and returned for taxation for the year 1875, be included by the city within



and issues bonds therefor under a statute empowering it to tax the real property therein, and where, by a statute subsequent to the contracting, the county is empowered to levy a tax upon personal property also, mandamus will lie to direct a tax to be levied upon both species of property.<sup>23</sup>

l. *Where Whole of Leviable Taxes Required for Ordinary Purposes.*—Mandamus will not lie to compel a county to set aside a portion of the leviable amount of taxes to pay a judgment, where the whole amount is necessary for the ordinary municipal administration.<sup>24</sup> The question of what expenditures are proper and necessary for the ordinary municipal administration is not judicial; it is legislative, and may be confided by law in the municipal authority.<sup>25</sup> Where, by its charter, a city is authorized to levy and collect a tax for general purposes, it cannot be mandamusd to apply such tax to a judgment instead of to the general expenses of the municipal government.<sup>26</sup>

m. *Where Municipality Owes Other Debts.*—A writ of mandamus to compel the levy of a tax will not be refused because the city owes other debts to creditors, who will be entitled to share in the distribution of the proceeds, when such creditors do not complain.<sup>27</sup>

n. *Where Corporation Has Been Abolished.*—Where a municipal corporation has been abolished, obligations incurred during its existence may still be enforced by a writ of mandamus, if a tax has been provided for and there are officers to levy and collect it.<sup>28</sup> The writ may issue under the same conditions where the corporation has been reorganized.<sup>29</sup>

the property to be taxed for the payment of his decree, in accordance with the original writ. The court awarded the writ accordingly. Held, that the mandamus to compel the city to levy and collect the tax for the payment of the decree was process in execution, and that the court below rightfully exercised control over it in deciding that its order to levy a tax upon all the property of the city included the capital of merchants taxable under the laws of the state for general purposes. *Memphis v. Brown*, 97 U. S. 300, 24 L. Ed. 924.

23. *Cape Girardeau County Court v. Hill*, 118 U. S. 68, 30 L. Ed. 73.

24. *Where whole of leviable taxes required for ordinary purposes.*—*Clay County v. McAleer*, 115 U. S. 616, 619, 29 L. Ed. 482; *East St. Louis v. Zebley*, 110 U. S. 321, 28 L. Ed. 162; *Louisiana v. United States*, 103 U. S. 289, 291, 26 L. Ed. 358.

The petitioner in this case recovered a judgment against a county of Iowa. At the time of the contracting of the obligation, upon which the judgment was rendered, the power of the county to tax was limited to four mills, and afterwards increased to six, annually on the dollar of the assessed value of taxable property. This tax was leviable for the ordinary running expenses of the county government. The county had no power to levy any further tax. The full amount of the six mills was necessary for the ordinary expenses of government. On petition for mandamus to compel the county officers to set apart a part of the six mills to satisfy a judgment, it was held that this was not a proper case for mandamus. *Clay County v. McAleer*, 115 U. S. 616, 29 L. Ed. 482.

25. *East St. Louis v. Zebley*, 110 U. S. 321, 28 L. Ed. 162; *Clay County v. McAleer*, 115 U. S. 616, 29 L. Ed. 483.

"In the present judgment the court has undertaken to foresee it, and by mandamus to compel the city, by limiting its expenditures for its general purposes, to create the surplus which it appropriates. But the question, what expenditures are proper and necessary for the municipal administration, is not judicial; it is confided by law to the discretion of the municipal authorities. No court has the right to control that discretion, much less to usurp and supersede it." *East St. Louis v. Zebley*, 110 U. S. 321, 324, 28 L. Ed. 162.

26. Where the charter of a city limits its taxing power for all purposes to an annual tax of one per centum per annum upon all taxable property, and further provides that three-tenths of one per centum be applied to the payment of interest on certain bonds and to a sinking fund for their liquidation, mandamus will not lie at the suit of a judgment creditor of the bonds to compel the levy and appropriation of the remaining seven-tenths of one per centum to the judgments. *East St. Louis v. Zebley*, 110 U. S. 321, 324, 28 L. Ed. 162.

27. *Where municipality owes other debts.*—*Galena v. Amy*, 5 Wall. 705, 709, 18 L. Ed. 560.

28. *Where corporation has been abolished.*—See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 812. And see ante, "Where There Are No Officers to Whom Writ May Issue," VIII, M. 4, g.

29. *Where corporation has been re-cognized.*—The corporation of the city of Mobile was dissolved and a new corporation formed with different territorial

o. *Sale of Property*.—The proper officers may, by mandamus, be compelled to make sales of property in order to collect the taxes.<sup>30</sup>

p. *Application of Funds Collected*.—The funds collected by a special tax, pursuant to the direction of a mandamus, for a special purpose, cannot be otherwise appropriated.<sup>31</sup>

q. *Joining Obligations*.—The benefit to the relator, arising from a mandamus to compel the levy and collection of taxes to pay his judgment, will not be embarrassed by the joining with it of other obligations against the corporation.<sup>32</sup>

**N. Mandamus to Private Corporations**—1. To COMPEL INSPECTION OF BOOKS.—Mandamus will lie to compel a corporation to permit stockholders to inspect its books.<sup>33</sup>

2. COLLECTION OF UNPAID SUBSCRIPTIONS.—In the English courts, the writ will issue to compel corporation directors to make calls upon the subscribers.<sup>34</sup>

3. TO COMPEL PERFORMANCE OF CONTRACT.—Mandamus may issue to compel a corporation to perform its contract.<sup>35</sup>

4. TO RAILROADS—*a. In General*.—The only duties of a railroad company that will be enforced by mandamus are those declared by law.<sup>36</sup> No act which is contrary to public policy will be compelled.<sup>37</sup>

b. *To Build Road*.—If the charter requires the corporation to construct its road, it may be compelled to do so by mandamus.<sup>38</sup>

c. *To Build Bridge*.—Mandamus will lie to compel a railroad corporation to build a drawbridge in accordance with an express requirement of statute.<sup>39</sup>

d. *To Build Station*.—The duty of a railroad company to build stations at

limits but embracing substantially the same population, after the city had contracted the obligation upon which a judgment is now sought to be enforced by mandamus to compel the levy of taxes. Held, mandamus would issue. *Moble v. Watson*, 116 U. S. 289, 29 L. Ed. 620.

A public corporation, charged with specific duties, such as building and repairing levees within a certain district, being superseded in its functions by a law dividing the district, and creating a new corporation for one portion, and placing the other under charge of the local authorities, ceases to exist except so far as its existence is expressly continued for special objects, such as settling up its indebtedness, and the like. The court cannot, by mandamus, compel the new corporations to perform the duties of the extinct corporation in the levy of taxes for the payment of its debts, especially where their territorial jurisdiction is not the same, and the law has not authorized them to make such levy. *Barkley v. Levee Comm'rs*, 93 U. S. 258, 23 L. Ed. 893.

30. *Sale of property*.—*Meriwether v. Garrett*, 102 U. S. 472, 520, 26 L. Ed. 197.

31. *Application of funds collected*.—*Meriwether v. Garrett*, 102 U. S. 472, 520, 26 L. Ed. 197.

32. *Joining obligations*.—*Benbow v. Iowa City*, 7 Wall. 313, 315, 19 L. Ed. 79.

33. *Private corporations—Inspection of books*.—*Guthrie v. Harkness*, 199 U. S. 148, 50 L. Ed. 130.

34. *Collection of unpaid subscriptions*.—In the English courts a mandamus is sometimes awarded to compel the directors to make the necessary calls. But this remedy can avail only when there are directors. The remedy in equity is more

complete, and it is well recognized. *Hatch v. Dana*, 101 U. S. 205, 215, 25 L. Ed. 885. See the title STOCK AND STOCK-HOLDERS.

35. *To compel performance of contract*.—*Florida v. Anderson*, 91 U. S. 667, 23 L. Ed. 290.

36. *Mandamus to railroads*.—*Northern Pac. R. Co. v. Dustin*, 142 U. S. 492, 503, 35 L. Ed. 1092; *United States v. Union Pac. R., etc., Co.*, 160 U. S. 1, 50, 40 L. Ed. 319; *New Orleans, etc., R. Co. v. Mississippi*, 112 U. S. 12, 28 L. Ed. 619; *Union Pac. R. Co. v. Hall*, 91 U. S. 343, 23 L. Ed. 428.

"A writ of mandamus to compel a railroad corporation to do a particular act in constructing its road or buildings, or in running its trains, can be issued only when there is a specific legal duty on its part to do that act, and clear proof of a breach of that duty." *Northern Pac. R. Co. v. Dustin*, 142 U. S. 492, 498, 35 L. Ed. 1092.

37. *Northern Pac. R. Co. v. Dustin*, 142 U. S. 492, 35 L. Ed. 1092. See ante, "Positive," VIII, E, 3. And see the title RAILROADS.

38. *To build road*.—"If the charter of a railroad corporation simply authorizes the corporation, without requiring it, to construct and maintain a railroad to a certain point, it has been held that it cannot be compelled by mandamus to complete or to maintain its road to that point, when it would not be remunerative." *Northern Pac. R. Co. v. Dustin*, 142 U. S. 492, 499, 35 L. Ed. 1092.

39. *To build bridge*.—*Northern Pac. R. Co. v. Dustin*, 142 U. S. 492, 499, 35 L. Ed. 1092; *New Orleans, etc., R. Co. v. Mississippi*, 112 U. S. 12, 28 L. Ed. 619.

This was a petition for mandamus, by the attorney general of Mississippi, to



particular points is ordinarily enforced by a legislative body and not by a court through the use of mandamus.<sup>40</sup> Mandamus will not lie to compel a railroad corporation to build a station at a particular point, unless there is a specific duty to do so imposed by statute, and that duty has been violated.<sup>41</sup>

e. *To Run Trains to Certain Place*.—A railroad company may be compelled by mandamus to run its trains to a certain place.<sup>42</sup>

f. *To Operate Road as One Continuous Line*.—If the charter of a railroad corporation expressly requires it to maintain its railroad as a continuous line, it may be compelled to do so by mandamus.<sup>43</sup>

g. *To Receive and Transport Passengers and Freight*.—Mandamus will lie to compel a railroad company to receive, transport and discharge passengers and freight without charging discriminating prices.<sup>44</sup>

compel the plaintiff in error to remove a bridge constructed by it without a sufficient draw across Pearl River, and in lieu thereof to construct a bridge having a drawbridge sixty feet wide. The controlling question was, whether the railroad company was under any legal obligation to construct and maintain a drawbridge of the width specified. The statute of Mississippi relating to the plaintiff in error provided: "That in the central portion of the channel of the Pearl River, \* \* \* said company shall construct and maintain a drawbridge, \* \* \* not less than sixty feet in width," and also provided, that should the company locate their road across the channel of the Rigolet "below the principal entrance of Pearl River into the Rigolet, then the said company should not be required to construct a drawbridge across any bayou leading into Pearl River, or across any small pass or mouth of said river." The plaintiff in error relied upon the latter provision of the above statute and also upon the act of congress of March 2, 1868, to exempt him from constructing a drawbridge of the kind specified. Held, the former part of the statute applies and mandamus will lie. *New Orleans, etc., R. Co. v. Mississippi*, 112 U. S. 12, 28 L. Ed. 619.

40. *To build station*.—*Northern Pac. R. Co. v. Dustin*, 142 U. S. 492, 503, 35 L. Ed. 1092.

41. *Northern Pac. R. Co. v. Dustin*, 142 U. S. 492, 498, 35 L. Ed. 1092; *Atchison, etc., R. Co. v. Denver, etc., R. Co.*, 110 U. S. 667, 28 L. Ed. 291; *Texas & Pac. R. Co. v. Marshall*, 136 U. S. 393, 34 L. Ed. 385.

The defendant railroad company, whose charter provided that its road "shall be constructed in a substantial and workman-like manner, with all the necessary \* \* \* stations, etc.," at one time stopped its trains at Yakima City, Washington, then the most important town in Yakima County and the county seat. It did not build a station there, but after completing its road four miles further, established a freight and passenger station at North Yakima, which was a town laid out by the defendant on its own unimproved land, and thereupon ceased to stop its train at Yakima City. Yakima City rapidly

dwindled, and most of its inhabitants removed to North Yakima, which soon became the most important town in the county, and later the county seat. The defendant could build a station at Yakima City, but the cost of building one would be \$8,000, and the expense of maintaining it \$150 a month, and the earnings of the whole of this division of the defendant's road are insufficient to pay its running expenses. There are other stations for receiving freight and passengers which furnish sufficient facilities for the country south of North Yakima, which must include Yakima City, and the passenger and freight traffic of the people living in the surrounding country, considering them as a community, would be better accommodated by a station at North Yakima than by one at Yakima City. A writ of mandamus was applied for to compel the defendant company to build a station and stop its trains at Yakima City. Held, that a writ of mandamus will not lie, as there is not a specific legal duty on the part of the railroad corporation to construct a station at Yakima City and stop its trains there. *Northern Pac. R. Co. v. Dustin*, 142 U. S. 492, 507, 35 L. Ed. 1092.

"The court will never order a railroad station to be built or maintained contrary to the public interest." *Northern Pac. R. Co. v. Dustin*, 142 U. S. 492, 509, 35 L. Ed. 1092.

42. *To run trains to certain place*.—The company may be compelled to continue to run its trains to a certain place when so required by law. *Northern Pac. R. Co. v. Dustin*, 142 U. S. 492, 499, 35 L. Ed. 1092. See, also, *Gladson v. Minnesota*, 166 U. S. 427, 41 L. Ed. 1064.

43. *To operate road as one continuous line*.—The bridge constructed by the Union Pacific Railroad Company over the Missouri River, between Omaha in Nebraska and Council Bluffs in Iowa, is a part of the railroad. The company was authorized to build it only for the uses of the road, and is bound to operate and run the whole road, including the bridge, as one connected and continuous line. *Union Pac. R. Co. v. Hall*, 91 U. S. 343, 23 L. Ed. 428.

44. *To receive and transport passengers and freight*.—*Covington Stock-Yards*



## IX. Procedure.

**A. In General.**—The writ of mandamus can only be obtained by instituting an independent suit for that purpose. There must be, first, a showing by the relator in support of his right to the writ; and, second, process to bring in the adverse party, whose action is to be coerced, to show cause, if he can, against it. If he appears and presents a defense, the showings of the parties make up the pleadings in the cause, and any issue of law or fact that may be raised, must be judicially determined by the court before the writ can go out. Such a determination is a judgment in a civil action brought to secure a right.<sup>45</sup> By statute in some of the states, the proceedings on madamus are the same as in an ordinary action.<sup>46</sup>

**B. By What Law Governed.**—Where a statute gives a remedy by mandamus but does not undertake to regulate the process by which it is to be secured, the practice established in the tribunal from which the writ is asked is to be followed.<sup>47</sup>

**C. Election of Remedies.**—The doctrine of election of remedies applies to proceedings in mandamus.<sup>48</sup>

**D. Prerequisites**—1. **DEMAND.**—Previous to making application for a writ to command the performance of any particular act, an express and distinct demand or request to perform it must have been made by the relator or prosecutor upon the respondent, and it must appear that he refused to comply with such demand, either in direct terms or by conduct from which a refusal can be conclusively inferred.<sup>49</sup>

2. **OBTAINING JUDGMENT.**—It is a necessary step, towards obtaining a mandamus from a federal court, that a judgment against the respondent be first

*Co. v. Keith*, 139 U. S. 128, 35 L. Ed. 73.

**45. Procedure.**—"The proceeding may be likened to a creditor's bill in equity, which is resorted to in aid of execution. The writ which is wanted cannot be had on application to a ministerial officer. It can only issue after a judgment of the court to that effect in an independent adversary proceeding instituted for that special purpose. Such a judgment is, in our opinion, a final judgment in a civil action, within the meaning of that term as used in the statutes regulating writs of error to this court." *Davies v. Corbin*, 112 U. S. 36, 40, 28 L. Ed. 627.

**46. As in an action by statute.**—By § 3379 of the Iowa Code it is provided that "the pleadings and other proceedings in any action in which a mandamus is claimed, shall be the same in all respects as nearly as may be, and costs shall be recovered by either party as in an ordinary action for the recovery of damages." *Chicago, etc., R. Co. v. Crane*, 113 U. S. 424, 432, 28 L. Ed. 1064.

**47. By what law governed.**—*Davenport v. County of Dodge*, 105 U. S. 237, 243, 26 L. Ed. 1018.

**48. Election of remedies.**—*Kendall v. Stokes*, 3 How. 87, 99, 11 L. Ed. 506; *Ex parte DeGroot*, 6 Wall. 497, 18 L. Ed. 887. See the title **ELECTION OF REMEDIES**, vol. 5, p. 719.

**49. Prerequisites—Demand.**—"Were a demand made upon him, he might discharge the duty and render the interposition of the court unnecessary." *United States v. Boutwell*, 17 Wall. 604, 607, 21

L. Ed. 721, quoted in *Warner Valley Stock Co. v. Smith*, 165 U. S. 28, 32, 41 L. Ed. 621. See ante, "As Dependent upon Breach of Duty," VIII, F.

"While the authorities, says Mr. High, in his valuable treatise on the law of mandamus, are not altogether reconcilable as to the necessity of a previous demand and refusal to perform the act which it is sought to coerce, a distinction is made between the cases where the duties to be enforced are of a public nature, affecting the public at large, and those where the duties are of a private nature, affecting only the rights of individuals. 'And while,' continues the author, 'in the latter class of cases, where the person aggrieved claims the immediate and personal benefit of the act or duty whose performance is sought, demand and refusal are held to be necessary as a condition precedent to relief by mandamus; in the former class, the duty being strictly of a public nature, not affecting individual interests, and there being no one specially empowered to demand its performance, there is no necessity for a literal demand and refusal. In such cases the law itself stands in lieu of a demand, and the omission to perform the required duty in place of a refusal.' Extraordinary Legal Remedies, § 13." *Virginia v. Rives*, 100 U. S. 313, 330, 25 L. Ed. 667. Separate opinion of Mr. Justice Field, in which Mr. Justice Clifford concurred.

**Under practice in Alabama.**—In a proceeding in the courts of Alabama, under the act of December 31, 1868, for the en-

obtained.<sup>50</sup>

**E. Time of Instituting Proceedings**—1. **PREMATURE.**—Proceedings for mandamus, instituted previous to the default of the person to whom directed, are premature.<sup>51</sup>

2. **LIMITATIONS OR LACHES.**—The authorities are much in conflict as to whether a statute of limitations, without express words to that effect, governs a proceeding in mandamus as though it were an ordinary civil action.<sup>52</sup> The writ may well be refused when the relator has slept upon his rights for an unreasonable time,<sup>53</sup> and especially if the delay has been prejudicial to the defend-

forcement of payment of bonds and coupons of a county, given in payment of subscription to railroad stocks, presentation and demand are not necessary; but, if the proceeding is in a federal court, a judgment is necessary. *County of Greene v. Daniel*, 102 U. S. 187, 26 L. Ed. 99.

**Under the code of Washington Territory**, § 2171, no demand upon the defendant was necessary before applying for the writ. *Northern Pac. R. Co. v. Dustin*, 142 U. S. 492, 508, 35 L. Ed. 1092.

**50. Obtaining judgment.**—See ante, "Necessity for," VIII, M, 4, d, (2), (a).

"Judgment is but one of the steps in the proceeding to obtain the mandamus." *Davenport v. County of Dodge*, 105 U. S. 237, 243, 26 L. Ed. 1018.

**In proceedings under the act of 1869 of the state of Nebraska** providing for the issuing of bonds by a precinct of a county, and for their enforcement by mandamus, it is necessary, in a federal court, that the petitioner first obtain a judgment. *Davenport v. County of Dodge*, 105 U. S. 237, 243, 26 L. Ed. 1018.

**Where a court of county commissioners in Alabama**, pursuant to the act of December 31, 1868 (Phamphlet Laws of 1868, p. 514), subscribed for stock in a railroad company, and issued the bonds of the county in payment therefor, the holder of them, or of the coupons thereto attached, is not required to present them when due to that court for allowance, before commencing suit, to enforce their payment. In case of nonpayment, a mandamus will, by the laws of the state, lie against that court to compel the assessment and levy of the necessary taxes; but a holder, who resorts to the courts of the United States, must there reduce the bonds or the coupons to judgment before he is entitled to that remedy. *County of Greene v. Daniel*, 102 U. S. 187, 26 L. Ed. 99.

**51. Time of instituting proceedings.**—See ante, "As Dependent upon Breach of Duty," VIII, F; "Time of Issuance," IX, J, 3, b.

**52. Limitation and laches.**—"Some of the cases hold that the statute of limitations applies which would govern an ordinary action to enforce the same right. Other cases hold that the statute of limitations does not apply as it would to ordinary civil actions, but the relator is only barred from relief where he has slept upon his rights an unreasonable time, particularly when the delay has been preju-

dicial to the rights of the respondent. The cases pro and con are collected in a note to § 30b, High, Extraordinary Legal Remedies, 3d Ed." *Duke v. Turner*, 204 U. S. 623, 628, 51 L. Ed. 652.

The statute of limitations relied upon in the case at bar is the three years' limitation, contained in second paragraph, § 18, Oklahoma Code, 2 Wilson's Rev. Stats. 973, 975, as to statutory liabilities, and § 23, regulating the time for the beginning of a new action to one year after reversal or failure of a former action. The limitation to three years, said to be applicable here, is upon an action created by statute other than forfeiture or penalty, but this language is in a section limiting civil actions other than for the recovery of real property, and the language used in § 23 has reference to actions of like character. The proceeding in mandamus is not a civil action, and therefore not within the terms of the statute of limitations. *Duke v. Turner*, 204 U. S. 623, 629, 51 L. Ed. 652.

Mandamus to the secretary of the treasury to compel him to deliver a warrant under the act of July 27th, 1861, directing him to refund to the governor of any state the expenses properly incurred in raising troops to aid in suppressing the rebellion, was refused; the secretary not having been asked to pay the money until the time limited in the appropriation act for the appropriation to take effect had expired; the right of the court to issue such order under other circumstances not being meant to be passed upon. *Commonwealth v. Boutwell*, 13 Wall. 526, 20 L. Ed. 631. See ante, "Action or Suit," II, D.

**53. Unreasonable delay.**—*Duke v. Turner*, 204 U. S. 623, 632, 51 L. Ed. 652.

Following the rule recognized and approved in *Chapman v. County of Douglas*, 107 U. S. 348, 27 L. Ed. 378, the question is, should the writ be refused because the relator has slept upon his rights for an unreasonable time, and has the delay caused prejudice to the defendant, or to the rights of other interested person? Held, that the facts do not disclose any laches in asserting their rights such as would bar the right to obtain a writ of mandamus, nor does it appear that the municipal corporation has been in anywise prejudiced by the delay. *Duke v. Turner*, 204 U. S. 623, 629, 51 L. Ed. 652.

If, within six weeks from an order of

ant, or to the rights of other persons, though what laches, in the assertion of a clear legal right, would be sufficient to justify a refusal of the remedy by mandamus, must depend, in a great measure, on the character and circumstances of the particular case.<sup>54</sup>

**F. Parties**—1. **APPLICANTS**—a. *In General*.—Where it is the appropriate process for asserting the right he claims, any person is entitled to have a writ of mandamus issued.<sup>55</sup>

b. *Parties in Interest*.—A party asking for a mandamus must show clearly his interest in the matter which he presents as the ground of his application.<sup>56</sup>

c. *Sureties on Supersedeas Bond*.—Sureties on a supersedeas bond, who were not parties to the original judgment or to the writ of error thereto, are not so concerned in the execution of the mandate of the supreme court, affirming such judgment, as to entitle them to a review of the action of the circuit court in rendering judgment on the bond against them, by a writ of mandamus.<sup>57</sup>

d. *The State*.—If a mandamus is sought upon the ground that the defendant had manifested a decided intention not to perform a definite duty to the public, required by law, the petition should be presented in the name of a territory at the relation of its prosecuting attorney.<sup>58</sup>

e. *Private Individuals*.—In England, it seems, a writ of mandamus to compel the performance of a public duty may be issued at the instance of a private relator.<sup>59</sup> In this country, there has been a diversity of opinion upon the question,

dismissal of a case by a circuit court, the plaintiff appealed and the appellee did not move to dismiss that appeal before the case was called for argument, and the appeal being then dismissed, the plaintiff, seeking another mode of relief, within five weeks afterwards presented his petition for a writ of mandamus, there is no ground for imputing to him such laches as should deprive him of this remedy. In *Re Hohorst*, 150 U. S. 653, 37 L. Ed. 1211.

**54. Prejudicial to respondent**.—*Duke v. Turner*, 204 U. S. 623, 629, 51 L. Ed. 652.

**55. Parties—Applicants**.—*Kentucky v. Dennison*, 24 How. 66, 98, 16 L. Ed. 717; *Hagood v. Southern*, 117 U. S. 52, 69, 29 L. Ed. 805; *Thompson v. Allen County*, 115 U. S. 550, 558, 29 L. Ed. 472; *Noble v. Union River Logging R. Co.*, 147 U. S. 165, 172, 37 L. Ed. 123; *Ex parte Cutting*, 94 U. S. 14, 20, 24 L. Ed. 49.

Any person who would be injured by the omission of a duty may have mandamus issue for its enforcement. *Board of Liquidation v. McComb*, 92 U. S. 531, 541, 23 L. Ed. 623.

**56. Parties in interest**.—*Ex parte Fleming*, 2 Wall. 759, 17 L. Ed. 924; *Ex parte Milwaukee, etc., R. Co.*, 154 U. S., appx., 554, 18 L. Ed. 887; *Northern Pac. R. Co. v. Dustin*, 142 U. S. 492, 507, 35 L. Ed. 1092; *Gusman v. Marrero*, 180 U. S. 81, 87, 45 L. Ed. 436. See ante, "Remote Interests," VIII, D, 5.

Where a county has subscribed to railroad stock, and it has become the duty of the board of county commissioners to issue bonds to the railroad in payment, a judgment creditor of the railroad may apply for a writ of mandamus. *Smith v. Bourbon County*, 127 U. S. 105, 111, 32 L. Ed. 73.

**Equitable interests**.—In this case the petitioner does not show that he has such an interest in the matter as would justify the court to permit him to interfere. "He describes himself as equitable owner of certain bonds made by the La Crosse and Milwaukee Railroad Company. These bonds were secured by a mortgage; and it was in a suit brought to foreclose that mortgage that the sale was had of which he complains. \* \* \* We deem it sufficient to say that the petitioner, who had no interest in the matter at the time of the sale and confirmation, shows no right now to disturb what the parties who were interested have acquiesced in." *Ex parte Fleming*, 2 Wall. 759, 762, 17 L. Ed. 924.

**Holder of bond**.—The holder of a bond, and not the person to whom made, may apply for a writ of mandamus to enforce it. *Memphis v. Brown*, 20 Wall. 289, 22 L. Ed. 264.

**Right of possession**.—The federal supreme court will not compel a circuit court, by mandamus, to take property out of the hands of a receiver and deliver it to the petitioners in pursuance to a decree entered in the circuit court, where the federal court has decided, since the presentation of the petition, upon an appeal between the parties, that the possession of the property does not belong to the petitioners. *Ex parte Milwaukee, etc., R. Co.*, 154 U. S., appx., 554, 18 L. Ed. 887.

**57. Sureties on supersedeas bond**.—In *re Humes*, 149 U. S. 192, 194, 37 L. Ed. 698.

**58. The state**.—*Northern Pac. R. Co. v. Dustin*, 142 U. S. 492, 507, 35 L. Ed. 1092.

**59. Private individuals**.—In England—"Tapping on Mandamus," p. 28, asserts the rule in that country to be, that, 'in general,



unless the nonperformance of the duty works a special injury to the relator; and, in several of the states, it has been decided that the writ will not so issue.<sup>60</sup> The decided preponderance of American authority is in favor of the doctrine that private persons may move for a mandamus to enforce a public duty, not due to the government as such, without the intervention of a government law officer.<sup>61</sup> This is true in cases where the defendant owes a duty, in the performance of which the prosecutor has a peculiar interest; and in cases of applications to compel the performance of duties to the public by corporations.<sup>62</sup> A mere creditor of a state has no standing to ask for the writ to prevent the state from increasing its indebtedness.<sup>63</sup> The petition for the writ, in such cases, is properly presented in the name of the state by its prosecuting attorney.<sup>64</sup>

all those who are legally capable of bringing an action are also equally capable of applying to the court of king's bench for the writ of mandamus." Union Pac. R. Co. v. Hall, 91 U. S. 343, 354, 23 L. Ed. 428.

"In *The King v. The Seven & Wye Railway Co.*, 2 Barn. & Ad. 646, a private individual, without any allegation of special injury to himself, obtained a rule upon the company to show cause why a mandamus should not issue commanding them to lay down again and maintain part of a railway which they had taken up." Union Pac. R. Co. v. Hall, 91 U. S. 343, 354, 23 L. Ed. 428.

**60. In America.**—"Yet, even in the supposed analogous case, a bill may be sustained to enjoin the obstruction of a public highway, when the injury complained of is common to the public at large, and only greater in degree to the complainants. It was in *Pennsylvania v. The Wheeling, etc., Bridge Co.*, 13 How. 518, 14 L. Ed. 249, where the wrong complained of was a public wrong, an obstruction to all navigation of the Ohio River." Union Pac. R. Co. v. Hall, 91 U. S. 343, 355, 23 L. Ed. 428.

**61. Union Pac. R. Co. v. Hall**, 91 U. S. 343, 355, 23 L. Ed. 428.

Under the laws of Alabama, a tax collector may be mandamusd to collect a tax levied by tax commissioners, on the application of a judgment creditor. The application need not be made by the tax commissioners. *Ex parte Rowland*, 104 U. S. 604, 613, 26 L. Ed. 861.

**62. Where individual has peculiar interest.**—"The appellants contend that the court erred in holding that Hall and Morse, on whose petition the alternative writ was issued, could lawfully become relators in this suit on behalf of the public without the assent or direction of the attorney general of the United States, or of the district attorney for the district of Iowa. They were merchants in Iowa, having frequent occasion to receive and ship goods over the company's road; but they had no interest other than such as belonged to others engaged in employments like theirs, and the duty they seek to enforce by the writ is a duty to the public generally." Union Pac. R. Co. v. Hall, 91 U. S. 343, 354, 23 L. Ed. 428.

"The principal reasons urged against the doctrine are, that the writ is prerogative in its nature—a reason which is of no force in this country, and no longer in England—and that it exposes a defendant to be harassed with many suits. An answer to the latter objection is that granting the writ is discretionary with the court, and it may well be assumed that it will not be unnecessarily granted." Union Pac. R. Co. v. Hall, 91 U. S. 343, 355, 23 L. Ed. 428.

"There is also, perhaps, a reasonable implication that congress, when they authorized writs of mandamus to compel the Union Pacific Railroad Company to operate their road according to law, did not contemplate the intervention of the attorney general in all cases. The act of 1873 does not prescribe who shall move for the writ, while the attorney general is expressly directed to institute the necessary proceedings to secure the performance of other duties of the company. For these reasons, we think the circuit court did not err in holding that Hall and Morse were competent to apply for the writ in this case." Union Pac. R. Co. v. Hall, 91 U. S. 343, 356, 23 L. Ed. 428.

**63. Creditor of a state.**—The amount of a state's indebtedness is a matter of eminently public concern, and it may admit of doubt, whether, in any case, the courts, at the instance of an individual citizen, even a taxpayer, would undertake to restrain the state officers in the execution of such laws. At all events, the case should be a very clear one to induce them to interpose by mandamus. *Board of Liquidation v. McComb*, 92 U. S. 531, 536, 23 L. Ed. 623.

"Where a person is neither a citizen nor a taxpayer, but is a citizen of another state, and presents himself simply in the character of a creditor of the state, the courts would hardly be justified in interfering on his behalf to prevent a supposed violation of the state constitution by an increase of the state debt. His interest is too remote to give him a standing in court for any such purpose." *Board of Liquidation v. McComb*, 92 U. S. 531, 536, 23 L. Ed. 623.

**64. Properly presented in name of state.**—Where mandamus is sought to compel the performance of definite duty to the

2. **RESPONDENTS**—a. *In General*.—A writ of mandamus is directed to some person, corporation or inferior court, commanding the performance of some particular thing appertaining to their office or duty.<sup>65</sup> It must be issued directly against him whose duty is sought to be enforced,<sup>66</sup> and not to one person to command another.<sup>67</sup> Persons who would not be concluded by the final order in a proceeding by mandamus cannot be properly made respondents.<sup>68</sup> To a mandamus to compel the land department to issue a patent to a pre-emption claimant, rival claimants are necessary parties.<sup>69</sup>

b. *Persons Owning Joint Duties*.—The writ may be addressed to one person, although it command the performance of a series of acts by other persons, each of which is a condition to the performance of its successor, where the right of the relator consists in the result legally flowing from the combined whole.<sup>70</sup>

c. *Courts and Judicial Officers*.—In a mandamus to a court, it is customary to direct the writ not merely to the court but to its judges by name.<sup>71</sup> At the present day, however, the direction to the different judges is little more than a mere matter of form.<sup>72</sup> Therefore, it may be directed to a court, consisting of dif-

public required by law, a petition is rightly presented in the name of the territory at the relation of its prosecuting attorney under the code of 1881 of the territory of Washington. *Northern Pac. R. Co. v. Dustin*, 142 U. S. 492, 507, 35 L. Ed. 1092.

65. **Respondents**.—*Kendall v. United States*, 12 Pet. 524, 614, 9 L. Ed. 1181.

66. **Person owing duty**.—*United States v. Boutwell*, 17 Wall. 604, 21 L. Ed. 721; *Commissioners v. Sellew*, 99 U. S. 624, 626, 25 L. Ed. 333. See ante, "Personal," VIII, E, 4.

67. Under the laws of Alabama, the county tax commissioners cannot be mandamusd to compel a tax collector to collect taxes, which the commission has assessed and levied. *Ex parte Rowland*, 104 U. S. 604, 617, 26 L. Ed. 861.

68. **Persons not concluded by proceeding**.—In a mandamus proceeding by the government against the railway company to compel it to comply with a charter provision to the effect that it will not make any agreement binding itself to prevent any telegraph company incorporated by any state has accepted the provisions of the act of Aug. 7, 1866, c. 772, a telegraph company with which it has made such an unlawful agreement could not properly be made a defendant, and no judgment in mandamus, as between the United States and the railway company, would conclude the rights of the telegraph company. *United States v. Union Pac. R., etc., Co.*, 160 U. S. 1, 50, 40 L. Ed. 319.

69. **Rival pre-emption claimants**.—*Litchfield v. The Register & Receiver*, 9 Wall. 575, 19 L. Ed. 681.

70. **Persons owing joint duties**.—"It can make no difference in principle that in a particular case the law, instead of casting the performance of the entire duty upon a single person, has divided it among several, each to perform but one act in the series, and each acting independently and not as responsible to any of the others, but all required to co-operate in the attainment of the single result, and by a

continuous and uninterrupted succession, so as to preserve the integrity and unity of the performance as an entire duty." *Labette County Comm'rs v. Moulton*, 112 U. S. 217, 224, 28 L. Ed. 698. See post, "Public Corporations," IX, F, 2, e.

**Levy and collection of taxes**.—"The levy and collection of a tax is not only an entire thing, although accomplished by successive steps and by separate officials, but is a continuous transaction, each one taking it up where his predecessor left it; and if the relator was compelled to obtain a separate mandamus against each person charged with the performance of a single service, the very delay and break in the continuity of the process might be, by the terms of the law itself, a sufficient answer to each succeeding writ; and if it were not, it would prolong the proceeding to such definite length as to deprive the writ of the very character of a remedy." *Labette County Comm'rs v. Moulton*, 112 U. S. 217, 224, 28 L. Ed. 698.

The present writ is precisely like that which was passed upon in the case of the *Cherokee County Comm'rs v. Wilson*, 109 U. S. 621, 27 L. Ed. 1053, although there the objection was made by the commissioners alone, who, it was held, were not entitled to complain on that account. *Labette County Comm'rs v. Moulton*, 112 U. S. 217, 225, 28 L. Ed. 698.

**Not duplicitious**.—The writ would not be duplicitious on that account. *Labette County Comm'rs v. Moulton*, 112 U. S. 217, 224, 28 L. Ed. 698.

71. **Courts and judicial officers**.—*Parker, Petitioner*, 131 U. S. 221, 226, 33 L. Ed. 123.

72. "The mandamus is to correct a mistake as to its jurisdiction, committed by the court, and although it is the custom in such cases to direct the writ not merely to the court but to its judges by name, yet including their names within the writ, except in special cases where disobedience may be apprehended, is at the present day little more than a mere matter of form.



ferent judges from those by whom the act, upon which the issuance of the writ is granted, was omitted or committed. Mandamus will lie to compel the judges of a court to reinstate a case dismissed by their predecessors, who consist of other judges than those at present constituting the court. A change in the constituent members of a court between the time of the wrongful dismissal of a cause, and the issuance of a mandamus to compel its reinstatement, does not constitute an obstacle to the issuance of the writ.<sup>73</sup>

d. *Governmental Officers*.—(1) *In General*.—The writ is directed to an officer as a person, and not to the office.<sup>74</sup>

(2) *After Resignation*.—Where it is provided by law that the resignation of an officer does not become effective until accepted or his successor appointed, he may be made a party defendant to a writ of mandamus after his resignation and before acceptance.<sup>75</sup>

e. *Public Corporations*.—A writ of mandamus may be directed to a municipal corporation in its corporate name,<sup>76</sup> or to any of its officers having a duty to perform, for the enforcement of which the writ is sought.<sup>77</sup> It may be directed to the mayor and aldermen,<sup>78</sup> a governing board,<sup>79</sup> or other proper officers.<sup>80</sup> The

Disobedience to the writ would be as unusual on the part of the court to which it is directed as would be a refusal to carry into effect the reversal of its judgment in an ordinary action." Parker, Petitioner, 131 U. S. 221, 226, 33 L. Ed. 123.

73. Parker, Petitioner, 131 U. S. 221, 226, 33 L. Ed. 123.

74. *Governmental officers*.—"If he be an officer, and the duty be an official one, still the writ is aimed exclusively against him as a person, and he only can be punished for disobedience. The writ does not reach the office. It cannot be directed to it." United States v. Boutwell, 17 Wall. 604, 607, 21 L. Ed. 721, quoted in Warner Valley Stock Co. v. Smith, 165 U. S. 28, 32, 41 L. Ed. 621, and Caledonian Coal Co. v. Baker, 196 U. S. 432, 440, 49 L. Ed. 540.

75. *After resignation*.—It has been so decided under the laws of Michigan. Edwards v. United States, 103 U. S. 471, 26 L. Ed. 314; Thompson v. United States, 103 U. S. 480, 26 L. Ed. 521. See post, "Plea of Pius Darrein Continuance," IX, J. 8; "To Existence of Duty of Respondent," IX, J. 10, d. (1). And see ante, "After Resignation," VIII, L. 4.

76. *Public corporations—In corporate name*.—A county in Kansas is a body politic, and a writ of mandamus is properly directed to it in its corporate name. Commissioners v. Sellev, 99 U. S. 624, 25 L. Ed. 333.

77. *To corporate officers*.—Smith v. Bourbon County, 127 U. S. 105, 110, 32 L. Ed. 73; Thompson v. United States, 103 U. S. 480, 483, 26 L. Ed. 521.

The officers of the municipality, to whom the writ may be directed, are those who stand as its legal representatives. Labette County Comm'rs v. Moulton, 112 U. S. 217, 28 L. Ed. 698.

78. *Mayor*.—A mandamus directed to the mayor and aldermen of a city is rightly directed, if it appears that they together constitute the city council and have the

government of it, although the city is incorporated by the name of "the city of Davenport," and by that name empowered by its charter to sue and be sued. The Mayor v. Lord, 9 Wall. 409, 19 L. Ed. 704.

79. *Governing board*.—Commissioners v. Sellev, 99 U. S. 624, 627, 25 L. Ed. 333; Warner Valley Stock Co. v. Smith, 165 U. S. 28, 32, 41 L. Ed. 621; Leavenworth v. Kinney, 154 U. S., appx., 642, 25 L. Ed. 336.

If a part of the members of the board have done all required of them by law, they will be protected, and those who are in actual default alone punished. Commissioners v. Sellev, 99 U. S. 624, 627, 25 L. Ed. 333.

"We think, therefore, that the peremptory writ was properly directed to the board in its corporate capacity." Commissioners v. Sellev, 99 U. S. 624, 627, 25 L. Ed. 333.

The writ may be directed to the commissioners of a county in Kansas, to compel them to levy and collect a tax to satisfy a judgment against a township within the county, on its bonds for municipal aid. Labette County Comm'rs v. Moulton, 112 U. S. 217, 28 L. Ed. 698.

A writ of mandamus, to compel the issuance of bonds by a board of county commissioners in payment of the county's subscription to railroad stocks, voted by them, issues against the board of county commissioners. Smith v. Bourbon County, 127 U. S. 105, 110, 32 L. Ed. 73.

80. *Other officers*.—Precincts in Nebraska are governed by the county commissioners, the governing board of the county, and by the appropriate officers of the state. Their relation to a county is like that of a ward to a city. The mandamus to enforce the levy and collection of the necessary taxes lies to the proper officers of the county alone. In Nebraska, there can be no bond except it be of a county, and, as a bond is to be made, it necessarily



writ may be directed to all officers upon whom the duty of levying and collecting a tax rests.<sup>81</sup>

f. *Private Corporations*.—The lessor of a railroad is a necessary party to a proceeding to compel its lessee to operate the road according to law.<sup>82</sup>

3. *INTERVENORS*.—Whether a third person will be permitted to intervene in a mandamus proceeding rests in the discretion of the court.<sup>83</sup>

4. *NEW PARTIES*.—See elsewhere in this title.<sup>84</sup>

**G. The Application**—1. *IN GENERAL*.—The petition is merely the process by which jurisdiction is invoked. It is the first step taken in mandamus proceedings.<sup>85</sup>

2. *FORM*—a. *In General*.—A bill in equity cannot serve the purpose of a petition for a writ of mandamus.<sup>86</sup>

b. *Verification*.—The petition must be verified.<sup>87</sup>

3. *STATEMENT OF FACTS*—a. *Prima Facie Case for Relief*.—The petition must set forth a prima facie case for the issuance of the writ.<sup>88</sup>

b. *To Show Breach of Duty*.—A petition for a mandamus to a court must set forth facts showing mistake, misconduct or omission of duty on the part of the court.<sup>89</sup>

**H. Abatement and Revival**—1. *MANDAMUS AGAINST OFFICERS*—a. *Duties Personal to Officer*—(1) *At Common Law*.—A proceeding in mandamus to enforce a personal duty of an officer, which exists only so long as he holds the office, abates upon his retirement from the office.<sup>90</sup> In the absence of a statu-

follows that a county must make it. *Davenport v. County of Dodge*, 105 U. S. 237, 241, 242, 26 L. Ed. 1018.

81. *Officers owing joint duties*.—Though the separate steps in levying and collecting the tax rests upon a part of the officers only, yet all must act co-operatively. *Labette County Comm'rs v. Moulton*, 112 U. S. 217, 28 L. Ed. 698.

It cannot be objected that the duty required of the county clerk and that of the county treasurer were separate and distinct from each other, and from that of the county commissioners; that neither the clerk nor the treasurer could act in the collection and payment of the tax, until after its levy by the commissioners; or that, as to each of those officers, it was shown on the face of the writ that he could not be in default. *Labette County Comm'rs v. Moulton*, 112 U. S. 217, 223, 28 L. Ed. 698.

82. *Private corporations*.—To an action by mandamus by the citizens of a town in Iowa, through which a railroad passed and maintained a station, the railroad is a necessary party to the proceedings to compel its lessee, a corporation of the state of Illinois, to replace the road which had been removed from the town and to stop its trains there. The case cannot be removed to a federal court on the ground of diverse citizenship, as the Iowa corporation is a necessary party. *Chicago, etc., R. Co. v. Crane*, 113 U. S. 424, 28 L. Ed. 1064.

83. *Intervenors*.—Ex parte Cutting, 94 U. S. 14, 24 L. Ed. 49.

84. *New parties*.—See post, "Abatement and Revival," IX. H.

85. *The application*.—*Virginia v. Rives*, 100 U. S. 313, 329, 25 L. Ed. 667. Separate

opinion of Mr. Justice Field, in which Mr. Justice Clifford concurred.

86. *Form*.—"The court is asked if it should fail to find any principle peculiar to courts of equity on which the bill can be sustained, to treat it as a petition for the writ of mandamus. This would ignore the well-established principle of the federal courts that the line between the equitable and common-law jurisdiction must be maintained, and that a suit must be of the one character or the other, and be prosecuted by pleadings and processes belonging to each class of jurisdiction." *Heine v. Levee Comm'rs*, 19 Wall. 655, 659, 22 L. Ed. 223.

87. *Verification*.—*Postmaster-General v. Trigg*, 11 Pet. 173, 9 L. Ed. 676.

The statements contained in a petition addressed to the supreme court, asking for "a rule to show cause why a mandamus, in the nature of a writ of procedendo, should not be issued," not being verified by affidavit, cannot, under the decisions and practice of the court, be considered. *Poultney v. La Fayette*, 12 Pet. 472, 9 L. Ed. 1161.

88. *Statement of facts—Prima facie case*.—*Postmaster-General v. Trigg*, 11 Pet. 173, 9 L. Ed. 676; Ex parte Taylor, 14 How. 3, 12, 14 L. Ed. 302.

89. *To show breach of duty*.—*Postmaster-General v. Trigg*, 11 Pet. 173, 9 L. Ed. 676.

90. *Abatement and revival—Mandamus to officers*.—*United States v. Boutwell*, 17 Wall. 604, 608, 21 L. Ed. 721; *Caledonian Coal Co. v. Baker*, 196 U. S. 432, 441, 49 L. Ed. 540; *United States v. Chandler*, 122 U. S., appx., 643; *United States v. Lochren*, 164 U. S. 701, 41 L. Ed. 1181; *Warner Valley Stock Co. v. Smith*, 165 U. S. 28,

tory provision to the contrary, a mandamus against an officer to enforce a personal duty abates on his death,<sup>91</sup> resignation<sup>92</sup> or the expiration of his term of office;<sup>93</sup> and cannot be continued against his successor.<sup>94</sup> His successor in office

41 L. Ed. 621; *United States v. Butterworth*, 169 U. S. 600, 42 L. Ed. 873; *Smith v. Reynolds*, 166 U. S. 717, 41 L. Ed. 1186.

A judgment in mandamus, ordering the performance of an official duty against the secretary of the interior, as if yet in office, when in fact he had resigned and gone out after service of the writ but before the judgment, is void. *The Secretary v. McGarrahan*, 9 Wall. 298, 19 L. Ed. 579; *United States v. Butterworth*, 169 U. S. 600, 42 L. Ed. 873.

"*United States v. Chandler*, 122 U. S., appx., 643, was the case of a writ of error in review of a judgment of the supreme court of the District of Columbia refusing a mandamus against William E. Chandler, secretary of the navy, to require of him the performance of certain alleged official duties. When the case was called, it appeared that Mr. Chandler was no longer secretary, and that the office was filled by his successor. Thereupon this court, upon the authority of *United States v. Boutwell*, 17 Wall. 604, 21 L. Ed. 721, held that the suit had abated, and dismissed the writ of error. A similar view prevailed in *United States v. Lochren*, 164 U. S. 701, 41 L. Ed. 1181." *United States v. Butterworth*, 169 U. S. 600, 42 L. Ed. 873.

**91. In absence of statute—Death.**—*United States v. Boutwell*, 17 Wall. 604, 21 L. Ed. 721; *United States v. Butterworth*, 169 U. S. 600, 42 L. Ed. 873; *United States v. Duell*, 172 U. S. 576, 578, 43 L. Ed. 559; *Murphy v. Utter*, 186 U. S. 95, 100, 46 L. Ed. 1070.

The proceedings, on a petition for mandamus to compel the commissioner of patents, Benjamin Butterworth, to issue a patent, abated upon the dismissal of the petition by the supreme court of the District of Columbia. A writ of error to the federal supreme court was then allowed, and while pending Butterworth died and C. H. Deull became commissioner of patents. On a motion for leave to substitute Deull instead of Butterworth, it was held, that the cause had abated and in the absence of statutory authority the court could not bring a new party into the case. *United States v. Butterworth*, 169 U. S. 600, 42 L. Ed. 873.

**92. Resignation.**—"That a petition for a writ of mandamus to a public officer of the United States abates by his resignation of his office has been determined by a series of uniform decisions of this court, and has for years been considered as so well settled that in some of the cases no opinion has been filed and no official report published." *Warner Valley Stock Co. v. Smith*, 165 U. S. 28, 31, 41 L. Ed. 621.

"In *Warner Valley Stock Co. v. Smith*,

165 U. S. 28, 41 L. Ed. 621, the subject was considered at some length. There a bill had been filed against Hoke Smith, as secretary of the interior, to compel him to cause patents to be issued to the plaintiff for certain tracts of land. The supreme court of the district sustained a demurrer to the bill and dismissed the suit. While an appeal to this court was pending, Hoke Smith resigned his office, and it was held that the bill could not be amended by making his successor a defendant, because he was not in office before the bill was filed and had no part in the doings complained of, and accordingly the cause was remanded with directions to dismiss the bill." *United States v. Butterworth*, 169 U. S. 600, 42 L. Ed. 873.

"The earliest case is that of *The Secretary v. McGarrahan*, 9 Wall. 298, 19 L. Ed. 579, which was a writ of mandamus against Mr. Browning, then secretary of the interior, in which it appeared that Mr. Browning had resigned some months before the decision of the court was announced. It was held that the suit abated by his resignation, because he no longer possessed the power to execute the commands of the writ, and that his successor could not be adjudged in default, as the judgment was rendered against him without notice or opportunity to be heard." *Murphy v. Utter*, 186 U. S. 95, 100, 46 L. Ed. 1070.

As to pleading resignation after issue joined, see post, "Plea of *Puis Darrein Continuance*," IX, § 8.

**93. Expiration of term of office.**—"When the personal duty exists only so long as the office is held, the court cannot compel the defendant to perform it after his power to perform has ceased." *United States v. Boutwell*, 17 Wall. 604, 608, 21 L. Ed. 721.

**94. Revived against successor.**—After a cause of this character has abated, a new party cannot be brought into the case. *United States v. Butterworth*, 169 U. S. 600, 42 L. Ed. 873.

The successor is not in privity with his predecessor, much less is he his predecessor's personal representative. *United States v. Boutwell*, 17 Wall. 604, 608, 21 L. Ed. 721; *Caledonian Coal Co. v. Baker*, 196 U. S. 432, 441, 49 L. Ed. 540.

One reason why the successor in office may not be substituted, is that he may be mulcted in costs for the fault of his predecessor, without any delinquency of his own. *United States v. Boutwell*, 17 Wall. 604, 608, 21 L. Ed. 721, quoted in *Warner Valley Stock Co. v. Smith*, 165 U. S. 28, 32, 41 L. Ed. 621; *Caledonian Coal Co. v. Baker*, 196 U. S. 432, 441, 49 L. Ed. 540.

Another reason is that the proceeding

cannot be brought in by way of amendment of the proceeding, or on an order for the substitution of parties.<sup>95</sup>

(2) *Under Statutes*—(a) *In General*.—A statute is necessary to change the common-law rule.<sup>96</sup> A statute providing that an action shall not abate by the death of either of the parties, but be continued against the heir, executor, etc., is not applicable to mandamus proceedings.<sup>97</sup>

(b) *Under Statute of Anne*.—Under the statute of 9th Anne, it was the acknowledged doctrine in England, that the rules and practice as to abatement by death, resignation, or removal from office were the same in cases of mandamus as in personal actions.<sup>98</sup>

(c) *Under Federal Statute*.—It is provided by statute that a writ of mandamus issued against any officer of the United States in his official capacity shall not abate by his death or retirement from office.<sup>99</sup> Under this statute, a territorial judge may be substituted for his predecessor, but is not liable to costs prior thereto.<sup>1</sup>

(3) *What Are Personal Duties*.—The delinquency is personal, where no charge against the office is involved.<sup>2</sup>

against his successor is both against a new party and in a new cause, for the duty sought to be enforced is that of the successor, not that of his predecessor, and notice to him is necessary. *United States v. Boutwell*, 17 Wall. 604, 609, 21 L. Ed. 721; *The Secretary v. McGarrahan*, 9 Wall. 298, 19 L. Ed. 579.

"Besides, were a demand made upon him, he might discharge the duty and render the interposition of the court unnecessary." *United States v. Boutwell*, 17 Wall. 604, 608, 21 L. Ed. 721, quoted in *Warner Valley Stock Co. v. Smith*, 165 U. S. 28, 32, 41 L. Ed. 621.

"Nor is the want of such authority supplied by the consent of a person not a party in the cause." *United States v. Butterworth*, 169 U. S. 600, 605, 42 L. Ed. 873.

**95. Bringing in successor by amendment.**—"In *United States v. Boutwell*, 17 Wall. 604, 21 L. Ed. 721, it was held that, in the absence of statutory provision to the contrary, a mandamus against an officer of the government abates on his death or retirement from office, and that his successor in office cannot be brought in by way of amendment of the proceeding, or on an order for the substitution of parties. The conclusion reached was put upon two independent grounds." *United States v. Butterworth*, 169 U. S. 600, 602, 42 L. Ed. 873.

**96. Under statute.**—*United States v. Boutwell*, 17 Wall. 604, 609, 21 L. Ed. 721.

**97. General statute not applicable to mandamus.**—The act of the state of Maryland enacted in 1785, chapter 80, § 1, providing "no action, brought or to be brought, in any court of this state, shall abate by the death of either of the parties to such action," etc., and which, it is claimed, became the law of the District of Columbia when the territory thereof was ceded to the United States, is not applicable to a proceeding in mandamus.

*United States v. Butterworth*, 169 U. S. 600, 605, 42 L. Ed. 873.

**98. Under statute of Anne.**—The statute here referred to is that of the 9th of Anne, ch. 20, § 1. This statute was, at the time of the decision of this case, in force in Maryland and the District of Columbia. *United States v. Boutwell*, 17 Wall. 604, 608, 21 L. Ed. 721. See post, "Under Statute of Anne," IX, J, 9, b.

**99. Under federal statute.**—According to act of congress, February 8, 1899, 30 Stat. 822, when a writ of mandamus issues against any officer of the United States in his official capacity, it does not abate by reason of his death, retirement, etc., but may be maintained against his successor in office. *Caledonian Coal Co. v. Baker*, 196 U. S. 432, 440, 49 L. Ed. 540.

It was doubtless to meet the difficulties occasioned by the decisions in the case of *United States v. Boutwell*, 17 Wall. 604, 21 L. Ed. 721, and those that followed it, that congress on February 8, 1899, passed an act, 30 Stat. 822, to prevent the abatement of such actions. The case of *Caledonian Coal Co. v. Baker*, 196 U. S. 432, 49 L. Ed. 540, arose after the above statute was passed.

**1. Territorial judge.**—In the case of *Caledonian Coal Co. v. Baker*, 196 U. S. 432, 49 L. Ed. 540, arising after the act of congress of February 8, 1899, 30 Stat. 822, was passed, providing that a writ of mandamus issued against any officer of the United States in his official capacity would not abate by reason of his death, retirement, etc., but could be maintained against his successor in office, it was held that, where a judge of a territorial court ceased to hold office while he was defendant in a mandamus proceeding, his successor in office could be made a party in his stead, subject to the condition that he shall not be liable for any costs prior to the date of his substitution.

**2. What are personal duties.**—A delinquency is personal to the officer where



b. *Duties Appertaining to Office*.—Proceedings in mandamus do not abate upon the retirement from office of an officer, where there is a continuing duty irrespective of the incumbent.<sup>3</sup> Where, in an action of mandamus against a federal judge in his official capacity, such judge dies, or otherwise vacates the office, the writ does not abate but may be maintained against his successor in office.<sup>4</sup>

2. **MANDAMUS AGAINST CORPORATIONS**—a. *In General*.—As a corporation cannot die or retire from the office it holds, a writ of mandamus issued to it does not abate upon the death or retirement of its officers.<sup>5</sup> The proceedings may be commenced with one set of officers and terminate with another, the latter being bound by the judgment.<sup>6</sup>

b. *Corporation Officers*.—Nor does the writ abate when issued to enforce a continuing duty of a continuing municipal board, or where the duty of the board arises out of its corporate capacity.<sup>7</sup> A proceeding against a township clerk is, in reality, a proceeding against the township itself and does not abate upon the

no action therefor will lie against the government under which he holds office. *Thompson v. United States*, 103 U. S. 480, 484, 485, 26 L. Ed. 521; *Warner Valley Stock Co. v. Smith*, 165 U. S. 28, 33, 41 L. Ed. 621.

"The cases in which it has been held by this court that an abatement takes place by the expiration of the term of office have been those of officers of the government, whose alleged delinquency was personal, and did not involve any charge against the government whose officers they were. A proceeding against the government would not lie." *Thompson v. United States*, 103 U. S. 480, 484, 26 L. Ed. 521.

**United States officers generally**.—The duties of public officers of the United States are personal. *Commissioners v. Sellew*, 99 U. S. 624, 25 L. Ed. 333; *United States v. Butterworth*, 169 U. S. 600, 604, 42 L. Ed. 873.

**The duties of heads of departments and bureaus** are personal, within the sense here used. *The Secretary v. McGarahan*, 9 Wall. 298, 19 L. Ed. 579.

3. **Duties appertaining to office**.—*Thompson v. United States*, 103 U. S. 480, 483, 26 L. Ed. 521.

4. *Caledonian Coal Co. v. Baker*, 196 U. S. 432, 440, 49 L. Ed. 540. This case was decided under the federal statute above, see ante, "Under Federal Statute," IX, H, 1, a, (2), (c). See, also, *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 296, 303, 8 L. Ed. 949; *Parker, Petitioner*, 131 U. S. 221, 226, 33 L. Ed. 123. And see ante, *Signing*, VIII, M, 5, k, (2).

5. **Mandamus against corporations**.—*Commissioners v. Sellew*, 99 U. S. 624, 628, 25 L. Ed. 333; *Murphy v. Utter*, 186 U. S. 95, 101, 46 L. Ed. 1070; *Thompson v. United States*, 103 U. S. 480, 483, 26 L. Ed. 521; *Labette County Comm'rs v. Moulton*, 112 U. S. 217, 221, 28 L. Ed. 698.

"As was said, in *Commissioners v. Sellew*, 99 U. S. 624, 627, 25 L. Ed. 333, by Chief Justice Waite: 'One of the objects in creating such corporations, capable of suing and being sued, and having per-

petual succession, is that the very inconvenience which manifested itself in *Boutwell's* case may be avoided.'" *Warner Valley Stock Co. v. Smith*, 165 U. S. 28, 32, 41 L. Ed. 621.

"In *Thompson v. United States*, 103 U. S. 480, 26 L. Ed. 521, the distinction is pointed out between proceedings where the obligation sought be enforced devolves upon a corporation or continuing body, and those where the duty is personal with the officer. In the former case there is no abatement. The duty is perpetual upon the corporation; in the latter, the delinquency charged is personal, and involves no charge against the government, against which a proceeding would not lie." *United States v. Butterworth*, 169 U. S. 600, 603, 42 L. Ed. 873.

6. *Thompson v. United States*, 103 U. S. 480, 483, 26 L. Ed. 521.

7. **Corporation officers—Continuing boards**.—*Murphy v. Utter*, 186 U. S. 95, 100, 46 L. Ed. 1070.

There is a difference between the case of a public officer of the United States and that of a municipal board, which is a continuing corporation, although its individual members may be changed, to which in its corporate capacity a writ of mandamus may be directed. *United States v. Butterworth*, 169 U. S. 600, 604, 42 L. Ed. 873.

**Board of county commissioners**.—Where the writ is sent against a board of county commissioners, it does not abate upon the death or retirement of any member of the board. *Commissioners v. Sellew*, 99 U. S. 624, 626, 25 L. Ed. 333.

The writ may be enforced against those who were members of the board at the time it was required to act. *Commissioners v. Sellew*, 99 U. S. 624, 627, 25 L. Ed. 333.

The case of *United States v. Boutwell*, 17 Wall. 604, 21 L. Ed. 721, was distinguished in *Commissioners v. Sellew*, 99 U. S. 624, 25 L. Ed. 333, upon the ground that the county commissioners were "a corporation created and organ-

resignation of the clerk.<sup>8</sup> Under the laws of Illinois, a mandamus may issue to a township officer until the appointment of his successor.<sup>9</sup> Whether or not a mandamus may issue to him after he ceases to be such officer is not decided.<sup>10</sup>

**1. Rule to Show Cause.**—1. NATURE OF RULE.—A rule to show cause is a call upon the person, against whom issued, to explain his conduct.<sup>11</sup>

2. NECESSITY FOR RULE.—The court may, in its discretion, dispense with a rule to show cause and issue an alternative writ of mandamus in the first instance, to prevent delay and to further justice.<sup>12</sup> The right to have a rule issued may be waived.<sup>13</sup>

3. DISCRETION OF COURT.—The granting of the rule is a matter of discretion of the court.<sup>14</sup>

4. GROUNDS FOR RULE.—A rule to show cause will not issue where a peremptory mandamus would be refused.<sup>15</sup>

ized for the express purpose of performing the duty, among others, which the relator seeks to have enforced. The alternative writ was directed both to the board in its corporate capacity and to the individual members by name, but the peremptory writ was ordered against the corporation alone." *Murphy v. Utter*, 186 U. S. 95, 101, 46 L. Ed. 1070.

**Board of loan commissioners.**—A change in the personnel of a commission does not abate a mandamus proceeding, not had against the individuals as such, but in their official capacity as a board of loan commissioners of the territory of Arizona. *Murphy v. Utter*, 186 U. S. 95, 99, 46 L. Ed. 1070.

**8. Township clerk.**—"The whole proceeding is really and in substance a proceeding against the township, as much as if it were named, and is in the nature and place of an execution." *Thompson v. United States*, 103 U. S. 480, 484, 26 L. Ed. 521.

"We think that the proceedings have not abated either by the resignation of the clerk and the appointment of a successor, or by the expiration of his term of office, even if it sufficiently appeared that either of these contingencies had occurred." *Thompson v. United States*, 103 U. S. 480, 485, 26 L. Ed. 521.

"If the resignation of the officer should involve an abatement, we would always have the unseemly spectacle of constant resignations and reappointments to avoid the effect of the suit. Where the proceeding is in substance, as it is here, a proceeding against the corporation itself, there is no sense or reason in allowing it to abate by the change of individuals in the office. The writ might be directed to the township clerk by his official designation, and will not be deprived of its efficacy by inserting his individual name." *Thompson v. United States*, 103 U. S. 480, 484, 26 L. Ed. 521; *Murphy v. Utter*, 186 U. S. 95, 102, 46 L. Ed. 1070.

**9. Prior to appointment of officer's successor.**—A supervisor, town clerk or justice of the peace, although his resignation is tendered to and accepted by the proper authority, continues in office, and is not relieved from his duties and

responsibilities as a member of the board of auditors, under the township organization laws of the state of Illinois, until his successor is appointed or chosen and qualified. *Badger v. United States*, 93 U. S. 599, 601, 23 L. Ed. 991.

**10. After termination of office.**—If they had ceased to be officers of the town when the mandamus was issued, there may be difficulty in maintaining the order awarding a peremptory mandamus against them. If they were then such officers, the case presents no difficulty. *Badger v. United States*, 93 U. S. 599, 601, 23 L. Ed. 991.

**11. Rule to show cause.—Nature of rule.**—*Postmaster-General v. Trigg*, 11 Pet. 173, 174, 9 L. Ed. 676.

**12. Necessity for rule.**—"The court \* \* \* may properly proceed at once to the hearing of the cause, for the purpose of ascertaining whether a mandamus ought or ought not to be awarded." *Life & Fire Ins. Co. v. Adams*, 9 Pet. 571, 572, 9 L. Ed. 233. But see *The Secretary v. McGarahan*, 9 Wall. 298, 313, 19 L. Ed. 579.

**13. Waiver of rule.**—Although no rule to show cause why a mandamus should not issue to a district judge of Louisiana had been granted by the court, he had agreed to appear, as if a rule had been granted by the federal supreme court and been served upon him, and copies of the papers, on which the motion for a mandamus was founded, had been served by the district judge on the parties in the suit, in which the mandamus was to operate, during vacation. The district judge by filing an answer, as if the rule had been served on him, appearing by counsel, and stating his readiness to show cause, waived the formal rule or notice. Under such circumstances, there was no necessity for directing a rule to be entered and notice to be given; all the purposes of the rule had been accomplished. *Life & Fire Ins. Co. v. Adams*, 9 Pet. 571, 9 L. Ed. 233.

**14. Discretion of court.**—*Life & Fire Ins. Co. v. Adams*, 9 Pet. 571, 9 L. Ed. 233. See ante, "Discretion of Court," VIII, B.

**15. Grounds for rule.**—*Ex parte Secombe*, 19 How. 9, 16, 15 L. Ed. 565

5. **EVIDENCE UPON WHICH GRANTED.**—A rule to show cause implies that a case had been established, which makes it proper that the court should know the reasons for the conduct of the persons against whom it is sought.<sup>16</sup> At least a *prima facie* case of necessity for interposition by mandamus must be made to appear.<sup>17</sup>

6. **COMMAND OF RULE.**—The rule is usually issued to the respondent, ordering him to show cause why a peremptory writ should not issue to him.<sup>18</sup>

7. **SERVICE OF RULE.**—There must be due service made of the rule upon the person against whom issued.<sup>19</sup>

8. **RETURN TO RULE.**—*a. In General.*—When due service of the rule has been made, the person against whom issued is required to make return to the charge contained in the rule, which he may do by denying the matters charged or by setting up new matter as an answer to the accusations of the relator,<sup>20</sup> or he may elect to submit a motion to quash the rule or to demur to the accusative allegations.<sup>21</sup>

*b. Verification.*—A return by a district judge to a rule to show cause need not be sworn to by him.<sup>22</sup>

*c. Effect.*—A return to a rule to show cause may stand in the place of a return to an alternative writ.<sup>23</sup>

**J. Alternative Writ.**—1. **NECESSITY FOR ISSUANCE.**—It is not a sufficient reason for setting aside a peremptory mandamus, that a previous alternative writ had not issued.<sup>24</sup>

2. **PREREQUISITES TO ISSUANCE.**—Whether or not the granting of a rule to show cause is a prerequisite to the issuance of a peremptory mandamus, is in the discretion of the court.<sup>25</sup>

**16. Evidence upon which granted.**—*Postmaster-General v. Trigg*, 11 Pet. 173, 174, 9 L. Ed. 676.

17. A rule will be refused for the judges of the circuit court of the District of Columbia to show cause why a mandamus should not issue, unless a case is presented which *prima facie* requires the interposition of the federal supreme court. Such a case is not presented where the circuit court decided that, under an act of congress, an affidavit was sufficient to hold a party to special bail. That court had the power, by the act, to exercise its judicial discretion. *Ex parte Taylor*, 14 How. 3, 14 L. Ed. 302.

18. **Command of rule.**—"Where a rule is laid, as in this case, on the judge of a subordinate court, he is ordered to show cause why the peremptory writ of mandamus shall not issue to him, commanding him to do some act which it is alleged he has power to do, and which it is his duty to do, and which he has improperly neglected and refused to do, as required by law." *Ex parte Newman*, 14 Wall. 152, 166, 20 L. Ed. 877.

19. **Service of rule.**—Before a respondent is bound to make return and answer, he must be duly served with the rule. *Ex parte Newman*, 14 Wall. 152, 166, 20 L. Ed. 877.

The manner of service of a rule to show cause is a matter in the discretion of the court. *Life & Fire Ins. Co. v. Adams*, 9 Pet. 571, 9 L. Ed. 233.

Want of service may be good ground for a motion to set aside proceedings based on a supposed service, but is not

a good return to the writ. *Edwards v. United States*, 103 U. S. 471, 479, 26 L. Ed. 314. See post, "Service of Writ," IX, J, 4.

20. **Return to rule.**—*Ex parte Newman*, 14 Wall. 152, 166, 20 L. Ed. 877.

**Right to make return.**—Where a rule had been granted on the district judge of the northern district of New York, to show cause why he did not sign a bill or exceptions in a case tried before him, it was held, that, on the day of the return of the rule, the district judge had a right to show cause; and whether the person who obtained the rule moved or not, the judge had a right to have the rule disposed of. *Ex parte Bradstreet*, 4 Pet. 102, 7 L. Ed. 796.

**Sufficiency of return.**—The appearance of the defendant and the actual making of the return are a sufficient answer to the rule. *Edwards v. United States*, 103 U. S. 471, 479, 26 L. Ed. 314.

21. **Motion to quash—Demurrer.**—*Ex parte Newman*, 14 Wall. 152, 166, 20 L. Ed. 877.

22. **Verification.**—The return of a judge, showing why he has refused to sign a bill of exceptions, need not be sworn to by him. *Ex parte Bradstreet*, 4 Pet. 102, 7 L. Ed. 796.

23. **Effect.**—*Ex parte Rowland*, 104 U. S. 604, 615, 26 L. Ed. 861.

24. **Alternative writ—Necessity for.**—*Board of Comm'rs v. Aspinwall*, 24 How. 376, 16 L. Ed. 735.

25. **Prerequisites to issuance.**—*Life & Fire Ins. Co. v. Adams*, 9 Pet. 571, 572, 9 L. Ed. 233.



3. **ISSUANCE OF WRIT**—a. *Issuance on Motion*.—The alternative writ issues on motion.<sup>26</sup>

b. *Time of Issuance*.—The issuance of an alternative mandamus to enforce a judgment more than a year after its rendition is not premature.<sup>27</sup>

c. *Effect of Issuance*.—By the issuance of an alternative mandamus, a legal proceeding is commenced.<sup>28</sup>

4. **SERVICE OF WRIT**—a. *In General*.—There must be due service of the writ.<sup>29</sup> Service upon a proper officer of a municipal corporation is sufficient service upon the corporation.<sup>30</sup>

b. *Return of Service*.—The amendment by a marshal of his return, so as to show that he had exhibited the original writ to the party served, is allowed as matter of common practice.<sup>31</sup>

5. **RETURN OR ANSWER TO WRIT**—a. *Necessity for*.—In the absence of a denial, the facts as stated in the petition of the applicant are confessed by the default of the respondent, and stands as an admission on the record.<sup>32</sup>

b. *Form*.—In a case where the return to the mandamus itself was quashed, the return to the rule stands in the place of a return to the writ for all purposes of the proceeding thereon.<sup>33</sup>

c. *Requisites*—(1) *In General*.—The return must set forth facts to show a legal excuse for not performing the acts sought to be enforced by the writ.<sup>34</sup> It must either deny the facts stated in the rule or alternative writ, on which the claim of the relator is founded, or must state other facts, sufficient in law, to defeat the claim of the relator.<sup>35</sup>

(2) *Responsiveness*.—To make a return properly responsive to a writ of mandamus, issued to compel the levy and collection of a tax, it is necessary to disclose the whole act constituting the levy, so as to enable the court to determine whether it was sufficient to pay the judgment of the relator.<sup>36</sup>

26. **Issuance of writ**—On motion.—*Hudson v. Parker*, 156 U. S. 277, 289, 39 L. Ed. 424; *Stafford v. Union Bank*, 17 How. 275, 15 L. Ed. 101.

27. **Time of issuance**.—Where the judgment, upon which issued, was recovered on the 11th of June, 1881, an alternative writ of mandamus issued on the 24th of July, 1882, returnable on the 9th of October, 1882, it was held, that the issuance was not premature. *Cherokee County Comm'r v. Wilson*, 109 U. S. 621, 625, 27 L. Ed. 1053.

28. **Effect of issuance**.—Section 49 of code of Tennessee, provides that the repeal of a statute shall not affect any proceeding commenced under or by virtue of the repealed statute. An alternative writ of mandamus, issued under the act of March 18, 1873, commences a proceeding within the code provision, and the relator thereby acquires a vested right not affected by the act of March 23, 1875. *Memphis v. United States*, 97 U. S. 293, 298, 24 L. Ed. 920.

29. **Service of writ**.—Ex parte Newman, 14 Wall. 152, 166, 20 L. Ed. 877.

30. **Upon corporation**.—A county in Kansas is a body politic, whose powers are exercised by a board of county commissioners, and when it is sued, process must be served upon the clerk of the board. Where, therefore, a mandamus was awarded against it, it was held, that service of a copy of the writ upon the clerk is service upon the corporation, and

the members of the board. *Commissioners v. Sellew*, 99 U. S. 624, 25 L. Ed. 333.

31. **Return of service**.—*Supervisors v. Durant*, 9 Wall. 736, 19 L. Ed. 813.

32. **Return or answer to writ**.—*Harshman v. Knox County*, 122 U. S. 306, 317, 30 L. Ed. 1152; *Northern Pac. R. Co. v. Dustin*, 142 U. S. 492, 506, 35 L. Ed. 1092.

"The answer, according to the law of pleading, admits what is alleged in the petition and not denied." *Von Hoffman v. Quincy*, 4 Wall. 535, 548, 18 L. Ed. 403.

If the answer is insufficient, a peremptory writ should issue. *Harshman v. Knox County*, 122 U. S. 306, 320, 30 L. Ed. 1152.

33. **Form**—Return to rule.—Ex parte Rowland, 104 U. S. 604, 615, 26 L. Ed. 861.

34. **Requisites**.—If it is impossible for the respondent to collect and pay certain taxes in the time allowed, the return should state facts, from which the court can infer a legal excuse for not doing it. *Benbow v. Iowa City*, 7 Wall. 313, 314, 19 L. Ed. 79.

35. The return will be upheld if any one of several defenses set up is sufficient. Ex parte Newman, 14 Wall. 152, 166, 20 L. Ed. 877.

36. **Responsiveness**.—A return to a mandamus, ordering a municipal corporation forthwith to levy a specific tax upon the taxable property of a city for the year 1865, sufficient to pay a judgment specified, collect and pay the same or

d. *Sufficiency*.—An answer to a petition for mandamus, which shows that the right of the petitioner is not clear, but the subject of pending litigation, is sufficient to defeat the rights of the petitioner.<sup>37</sup> An answer which sets up an unconstitutional statute, as an excuse for the nonperformance of the duty sought to be enforced by the petitioner, is insufficient.<sup>38</sup>

e. *Setting Up Several Defenses*.—Several defenses may be set up in the same return, and, if any one of them be sufficient, the return will be upheld.<sup>39</sup>

6. *MOTION TO QUASH*.—The respondent may make a motion to quash the writ. Such motion is addressed to the discretion of the court.<sup>40</sup>

7. *DEMURRER*.—The writ may be demurred to. All averments of fact therein are admitted by the demurrer.<sup>41</sup>

8. *PLEA OF PUIS DARREIN CONTINUANCE*.—Where the respondent seeks to establish the fact that he has resigned his office by evidence of the appointment of his successor since issue joined in the cause, he cannot do so under the issue framed on his answer, but must plead it by a plea of puis darrein continuance or its equivalent.<sup>42</sup>

9. *PLEADINGS SUBSEQUENT TO RETURN*—a. *Necessity for*.—Statements in the return, not controverted by a subsequent pleading, are to be taken as true.<sup>43</sup>

b. *Under Statute of Anne*.—By the statute of Anne it was enacted that the prosecutor or relator may plead to or traverse all or any of the material facts averred in the return, the defendant having liberty to reply, take issue, or demur, and that such further proceedings might be had, as might have been had, if the prosecutor had brought his action on the case for a false return.<sup>44</sup>

show cause to the contrary by the next term of the court, is not answered by a return that the defendants, "in obedience to the order of the court, did proceed to levy a tax of one per cent upon the taxable property of the said city, for the purpose of paying the judgment named in the information, and other claims, and

at the said tax is sufficient in amount to pay the said judgment and other claims for the payment of which it was levied." The return should have disclosed the whole act constituting the levy, so as to enable the court to determine whether it was sufficient to pay the judgment of the relator. It was also erroneous in returning that the tax was levied to pay this judgment "and other claims." *Benbow v. Iowa City*, 7 Wall. 313, 19 L. Ed. 79.

A recital in an alternative mandamus to a city to levy and collect a tax, in a coming year, on the real cash valuation of its property for that year (stating the value), that property in the city is subject to taxation at such real cash valuation, but that its assessed valuation never exceeded one-half of that valuation, and that the mayor and aldermen were authorized by the city charter to correct the valuation when erroneous, and that they had hitherto neglected to perform that duty, is not traversed by a denial that the valuation never exceeded half the cash value, and an averment that the city council always performed its duty in respect to correcting erroneous assessments. *The Mayor v. Lord*, 9 Wall. 409, 19 L. Ed. 704.

37. *Sufficiency*—Showing doubtful right.

This was a proceeding by mandamus against T. F. Bayard, secretary of state,

to compel him to pay the petitioner certain sums of money on a claim evidenced by awards, made under the joint convention of April 23, 1886, between the United States and Mexico. The petitioner was assignee of the claim. A part of the claim, consisting of installments, had been paid by the respondent's predecessor in office. The respondent answered, admitting the validity of the awards and that the payments had been made by his predecessor, but that to acknowledge the claims of the respondent would be to ignore the conflicting claims of another, between whom and the respondent, litigation in regard to the claims is pending. Held, the answer is sufficient, a demurrer thereto could be overruled and the petition dismissed. *Bayard v. White*, 127 U. S. 246, 249, 32 L. Ed. 116.

38. *Showing excuse for nonperformance*.—Board of Liquidation *v. McComb*, 92 U. S. 531, 541, 23 L. Ed. 623.

39. *Setting up several defenses*.—Ex parte Newman, 14 Wall. 152, 167, 20 L. Ed. 877.

40. *Motion to quash*.—Ex parte Newman, 14 Wall. 152, 166, 20 L. Ed. 877.

41. *Demurrer*.—United States *v. County of Clark*, 95 U. S. 769, 773, 24 L. Ed. 545; Ex parte Newman, 14 Wall. 152, 166, 20 L. Ed. 877.

42. *Plea of puis darrein continuance*.—Thompson *v. United States*, 103 U. S. 480, 483, 26 L. Ed. 521.

43. *Pleadings subsequent to return*.—Ex parte Rowland, 104 U. S. 604, 615, 26 L. Ed. 861.

44. *Under statute of Anne*.—This statute, that of the 9th of Anne, ch. 20, § 1, was in force in Maryland when the

c. *Demurrer*.—If the return of the respondent shows no sufficient reason why a peremptory writ of mandamus should not issue, the demurrer of the relator should properly be sustained.<sup>45</sup> The answer of the respondent must, on the demurrer of the relator be taken as true, so far as its statement of facts is concerned, and, therefore, presents a complete defense against the demand of the writ.<sup>46</sup>

10. *HEARING AND DETERMINATION*.—a. *In Vacation*.—The hearing on the return to an alternative writ may take place in vacation, under a statute which provides that, for the purpose of hearing on the application for the writ, the court shall be regarded as open at all times.<sup>47</sup>

b. *Mode of Trial*.—In mandamus proceedings, the supreme court of Florida can determine questions of fact.<sup>48</sup> A jury trial is not necessary.<sup>49</sup>

c. *Burden of Proof*.—Matters charged in the rule and denied by the respondent must be proved by the relator; matters alleged in avoidance of the charge made, if denied by the relator, must be proved by the respondent.<sup>50</sup>

d. *Extent of Inquiry*.—(1) *To Existence of Duty of Respondent*.—On the hearing of a mandamus, to which the respondent makes return that he has resigned his office, evidence of collusion and fraud on the part of the respondent may probably be shown, though it is not so decided in this case.<sup>51</sup>

(2) *To Matters Determined by Award*.—The validity of an award, for the enforcement of which the writ is issued, cannot be inquired into on a hearing in mandamus proceedings.<sup>52</sup>

(3) *To Matters Determined by Judgment*.—The validity of the judgment sought to be enforced by a writ of mandamus, serving the purpose of an execution, cannot be inquired into.<sup>53</sup> Nor can inquiry be made as to the obligations upon which the judgment was rendered.<sup>54</sup>

e. *Decision on Hearing*.—(1) *Dismissal of Petition*.—The petition should be dismissed for want of jurisdiction in the court.<sup>55</sup>

District of Columbia was a part of that state, and hence it is in force in the District now. *United States v. Boutwell*, 17 Wall. 604, 608, 21 L. Ed. 721.

45. *Demurrer—Propriety of*.—*Galena v. Amy*, 5 Wall. 705, 709, 18 L. Ed. 560.

46. *Facts admitted by*.—*Commonwealth v. Boutwell*, 13 Wall. 526, 529, 20 L. Ed. 631; *Von Hoffman v. Quincy*, 4 Wall. 535, 548, 18 L. Ed. 403; *Ex parte Newman*, 14 Wall. 152, 166, 20 L. Ed. 877.

47. *Hearing and determination*.—Section 2005, Comp. Laws of the Territory of New Mexico, provides: "For the purpose of hearing application for and issuing writs of mandamus the district court shall be regarded as open at all times wherever the judge of such court may be within the territory." A somewhat similar provision has been made for the circuit courts of the United States, in respect to the supervision of elections by Rev. Stat., § 2013. In *re Delgado*, 140 U. S. 586, 588, 35 L. Ed. 578. See the title CHAMBER AND VACATION, vol. 3, p. 667.

48. *Mode of trial*.—The supreme court of Florida, in the exercise of its original jurisdiction of mandamus cases, determines questions of fact as well as of law. *Atlantic Coast Line R. Co. v. Florida*, 203 U. S. 256, 259, 51 L. Ed. 174.

49. "While no jury was had, apparently, none was demanded; and the determina-

tion of the facts by a jury in a mandamus case is not a necessary preliminary to a valid judgment." In *re Delgado*, 140 U. S. 586, 588, 35 L. Ed. 578.

50. *Burden of proof*.—*Ex parte Newman*, 14 Wall. 152, 166, 20 L. Ed. 877.

Where the relator seeks the writ to restrain a court from proceeding against him, on the ground of a diplomatic privilege, the burden rests upon the respondent to overcome the case of privilege made out by the relator. In *re Balz*, 135 U. S. 403, 34 L. Ed. 222.

51. *Extent of inquiry—Duty of respondent*.—*Thompson v. United States*, 103 U. S. 480, 482, 26 L. Ed. 521.

52. *To matters determined by award*.—*Kendall v. Stokes*, 3 How. 87, 99, 11 L. Ed. 506.

53. *To matters determined by judgment*.—See ante, "Impeaching Judgment," VIII, M. 4, d. (2), (b). See, also, the title RES ADJUDICATA.

54. In *Ralls County Court v. United States*, 105 U. S. 733, 26 L. Ed. 1220, it was decided that the injury did not extend to the validity of bonds issued by a county of Missouri, in a mandamus proceeding to enforce a judgment upon coupons from such bonds.

55. *Decision — Dismissal*.—*Covington, etc., Bridge Co. v. Hager*, 203 U. S. 109, 111, 51 L. Ed. 111.



(2) *Issuance of Peremptory Writ*.—If the return of the respondent is insufficient, the court should order a peremptory writ to issue.<sup>56</sup>

(3) *Finality of Decision*.—(a) *As Subject to Review*.—For treatment of this subject, see elsewhere.<sup>57</sup>

(b) *As Res Judicata*.—A decision granting or refusing a mandamus is within the doctrine of res judicata.<sup>58</sup> When a writ of mandamus is refused on grounds that are conclusive against the right of the plaintiff to recover in any action whatever, the judgment is conclusive of that fact, under a statute declaring the judgment granting the writ to be conclusive, but declaring nothing as to the judgment of refusal.<sup>59</sup>

(4) *Amendment of Record*.—An amendment, by allowing, nunc pro tunc, an entry, omitted at the proper time by inadvertance, in the journal record of the clerk, of the issue of a writ of peremptory mandamus, may be made.<sup>60</sup>

**K. Peremptory Writ**.—1. **ISSUANCE OF WRIT**.—For treatment of this subject, see elsewhere in this title.<sup>61</sup>

2. **COMMAND OF WRIT**.—When issued to a governmental officer, the command of the writ is to do a particular specified thing, which appertains to his office and duty.<sup>62</sup> The writ may command the performance of a general duty, which is to be performed by a number of distinct successive steps.<sup>63</sup>

3. **OPERATION AND EFFECT**.—a. *To Confer Authority*.—See elsewhere in this title.<sup>64</sup>

b. *To Transfer Cause*.—The writ of mandamus does not operate to remove the cause in which issued to the court granting the writ.<sup>65</sup>

**56. Issuance of peremptory writ**.—The return of the respondents to the alternative writ of mandamus is insufficient in law, and the circuit court erred in not awarding to the relator a peremptory writ of mandamus. *Harshman v. Knox County*, 122 U. S. 306, 320, 30 L. Ed. 1152. See, also, *Galena v. Amy*, 5 Wall. 705, 709, 18 L. Ed. 560.

**57. Finality of decision**.—As subject to review.—See the title **APPEAL AND ERROR**, vol. 1, p. 928.

**58. Res judicata**.—"In the case of *Block v. Commissioners*, 99 U. S. 686, 25 L. Ed. 491, the denial of the writ is held to be conclusive in a subsequent action as to the invalidity of the bonds, though the fact that the decision in mandamus was based on that ground is inferred from the pleadings, and not from the express language of the judgment, as in the present case." *Louis v. Brown Tp.*, 109 U. S. 162, 166, 27 L. Ed. 892.

The bar of a judgment is all the more perfect and complete in this proceeding because it is not a new action. *Harshman v. Knox County*, 122 U. S. 306, 318, 30 L. Ed. 1152. See, also, *Kendall v. Stokes*, 3 How. 87, 100, 11 L. Ed. 506. See the title **RES ADJUDICATA**.

**59. Under Ohio statute**.—"The only objection made to this is that while the statute of Ohio makes a judgment on mandamus a bar to another civil action where the writ is granted, it does not so declare where it is refused. The words of the statute are not presented to us, nor any decision of the courts of that state cited to sustain the proposition. \* \* \* Here is not only a denial of the

writ of mandamus, but an adjudication that in the hands of Hopple the bonds in suit were absolutely void. \* \* \* We are of opinion that the judgment of the supreme court of Ohio established the fact that the bonds and coupons were void in the hands of Hopple, and the judgment is conclusive of that fact against his vendee and privy in this action." *Louis v. Brown Tp.*, 109 U. S. 162, 165, 166, 167, 27 L. Ed. 892.

**60. Amendment of record**.—*Supervisors v. Durant*, 9 Wall. 736, 19 L. Ed. 813.

**61. Peremptory writ—Prerequisites to issuance**.—See ante, "Prerequisites to Issuance," IX, J, 2.

**In vacation**.—See ante, "Time of Issuance," IX, J, 3, b.

**On insufficient return**.—See ante, "Issuance of Peremptory Writ," IX, J, 10, c, (2).

**62. Command of writ**.—*Marbury v. Madison*, 1 Cranch 137, 169, 2 L. Ed. 60; *Commissioners v. Sellev*, 99 U. S. 624, 627, 25 L. Ed. 333.

**63. Labette County Comm'rs v. Moulton**, 112 U. S. 217, 224, 28 L. Ed. 698. See, also, *County Comm'rs v. Wilson*, 109 U. S. 621, 27 L. Ed. 1053.

**64. Operation and effect—To confer authority**.—See ante, "Existing," VIII, E, 2; "Authorized by Statute," VIII, M, 4, b.

**65. To transfer cause**.—"This cause remains in the court below, whether the writ be obeyed or not, the sole object being to compel them to act on the matter themselves, not to remove it for revision." *Ex parte Crane*, 5 Pet. 190, 206, 8 L. Ed. 92, Baldwin, J., dissenting.

4. **ENFORCEMENT OF WRIT.**—a. *In General.*—As the writ is a judicial process, the court has power to enforce its commands.<sup>66</sup>

b. *By Action.*—Disobedience to<sup>67</sup> or interference with the carrying out of the commands of the writ give rise to a cause of action in favor of the relator.<sup>68</sup>

c. *By Punishment for Contempt.*—A breach of a duty enjoined by mandamus may be punished as a contempt.<sup>69</sup> Under a writ directed to a municipal board, only such members thereof as are guilty of disobedience should be punished for contempt.<sup>70</sup> The court has not power to punish for a contempt of a writ of which it is without jurisdiction.<sup>71</sup>

d. *By Appointment of Special Officer.*—In the absence of permission by state law,<sup>72</sup> a federal court, sitting in equity, cannot appoint a marshal to levy and collect a tax, commanded to be levied and collected by a mandamus to the authorities of a municipal corporation, although the authorities refuse to act.<sup>73</sup>

e. *Cumulative Remedies.*—A statute, providing a punishment by fine for a neglect of duty prior to the issuance of a peremptory mandamus, and providing also that such fine shall be a bar to any action for a penalty incurred thereby, does not prevent the court from punishing any disobedience of the writ.<sup>74</sup>

5. **RELIEF AGAINST WRIT.**—See elsewhere.<sup>75</sup>

6. **DISCHARGE OF WRIT.**—A municipal corporation may relieve itself from the binding force of a mandamus, to compel the levy and collection of a tax to dis-

66. **Enforcement of writ.**—*Memphis v. Brown*, 97 U. S. 300, 24 L. Ed. 924.

67. **By action—Disobedience to writ.**—“If the postmaster general had refused to obey the mandamus, then indeed an action on the case might have been maintained against him.” *Kendall v. Stokes*, 3 How. 87, 101, 11 L. Ed. 506.

68. **Interference with execution of writ.**—The relator may maintain an action against persons preventing the levy of a county tax in pursuance of a writ of mandamus issued at his instigation. *Findlay v. McAllister*, 113 U. S. 104, 28 L. Ed. 930.

69. **By punishment for contempt.**—See the title **CONTEMPT**, vol. 4, p. 536.

70. **Contempts of corporation boards.**—*Commissioners v. Sewell*, 99 U. S. 624, 627, 25 L. Ed. 333; *Thompson v. United States*, 103 U. S. 480, 483, 26 L. Ed. 521. See ante, “Public Corporations,” IX, F, 2, e.

71. **Where court has not jurisdiction.**—“If the command was in whole or in part beyond the power of the court, the writ, or so much as was in excess of jurisdiction, was void, and the court had no right in law to punish for any contempt of its unauthorized requirements. Such is the settled rule of decision in this court.” *Ex parte Rowland*, 104 U. S. 604, 612, 26 L. Ed. 861. See the title **HABEAS CORPUS**, vol. 6, p. 655.

72. **By appointment of special officers.**—“In the case of *Supervisors v. Rogers*, 7 Wall. 175, 19 L. Ed. 162, we held that the circuit court acting in that case, after having issued a mandamus to the supervisors of the county, commanding them to levy a tax, and they having refused to obey the writ, was authorized, under the code of Iowa, which provided for such a proceeding, to issue a writ to the marshal commanding him to levy and collect the

taxes required. But we have never gone beyond this case, which depended on the special law referred to.” *Barkley v. Levee Comm’rs*, 93 U. S. 258, 264, 23 L. Ed. 893.

73. Although a mandamus, and alias mandamus, and pluries mandamus, commanding a city to levy and collect a tax upon the taxable property of its citizens in it, to pay judgments which the relator in the mandamus has obtained against it, have all in consequence of the devices of the city authorities, such as resignation of their offices, etc., proved unavailing to compel the levy and collection of the tax, and though “the prospect of future success” by the same writ “is perhaps not flattering,” the federal courts sitting in equity do not possess power to appoint the marshal to levy and collect the tax, nor to subject the taxable property situate within the corporate limits of the city in any way to an assessment in order to pay the judgment. *Rees v. Watertown*, 19 Wall. 107, 22 L. Ed. 72, approved in *Heine v. Levee Comm’rs*, 19 Wall. 655, 658, 22 L. Ed. 223. See ante, “Where There Are No Officers to Whom Writ May Issue,” VIII, M, 4, g.

74. **Cumulative remedies.**—Under § 2005, *Comp. Laws of Territory of New Mexico*, which provides for the punishment of a person refusing to obey a peremptory mandamus by fine, and that the payment of such fine shall be a bar to an action for any penalty incurred by reason of such refusal or neglect, does not exclude power of the court to punish disobedience of the writ, or to compel obedience to the writ of imprisonment until compliance therewith. In *re Delgado*, 140 U. S. 586, 588, 35 L. Ed. 578.

75. **Relief against writ.**—See the title **HABEAS CORPUS**, vol. 7, p. 655.

charge a debt, by making actual payment.<sup>76</sup>

**L. Alias and Pluries Writs.**—The issuance of the writ may be repeated as often as the occasion requires.<sup>77</sup>

**M. Costs**—1. **RIGHT TO RECOVER.**—In a mandamus proceeding, the prevailing party can recover of the unsuccessful party the legal costs which he has expended in obtaining his right;<sup>78</sup> and, as it is the personal default of the respondent that warrants the impetration of the writ, if granted, the costs must fall upon him. This rule applies where the respondent is a governmental officer of the United States.<sup>79</sup> A federal officer, substituted in the place of his predecessor, against whom the writ had abated, under the federal statute, is not liable for costs arising prior to his substitution.<sup>80</sup>

2. **WHAT ALLOWED AS COSTS.**—The respondent is entitled as costs to disbursements for docket fees and expenses, incurred in printing objections and pleadings, but not for printing briefs.<sup>81</sup>

**N. Removal of Causes.**—See elsewhere.<sup>82</sup>

**O. Review.**—The judgment in a proceeding for mandamus is subject to review on the same conditions as that in any other action.<sup>83</sup>

**P. Remand.**—A cause may be remanded with leave to modify the judgment in such a way as to adapt the command of the writ of mandamus to the circumstances consequent to the delay caused by the pendency of a writ of error in the federal supreme court.<sup>84</sup>

**MANDATARIES.**—Mandararies are persons who have gratuitously undertaken to perform certain duties, and who are therefore bound to apply ordinary skill and diligence, but no more.<sup>1</sup>

**MANDATE.**—See note 2.

**76. Discharge of writ.**—*Memphis v. United States*, 97 U. S. 293, 299, 24 L. Ed. 920.

**77. Alias and pluries writs.**—*Rees v. Watertown*, 19 Wall. 107, 117, 22 L. Ed. 72; *United States v. Memphis*, 97 U. S. 284, 24 L. Ed. 937; *Heine v. The Levee Comm'rs*, 19 Wall. 655, 658, 22 L. Ed. 223.

**78. Costs—Right to recover.**—*United States v. Boutwell*, 17 Wall. 604, 607, 21 L. Ed. 721; *Warner Valley Stock Co. v. Smith*, 165 U. S. 28, 32, 41 L. Ed. 621; *Commissioners of Patents v. Whiteley*, 4 Wall. 522, 535, 18 L. Ed. 335.

**79. Against public officer.**—*Kendall v. United States*, 12 Pet. 524, 9 L. Ed. 1181; *United States v. Schurz*, 102 U. S. 378, 408, 26 L. Ed. 167; *United States v. Boutwell*, 17 Wall. 604, 21 L. Ed. 721. See the title **COSTS**, vol. 4, p. 812.

**80. Where substituted for successor.**—It was so held under the act of February 8, 1899. *Caledonian Coal Co. v. Baker*, 196 U. S. 432, 440, 49 L. Ed. 540. See ante, "Under Federal Statute," IX, H, 1, (2), (c).

**81. What allowed as costs.**—*Ex parte Hughes*, 114 U. S. 548, 29 L. Ed. 281.

**82. Removal of causes.**—See the title **REMOVAL OF CAUSES**.

**83. Review—As in action.**—*Hartman v. Greenhow*, 102 U. S. 672, 26 L. Ed. 271. See the title **APPEAL AND ERROR**, vol. 1, pp. 928, 975.

Mandamus is a "suit" within § 709 of the revised statutes. *American Express Co. v. Michigan*, 177 U. S. 404, 406, 44 L.

Ed. 823; *McPherson v. Blacker*, 146 U. S. 1, 24, 36 L. Ed. 869.

**As compared to habeas corpus.**—The right to a writ of error in the case of habeas corpus has always stood on firmer and better ground than in the case of mandamus. *Holmes v. Jennison*, 14 Pet. 540, 567, 10 L. Ed. 579.

**Where no federal question involved.**—See the title **APPEAL AND ERROR**, vol. 1, p. 724.

**Amount in controversy.**—See the title **APPEAL AND ERROR**, vol. 1, p. 927.

**Review of discretion.**—See the title **APPEAL AND ERROR**, vol. 1, p. 996.

**84. Remand.**—*Hawley v. Fairbanks*, 108 U. S. 543, 552, 27 L. Ed. 820. See the title **MANDATE AND PROCEEDINGS THEREON**.

1. *Briggs v. Spaulding*, 141 U. S. 132, 148, 35 L. Ed. 662. See the titles **BAILMENTS**, vol. 2, p. 787; **BANKS AND BANKING**, vol. 3, p. 96.

2. **A mandate** is a "consensual contract, by which one of the parties confides the carrying on or execution of one or more matters of business to the other who takes it in his charge. \* \* \* Again: 'The mandate may be contracted between persons present, or absent, by words, by messengers, by public writing or private writing, and even by letter, as likewise by acts; e. g., if a person, being present, allows another to transact his business, etc.'" *Williams v. Conger*, 125 U. S. 397, 422, 21 L. Ed. 778. See the titles **BAILMENTS**, vol. 2, p. 782; **POWERS**.



## MANDATE AND PROCEEDINGS THEREON.

BY T. B. BENSON AND WARREN LEE KINDER.

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**IX. Relief against Mandate, 146.**

**CROSS REFERENCES.**

See the titles APPEAL AND ERROR, vol. 1, p. 33; MANDAMUS, ante, p. 1; REHEARING; RES ADJUDICATA; SUPERSEDEAS AND STAY OF PROCEEDINGS.

**I. Definition.**

A mandate is the judgment of an appellate court, transmitted to a lower court,<sup>1</sup> by which the lower court is to be guided.<sup>2</sup>

**II. Parties to Proceedings.**

**A. On Appeal by One of Several Parties.**—Where, in a collision case, the owner of the vessel and the owner of the cargo file a libel which is dismissed and the order of dismissal reversed on an appeal by the owner of the vessel, the rights of the owner of the vessel under the decree of reversal and the mandate thereon should not be prejudiced by the failure of the owner of the cargo to take an appeal.<sup>3</sup>

**B. Admitting Third Persons.**—If consented to of record by all the parties, the court, in proceeding upon a mandate, may admit a third person to become a party and to set up rights not embraced in the former decree.<sup>4</sup>

**III. Remand and Directions Thereon.**

**A. Prerequisites to Remand**—1. PAYMENT OF COSTS.—The payment of

1. Definition.—West v. Brashear, 14 Pet. 51, 54, 10 L. Ed. 350.

Authority of court irrespective of mandate.—When a circuit court is, denying a writ of habeas corpus to release a prisoner from the custody of a state court, affirmed by the supreme court, the state court has power to proceed at once, and need not wait for a mandate to be sent down. In re Jugiro, 140 U. S. 291, 35 L. Ed. 510.

2. Mandate as guide to court.—“There

has been some discussion at the bar, as to the principles by which a circuit court of the United States is to be governed, when executing a mandate from the supreme court. Undoubtedly, the mandate must be its guide.” West v. Brashear, 14 Pet. 51, 54, 10 L. Ed. 350.

3. Parties—Appeal by one of several parties.—The Beaconsfield, 158 U. S. 303, 39 L. Ed. 993.

4. Admitting third persons.—Hawkins v. Blake, 108 U. S. 422, 432, 27 L. Ed. 775.

costs is a prerequisite to a party's right to request the issuance of a mandate.<sup>5</sup>

2. **ENTRY OF DOCKET.**—A motion to award a procedendo cannot be entertained before the case has been regularly entered upon the docket.<sup>6</sup>

3. **NOTICE TO OTHER PARTY.**—The party moving for a writ of mandate must give notice to the opposite party, in the absence of an agreement to the contrary,<sup>7</sup> or waiver of notice.<sup>8</sup> The notice may be given after the filing of the motion.<sup>9</sup>

4. **APPLICATION TO LOWER COURT.**—Until it has been reversed, the lower court is presumed to act properly in the premises, and until it refuses to do so a mandate will not issue.<sup>10</sup>

**B. Discretion as to Remand.**—The remanding of a case rests in the discretion of the appellate court.<sup>11</sup>

**C. Where Decision of Lower Court Conforms to Law.**—The supreme court cannot with propriety reverse a decision which conforms to law, and remand the cause for further proceedings.<sup>12</sup>

**D. Where Case Admits of Partial Reversal.**—Where a judgment is based upon a cause of action of such a nature that it might work injustice to one of several joint defendants if it were to remain intact as against him, while reversed for error as to the other defendants, the judgment will be re-

5. **Prerequisites to remand—payment of costs.**—"As the clerk has no security for his fees charged to the appellee, we think it not improper in this case for him to withhold the mandate, when asked for by that party, until such fees are paid or he is in some manner satisfied in that behalf." *Osborn v. United States*, 131 U. S., appx. cxxxvii, cxxxviii, 23 L. Ed. 871.

**Payment by appellee on affirmance.**—"Very (the appellant) refused to abide by that decree (of the lower court), and prosecuted an appeal to this court. Here the decree of the court below was affirmed. On its return, Very refused to pay the costs. Levy (the appellee), must pay them in order to get a mandate from this court to carry its decree into execution." *Very v. Watkins*, 23 How. 469, 472, 16 L. Ed. 522.

6. **Entry of docket.**—*Stafford v. Union Bank*, 16 How. 135, 14 L. Ed. 876.

7. **Notice to other party.**—"No notice having been given to the other side and there being no agreement of the parties that the mandate may issue, the motion is denied." *Means v. Dowd*, 128 U. S. 583, 32 L. Ed. 578; *Chappell v. Bradshaw*, 128 U. S. 584, 32 L. Ed. 578.

8. **Waiver of notice.**—No notice of the motion for the mandate had been served on the opposite party; but no opposition had been made to the dismissal of the case, and the dismissal had been made for want of jurisdiction. Per curiam: Sufficient cause has been shown, and the mandate may issue at once. *Pacific Express Co. v. Malin*, 131 U. S. 394, 395, 33 L. Ed. 204.

9. **Notice given after motion.**—A motion for the issuance of a mandate was denied in this case, because made without notice to the opposite party, but the court informed the moving counsel that he was at liberty to file his motion and give

notice thereafter. *Chappell v. Bradshaw*, 128 U. S. 584, 32 L. Ed. 578.

10. **Application to lower court.**—*Wylie v. Cox*, 14 How. 1, 14 L. Ed. 301; *In re Royall*, 125 U. S. 696, 31 L. Ed. 855. But see post, "As to Citizenship," III, S, 5, a.

In *Wylie v. Cox*, 14 How. 1, 3, 14 L. Ed. 301, a case where two appeals were taken, one from the original decree, and the other from the refusal to open it, the court said: "The first appeal was, \* \* \* regularly taken, and the case will stand for hearing when it is reached in the regular call of the docket. And, as it is now presented by the record, we see no ground for a mandate to the circuit court. No application has been made to it to carry the decree into execution; or to stay proceedings in it pending this appeal. We are bound to presume that the court below will do whatever may be right in the premises, if the subject is properly brought before it. And we cannot, in advance, undertake to guide their judgment by a mandate. The motion for an order on the circuit court to proceed to carry the decree into execution, is therefore overruled."

11. **Discretion as to remand.**—The supreme court may exercise a discretion whether to affirm a decree in one part and reverse it in another, or to reverse in toto and remand. The latter is the ordinary course pursued; and when departed from, it is in the exercise of that discretion which the court has a right to exercise in reference to the particular form of its decrees. *Elizabeth v. American Nicholson Pavement Co.*, 131 U. S., appx. cxlviii, 24 L. Ed. 1059. See the title **APPEAL AND ERROR**, vol. 2, p. 382.

12. **Where decision of lower court conforms to law.**—If in point of law, the judgment of the lower court should be affirmed, it is the duty of the supreme court to do so, and not remand the case



versed in toto and a new trial granted in regard to all the defendants;<sup>13</sup> but, in a case where there is a failure to prove a cause of action against one defendant while no such failure exists as to the others, there is no special reasons for a total reversal, but on the contrary, justice requires that plaintiff have the liberty of entering judgment upon his verdict against the other defendants.<sup>14</sup>

**E. Where Finding of Facts Involved.**—The supreme court will not remand a case with directions which amount to a decision of facts upon the evidence.<sup>15</sup>

**F. Where Pleadings in Another Case Relied on.**—Where the proceedings in a litigation on several causes of action have been conducted in the confidence that the pleadings in a particular case could be introduced into the other cases, the cases will be remanded with direction to allow bills to be filed and other proceedings thereon according to law.<sup>16</sup>

**G. Where Proceedings under Mistake of Law.**—Where the parties proceed to judgment on a mutual mistake of law, the practical injustice that might result from an affirmance of the judgment may be avoided by reversing the judgment at the cost of the plaintiff in error, and sending the cause back to the circuit court with directions to proceed therein according to law.<sup>17</sup>

**H. As Required by Justice of Case.**—Where error exists in the proceedings of a lower court, which will justify a reversal of its judgment, the cause

for further proceedings as to rights claimed by one of the parties. *Binney v. Chesapeake & Ohio Canal Co.*, 8 Pet. 214, 8 L. Ed. 921.

**13. Where case admits of partial reversal.**—*Washington Gas Light Co. v. Lansden*, 172 U. S. 534, 556, 43 L. Ed. 543. See the title APPEAL AND ERROR, vol. 2, p. 382.

**14.** *Washington Gas Light Co. v. Lansden*, 172 U. S. 534, 556, 43 L. Ed. 543; *Pennsylvania R. Co. v. Jones*, 155 U. S. 333, 354, 39 L. Ed. 176. See the title APPEAL AND ERROR, vol. 2, p. 382.

The judgment of the general term of the supreme court of the District of Columbia was reversed, and the case remanded with directions to set aside the judgment of the special term, and permit the plaintiffs to elect to become nonsuited as against the Pennsylvania Railroad Company, and take judgment on the verdict against the other defendants, and, if they do not so elect, then to set aside the verdict and order a new trial generally. *Pennsylvania R. Co. v. Jones*, 155 U. S. 333, 354, 39 L. Ed. 176.

**Discretion of appellate court.**—The supreme court have in some cases affirmed a decree in part and reversed it in part, where such a course did not affect the interest of different parties in a different manner, as might have been the case here had the court come to the conclusion that the decree was right in all respects except as to the amount. But even then it would have been in the discretion of the court to have reversed the decree and remanded the cause for correction. This is the ordinary course; and if in any case the court depart from it, it is in the exercise of that discretion which they, in view of all the circumstances of the case, have a right to exercise in reference to the particular form of

their decree. *Elizabeth v. American Nicholson Pavement Co.*, 131 U. S., appx., cxlviii, cxlix, 24 L. Ed. 1059.

**15. Where finding of facts involved.**—*Union Pac. R. Co. v. United States*, 116 U. S. 154, 29 L. Ed. 584; *Burr v. Des Moines R., etc., Co.*, 1 Wall. 99, 17 L. Ed. 561; *United States v. Pugh*, 99 U. S. 265, 25 L. Ed. 322; *The Frances Wright*, 105 U. S. 381, 26 L. Ed. 1100. See the title APPEAL AND ERROR, vol. 1, p. 1005.

In *McClure v. United States*, 116 U. S. 145, 29 L. Ed. 572, the court refused to remand the case to the court of claims with directions to return whether certain facts were established by the evidence at the trial, as that would have amounted to a finding of facts upon the evidence. The court said: "All we can do is to declare the law upon facts which, so far as we are concerned, must be taken to be undisputed."

**16. Where pleadings in another case relied on.**—"It appears that decrees were pronounced in all the causes, though regular proceedings were had only in the case of *Romulus Riggs*. Under such circumstances, the court can only reverse the decree for want of a bill. Under the particular circumstances, the whole business appearing to have been conducted in the confidence that the pleadings in the case of *Romulus Riggs* could be introduced into the other causes, the case is remanded to the circuit court, with directions to allow a bill to be filed, and to proceed thereon according to law." *Mandeville v. Burt*, 8 Pet. 256, 258, 8 L. Ed. 936.

**17. Where proceedings under mistake of law.**—In the case of *Murdock v. Ward*, 178 U. S. 139, 44 L. Ed. 1009, the parties proceeded under a mutual misconception of the act of June 13, 1898, taxing

will be remanded with such instructions as the justice of the case requires.<sup>18</sup>

**I. As to Facts Not of Record.**—Where, in a redemption suit, the record does not enable the supreme court to determine upon the rights of purchasers, the case will be remanded to the circuit court for its adjudication thereon.<sup>19</sup>

**J. As to Instructions to Jury.**—It is not usual for the supreme court in remanding a case to state the particular manner in which the instructions to the jury should have been framed,<sup>20</sup> but to state the principles of law which govern the case as it appears in the record, and leave it to the circuit court to apply them to the case, as it may appear in evidence upon the second trial, in such manner and form as it may think advisable.<sup>21</sup>

**K. As to Parties.**—A case may be remanded to permit the bringing in of necessary parties.<sup>22</sup> The mandate in a case arising over the contest of a will may direct the lower court to permit a claimant, whose claims it had adjudicated to have been presented too late, to come in and prove his claims.<sup>23</sup>

**L. As to Allowance of Restitution.**—A cause may be remanded, with directions to the lower court to cause restitution to be made to the appellant of

inheritances and legacies in United States bonds.

**18. As required by justice of case.**—*Binney v. Chesapeake & Ohio Canal Co.*, 8 Pet. 214, 219, 8 L. Ed. 921.

**19. As to facts not of record.**—In the condition in which this case was before the supreme court, it was not practicable for the court to pass finally upon the rights of the parties; the cause was therefore remanded without decision upon the existence or extent of the right of either of them as a purchaser. A decree was entered, reversing the court below and declaring that a conveyance by the complainant to be a mortgage, and that he was entitled to redeem the same, and remanding the cause to the circuit court, with directions to proceed therein in conformity with its opinion and as the principles of equity required. *Russell v. Southard*, 12 How. 139, 158, 13 L. Ed. 927.

**20. As to instructions to jury.**—"It is not usual in remanding a case to state in the opinion of this court the particular manner in which the instructions to the jury should have been framed, but to state in the opinion the principles of law which govern the case as it appears in the record, and leaves it to the circuit court to apply them to the case, as it may appear in evidence upon the second trial, in such manner and form as it may think advisable. From the manner, however, in which the directions of the circuit court appear in the record before us, upon the trial under the mandate, we may perhaps prevent future difficulty by stating the form in which instructions to the jury might have been given so as to carry into effect the opinion of this court, and enable the jury to understand more clearly the points in issue before them." *Bank v. New England Bank*, 6 How. 212, 226, 12 L. Ed. 409.

**21.** It is not meant that the supreme court will prescribe this form for the circuit court when the case again comes before it, because the testimony then offered may differ materially from that

now contained in the record; but, if, instead of the complex instructions under which the case was decided at the last trial, the directions recommended had been given, it would have conformed to the opinion of the supreme court when the case was formerly before it, and at the same time have enabled the jury to understand more distinctly the matter of fact in dispute between the parties, and submitted to them for decision. *Bank v. New England Bank*, 6 How. 212, 226, 12 L. Ed. 409.

**22. As to parties.**—*Caldwell v. Taggart*, 4 Pet. 190, 7 L. Ed. 828.

**New administrator.**—An appeal may be dismissed and remanded to the lower court, with leave to the appellants to make the proper parties, and to a new administrator, to become a party to the suit; and that such other proceedings be had therein as to law and justice shall appertain. *Taylor v. Savage*, 2 How. 395, 397, 11 L. Ed. 313.

**Assignees of a claim** have a right to contest it and may either deny its original validity, or show that it has been paid. They are, then, essential parties, and the court ought not to decree in favor of the plaintiff, without them. It is possible that they may consent to make themselves parties in this cause, and as a court may, instead of dismissing a bill brought to a hearing, without proper parties, give leave to make new parties, the court will, in this case, set aside the decree of the circuit court, dismissing the bill, and remand the cause of the circuit court, with leave to make new parties. *Russell v. Clarke*, 7 Cranch 69, 98, 3 L. Ed. 271.

**23.** "It appears, from the motions which have been made to this court, as well as from certain proceedings in the court below, which have been laid before us in support thereof, that there are certain claimants of this bequest (to a testator's heirs at law), asserting \* \* \* claims (that) have not been adjudicated upon in the court below, on account of their having been presented at too



whatever sum of money he has been compelled to pay under the reversed decree.<sup>24</sup>

**M. As to Allowance of Costs**—1. ON REMOVAL OF CAUSE.—See elsewhere.<sup>25</sup>

2. ON STIPULATION OF PARTIES.—The mandate may direct the taxation of costs as stipulated by the parties.<sup>26</sup>

3. IN ADMIRALTY CASES.—See elsewhere in this title.<sup>27</sup>

**N. As to Allowance of Interest.**—The mandate may direct the allowance of interest on a judgment affirmed.<sup>28</sup>

**O. On Stipulation of Parties.**—The lower court may be reversed and the cause remanded pursuant to a stipulation of the parties.<sup>29</sup>

**P. In Admiralty Cases**—1. REMAND FOR AMENDMENTS.—See elsewhere.<sup>30</sup>

2. REMAND FOR REHEARING.—To justify the remanding of a cause in admiralty for a rehearing, it must clearly appear that the omission was attributable to the fault or neglect of the court and not to the parties.<sup>31</sup>

3. REMAND FOR CHANGE OF FORM OF PROCEEDING—*a. Salvage Sued on as Prize.*—If, in a proceeding in prize, the cause is in salvage, it will be remanded to the lower court, with direction to allow an amendment of the libel, where merits appear on the record.<sup>32</sup>

*b. Forfeiture Sued on as Prize.*—When the record presents a case in the court which has been prosecuted exclusively as prize, the property cannot be here condemned as for a statutory forfeiture, and, if the facts disclosed in the record justify it, the case will be remanded to the court below for a new libel, and proper proceedings according to the true nature of the case.<sup>33</sup>

late a period. As the cause is to go back again for further proceedings, and must be again opened there, for new allegations and proofs, these claimants will have a full opportunity of presenting and proving their claims in the cause; and we are of opinion that they ought to be let into the cause for this purpose. In drawing up the decree, remanding the cause, leave will be given to them accordingly. The decree of the circuit court is, therefore, reversed; and the cause is remanded to the circuit court for further proceedings, in conformity to this opinion." *Harrison v. Nixon*, 9 Pet. 483, 505, 9 L. Ed. 201, cited in *Ex parte Cutting*, 94 U. S. 14, 24 L. Ed. 49. For further proceedings in the former case, see *Packer v. Nixon*, 10 Pet. 408, 9 L. Ed. 473.

**24. As to allowance of restitution.**—*Morris v. United States*, 7 Wall. 578, 580, 19 L. Ed. 281; *Ex parte Morris*, 9 Wall. 605, 19 L. Ed. 799. See the title APPEAL AND ERROR, vol. 2, p. 388.

**25. Allowance of costs**—On removal of cause.—See the title APPEAL AND ERROR, vol. 2, p. 419.

**26. On stipulation of parties.**—*Union Mut. Life Ins. Co. v. Waters*, 124 U. S. 369, 31 L. Ed. 474.

**27. In admiralty cases.**—See post, "Remand for Allowance of Costs," III, P. 5.

**28. As to allowance of interest.**—*Boyce v. Grundy*, 9 Pet. 275, 9 L. Ed. 127; *In re Washington, etc.*, R. Co., 140 U. S. 91, 35 L. Ed. 339.

"With respect to the entry of this affirmance, interest is to be calculated to

the present time, upon the aggregate sum of principal and interest in the judgment below; but no further. We cannot extend the calculation to June term next, when the mandate will operate in the circuit court, as the party has a right to pay the money immediately." *Brown v. Van Braam*, 3 Dall. 344, 356, 1 L. Ed. 629.

**29. On stipulation of parties.**—*Union Mut. Life Ins. Co. v. Waters*, 124 U. S. 369, 31 L. Ed. 474. See the title STIPULATIONS, and references there given.

**30. Admiralty cases—Amendments.**—See the title ADMIRALTY, vol. 1, p. 167.

**31. Remand for rehearing.**—*The S. S. Osborne*, 104 U. S. 183, 184, 26 L. Ed. 693. See the title REHEARING.

**32. For change of form of proceeding.**—*United States v. Weed*, 5 Wall. 62, 71, 18 L. Ed. 531; *The Schooner Adeline*, 9 Cranch 244, 3 L. Ed. 719; *Mrs. Alexander's Cotton*, 2 Wall. 404, 17 L. Ed. 915. See the titles ADMIRALTY, vol. 1, p. 156; PRIZE.

"In the case of *United States v. Weed*, 5 Wall. 62, 18 L. Ed. 531, we had occasion, at the last term, to consider the question of the practice proper under such circumstances. We then came to the conclusion that where sufficient evidence was found to justify it, the case would be remanded to the court below for an amendment of the libel, or for such other proceedings as the government might, under all the circumstances, choose to adopt." *The Watchful*, 6 Wall. 91, 93, 18 L. Ed. 763.

**33. Forfeiture sued on as prize.**—*United States v. Weed*, 5 Wall. 62, 18 L. Ed. 531; *The Cotton Plant*, 10 Wall.



c. *Forfeiture Sued for on Instance Side of Court.*—When the record presents a case prosecuted below on the instance side of the court, for a forfeiture under a statute, it cannot be condemned as prize in the supreme court, and, if the facts disclosed in the record justify it, the case will be remanded to the court below for a new libel, and proper proceedings according to the true nature of the case.<sup>34</sup>

4. *REMAND FOR CHANGE OF PARTIES.*—The cause may be remanded with directions to the lower court to treat petitions for intervention as independent libels and to issue process thereon.<sup>35</sup>

5. *REMAND FOR ALLOWANCE OF COSTS.*—On reversal of a cause in admiralty on petition for intervention, the mandate may direct costs to be awarded to the original libelants as against the respondent, and with costs to the respondent as against the intervenors.<sup>36</sup>

6. *IN PRIZE CASES*—a. *To Permit Presentation of Claim.*—A claim for a share in prize money cannot be presented in the supreme court for the first time, but the cause will be remanded that the claim be made in a circuit court.<sup>37</sup>

b. *To Permit Amendment of Libel.*—A prize cause may be remanded to permit an amendment of the libel so as to conform to the general allegation of prize.<sup>38</sup>

7. *IN COLLISION CASES.*—The mandate may direct the apportionment of loss in a collision suit.<sup>39</sup>

Q. *In Interstate Commerce Cases.*—Where a circuit court of appeals decides that, as applied to the circumstances of a particular case, an order of the interstate commerce commission is invalid, it is the duty of the court to reverse

577, 582, 19 L. Ed. 983. See the title PRIZE.

"This practice was also followed in the case of *Mrs. Alexander's Cotton*, 2 Wall. 404, 17 L. Ed. 915. In that case the cotton had been libelled as prize of war. This court was of opinion that it was not a case of prize, but that it came within the statute covering captured and abandoned property. The court did not, for that reason, affirm the decree of the district court, which had restored the property, or its proceeds, to *Mrs. Alexander*, but reversed that decree, and remanded the case to the district court, that it might dispose of the proceeds of the sale of the property, then in the registry, according to the opinion of the court." *United States v. Weed*, 5 Wall. 62, 71, 18 L. Ed. 531.

34. *Forfeiture sued for on instance side of court.*—*United States v. Weed*, 5 Wall. 62, 18 L. Ed. 531.

35. *Remand for change of parties.*—*The Oregon*, 158 U. S. 186, 211, 39 L. Ed. 943. See the title ADMIRALTY, vol. 1, p. 159.

36. *Remand for allowance of costs.*—*The Oregon*, 158 U. S. 186, 211, 39 L. Ed. 943. See the title ADMIRALTY, vol. 1, p. 181.

37. *In prize cases—Presentation of claim.*—"The officers of the *Rattlesnake* and *Enterprise*, armed vessels of the United States, offered a petition to this court to be permitted to claim for themselves and their crew a share of the prize in the case of the *Societe*; alleging that they are entitled equally with the officers and crew of the gunboat by whom the said cargo was libelled; which petition

was rejected, and the claim was not received; it being the opinion of this court, that the claim of the petitioners must be made in the circuit court, to which the cause is remanded." *The Ship Societe*, 9 Cranch 209, 212, 3 L. Ed. 707. See, also, *The Harrison*, 1 Wheat. 298, 4 L. Ed. 95. And see the title PRIZE.

38. *To permit amendment of libel.*—"In prize causes, this court can exercise only an appellate jurisdiction, and between parties who have litigated in the court below. We are all, therefore, of opinion, that this cause ought to be remanded to the circuit court, with directions to allow the claim to be filed in that court; and also to allow the libel to be amended, so as to conform to the general allegation of prize, and enable the captors to obtain condemnation of the property, if the asserted claim shall not be sustained, and the property shall not appear entitled to the protection of the Spanish treaty." *The Harrison*, 1 Wheat. 298, 299, 4 L. Ed. 95. See the title ADMIRALTY, vol. 1, p. 168.

39. *In collision cases.*—*Rogers v. Steamer St. Charles*, 19 How. 108, 15 L. Ed. 563; *The Sapphire*, 18 Wall. 51, 54, 21 L. Ed. 814; *Cushing v. Owners of the Ship John Fraser*, 21 How. 184, 16 L. Ed. 106. See the title COLLISION, vol. 3, p. 935.

Where the supreme court, in a collision case, decides that both vessels were at fault, upon reversal of a circuit court adjudging only one vessel in default, the case must be remanded with directions to apportion the loss. *Rogers v. Steamer St. Charles*, 19 How. 108, 15 L. Ed. 563.

a circuit court upholding the order and to remand the cause to the commission for proceedings according to law.<sup>40</sup>

**R. In Cases of Judicial Sales.**—The mandate of an appellate court may direct a resale in default of the payment of the purchase price in a sale of trust property.<sup>41</sup>

**S. For Amendments**—1. **IN GENERAL.**—There can be no substantial amendment in the supreme court;<sup>42</sup> but, if the pleadings or evidence are so defective that no decree can be founded upon them, and the case appeared to have merits, the court will reverse the decree and remand the cause to the court below with directions to permit amendments and further proofs.<sup>43</sup> By the modern practice the court will neither direct a replender nor an amendment, but remand the case for further proceedings.<sup>44</sup>

2. **TO MAKE MORE CERTAIN.**—The lower court may be directed to permit the amendment of a bill so as to put in issue matters that do not appear with sufficient precision.<sup>45</sup>

3. **TO CHANGE OF FORM OF ACTION.**—A mistaken view by a person of his rights or remedies should not be permitted wholly to defeat a claim founded upon principles of equity and justice; and, if the pleadings can be so amended as to admit proof of such claim, and such amendment does not introduce a new cause of action, though it may set up a new measure of damages, or work a real hardship to the party defendant, it is within the discretion even of the appellate court to permit such amendment to be made.<sup>46</sup>

4. **TO CHANGE GROUND OF RELIEF.**—An appellate court, after concluding every issue actually litigated, in favor of the defendant, cannot remand the case for the purpose of allowing the complainant to amend his bill in order to assert a new and distinct ground of relief, constituting a complete departure from the theory upon which the bill had been framed and upon which the case had been tried, if the defendants are deprived by the mandate of all opportunity

**40. In interstate commerce cases.**—*Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 238, 40 L. Ed. 940.

What the commission complained of was that the defendant refused to recognize the lawfulness of its order; and what the defendant asserted, by way of defense, was that the order was invalid, because the commission had avowedly declined to consider certain "circumstances and conditions" which, under a proper construction of the act of February 4, 1887, as amended by the act of February 10, 1891, it ought to have considered. If the circuit court of appeals was of opinion that the commission in making its order had misconceived the extent of its powers, and if the circuit court had erred in affirming the validity of an order made under such misconception, the duty of the circuit court of appeals was to reverse the decree, set aside the order, and remand the cause to the commission, in order that it might, if it saw fit, to proceed therein according to law. *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 238, 40 L. Ed. 940.

**41. In cases of judicial sales.**—*District of Columbia v. McBlair*, 124 U. S. 320, 31 L. Ed. 449.

**42. Amendments—In appellate court.**—see post, "To Show Jurisdiction," III, S. 5. See the title *ADMIRALTY*, vol. 1, p. 167.

**43. Remand for amendment.**—*The Mabey*, 10 Wall. 419, 420, 19 L. Ed. 963; *The Caroline*, 7 Cranch 496, 500, 3 L. Ed. 417; *The Mary Ann*, 8 Wheat. 380, 5 L. Ed. 641; *Garland v. Davis*, 4 How. 131, 155, 11 L. Ed. 907; *United States v. Coe*, 155 U. S. 76, 84, 39 L. Ed. 76; *Wiggins Ferry Co. v. Ohio, etc., R. Co.*, 142 U. S. 396, 35 L. Ed. 1055; *Jones v. Meehan*, 175 U. S. 1, 29, 44 L. Ed. 49; *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 447, 32 L. Ed. 788; *Crocket v. Lee*, 7 Wheat. 522, 5 L. Ed. 513; *New Orleans v. Fisher*, 180 U. S. 185, 45 L. Ed. 485; *Supervisors v. Stanley*, 105 U. S. 305, 26 L. Ed. 1044.

Where the ends of justice so require, the cause will be remanded with directions to allow amendment. *United States v. Coe*, 155 U. S. 76, 84, 39 L. Ed. 76; *Sheehy v. Mandeville*, 6 Cranch 253, 3 L. Ed. 215; *United States v. Kirkpatrick*, 9 Wheat. 720, 738, 6 L. Ed. 199; *Mullen v. Torrance*, 9 Wheat. 537, 6 L. Ed. 154; *Day v. Chism*, 10 Wheat. 449, 6 L. Ed. 363; *Wiggins Ferry Co. v. Ohio, etc., R. Co.*, 142 U. S. 396, 35 L. Ed. 1055.

**44.** *Garland v. Davis*, 4 How. 131, 155, 11 L. Ed. 907.

**45. To make more certain.**—*Lewis v. Darling*, 16 How. 1, 13, 14 L. Ed. 819; *Combs v. Hodge*, 21 How. 397, 16 L. Ed. 115.

**46. To change of form of action.**—*Wiggins Ferry Co. v. Ohio, etc., R. Co.*,

of a hearing on the new ground of relief permitted to be asserted against them.<sup>47</sup>

5. To SHOW JURISDICTION—*a. As to Citizenship.*—If, in a case prosecuted in a federal court, the transcript shows insufficient allegations in the pleadings, of the necessary citizenship of the parties to confer jurisdiction, the pleadings cannot be amended in the supreme court;<sup>48</sup> but that court will reverse the lower court and remand the case with directions for amendments and further proceedings.<sup>49</sup> No objection need have been made in the lower court.<sup>50</sup> Such an amendment is not a new suit.<sup>51</sup>

*b. As to Amount in Controversy.*—A case may be remanded for amendment

142 U. S. 396, 415, 35 L. Ed. 1055; *The Schooner Anne*, 7 Cranch 570, 3 L. Ed. 442.

47. To change ground of relief.—*Warner v. Godfrey*, 186 U. S. 365, 377, 46 L. Ed. 1203, citing and approving *Hovey v. Elliott*, 167 U. S. 409, 42 L. Ed. 215. See post, "As to Citizenship," III, S. 5, a.

48. To show jurisdiction—Amendment in appellate court.—It was said in *Continental Ins. Co. v. Rhoads*, 119 U. S. 237, 30 L. Ed. 380, citing *Morgan v. Gay*, 19 Wall. 81, 22 L. Ed. 100, and *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057, that, if the party in regard to whom the necessary citizenship was not shown actually possessed such citizenship, the record could not be amended in the federal supreme court so as to show the fact, but that the court below might, in its discretion, allow that to be done when the case should get back there. *Johnson v. Christian*, 125 U. S. 642, 644, 31 L. Ed. 820; *Everhart v. Huntsville College*, 120 U. S. 223, 224, 30 L. Ed. 623.

49. Remand for amendment.—*Morgan v. Gay*, 19 Wall. 81, 22 L. Ed. 100; *Continental Ins. Co. v. Rhoads*, 119 U. S. 237, 30 L. Ed. 380; *Robertson v. Cease*, 97 U. S. 646, 649, 24 L. Ed. 1057; *Conolly v. Taylor*, 2 Pet. 556, 7 L. Ed. 518; *Brown v. Keene*, 8 Pet. 112, 115, 8 L. Ed. 885; *Bors v. Preston*, 111 U. S. 252, 263, 28 L. Ed. 419; *Denny v. Pironi*, 141 U. S. 121, 35 L. Ed. 657; *Horne v. Hammond Co.*, 155 U. S. 393, 39 L. Ed. 197; *Bingham v. Cabot*, 3 Dall. 382, 1 L. Ed. 646; *Mossman v. Higginson*, 4 Dall. 12, 1 L. Ed. 720; *Capron v. Van Noorden*, 2 Cranch 126, 2 L. Ed. 229; *Jackson v. Twentyman*, 2 Pet. 136, 7 L. Ed. 374; *Halsted v. Buster*, 119 U. S. 341, 30 L. Ed. 462; *Anderson v. Watt*, 138 U. S. 694, 702, 34 L. Ed. 1078; *Northern Pac. R. Co. v. Walker*, 148 U. S. 391, 392, 37 L. Ed. 494; *King Bridge Co. v. Otoe County*, 120 U. S. 225, 227, 30 L. Ed. 623; *Everhart v. Huntsville College*, 120 U. S. 223, 224, 30 L. Ed. 623; *Jackson v. Allen*, 132 U. S. 27, 34, 33 L. Ed. 249; *Crehore v. Ohio*, etc., R. Co., 131 U. S. 240, 33 L. Ed. 144; *Peper v. Fordyce*, 119 U. S. 469, 30 L. Ed. 435; *Timmons v. Elyton Land Co.*, 139 U. S. 378, 35 L. Ed. 195. See the title COURTS, vol. 4, p. 1005.

"As the transcript of the record does not show that the circuit court had juris-

diction of the suit, which depended upon the citizenship of the parties, and as counsel, upon having their attention called to the matter, have furnished nothing of record which would supply the defect, the judgment must be reversed at the costs of plaintiff in error, and the cause be remanded to the circuit court for further proceedings." *Horne v. Hammond Co.*, 155 U. S. 393, 39 L. Ed. 197.

This procedure was pursued in *Johnson v. Christian*, 125 U. S. 642, 31 L. Ed. 820, where there was no allegation as to the citizenship of a sole defendant.

*Alien citizenship.*—"Plaintiff in error is described throughout the record as 'a citizen of London, England,' and the defendants as 'corporations of the state of Pennsylvania.' As the jurisdiction of the circuit court confessedly depended on the alienage of plaintiff in error, and that fact was not made affirmatively to appear, the judgment must be reversed at the costs of the plaintiff in error, and the cause be remanded to the circuit court with leave to apply for amendment and for further proceedings." *Stuart v. Easton*, 156 U. S. 46, 39 L. Ed. 341.

50. Raising objection in lower court.—"*Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057, was a suit originally commenced in the United States circuit court. It failed to allege diverse citizenship, but no objection was made in the court below on that ground, and while this court reversed the judgment, it sent the case back with leave to amend the petition in respect to the allegation of citizenship. The case relied upon in the opinion was *Morgan v. Gay*, 19 Wall. 81, 22 L. Ed. 100, in which the same ruling had been made." *Kinney v. Columbia Sav., etc., Ass'n*, 191 U. S. 78, 83, 48 L. Ed. 103.

51. Not new suit.—The plaintiff in error insisted that such amendment would be, in legal effect, a new suit, asserting a new cause of action, but it is clear that an amendment of that nature could not be so regarded, either upon principle or authority. It would introduce no new cause of action. It would only show, if its allegations as to citizenship are true, that the court had jurisdiction, from the commencement of the litigation, of the cause of action set out in the original petition. *Robertson v. Cease*, 97 U. S. 646, 650, 24 L. Ed. 1057.



to show a jurisdictional amount in controversy.<sup>52</sup>

c. *As to Territorial Extent of.*—Where it does not appear, upon an appeal in a controversy concerning real estate, in which of several districts in a state the land is situated, the lower court will be reversed and the case remanded to make jurisdiction apparent.<sup>53</sup>

6. AS TO PARTIES—a. *Necessary.*—While the decree of a lower court is reversed for want of necessary parties, the mandate will direct the court to grant leave to amend.<sup>54</sup>

b. *Misjoinder.*—The mandate may direct an amendment of a bill to cure the defect of misjoinder.<sup>55</sup>

7. OF PLEADINGS DEMURRED TO.—Where the judgment of a lower court in overruling a demurrer is reversed, the cause will be remanded with directions to permit the parties to amend their pleadings;<sup>56</sup> but, in a previous case, the court

**52. As to amount in controversy.**—The record “does not show that the amount of the assessments and taxes, forming the subject of the litigation, levied in either or all of the counties, exceeded the sum of \$2,000; and even if this had been so as to the aggregate, the defendants could have been joined in a single suit, and the jurisdiction thus been sustained. Upon the face of the record, therefore, the circuit court was without jurisdiction, but as perhaps by amendment the bill might be retained as to some one of the defendants, we will not direct its dismissal.” *Northern Pac. R. Co. v. Walker*, 148 U. S. 391, 392, 37 L. Ed. 494.

**53. As to territorial extent of.**—Upon an appeal from the district court of the United States for the Northern District of California, where it did not appear, from the proceedings, whether the land claimed was within the northern or southern district, the federal supreme court will reverse the judgment of the district court and remand the case for the purpose of permitting amendments to make its jurisdiction apparent and of correcting any other matters of form or substance which may be necessary. *Cervantes v. United States*, 16 How. 619, 14 L. Ed. 1083.

**54. As to parties—Necessary.**—*Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158; *Barney v. Baltimore City*, 6 Wall. 280, 18 L. Ed. 825; *House v. Mullen*, 22 How. 42, 22 L. Ed. 838; *Kendig v. Dean*, 97 U. S. 423, 24 L. Ed. 1061; *May v. LeClaire*, 11 Wall. 217, 227, 20 L. Ed. 50; *Caldwell v. Taggart*, 4 Pet. 190, 203, 7 L. Ed. 828.

If the complainant shall ask leave to amend his bill by making the proper parties defendants, he should be permitted to do so and proceed with his case. If he does not do this, a decree should be entered dismissing the bill for want of these parties and without prejudice to any other suit on the merits. *Goodman v. Niblack*, 102 U. S. 556, 563, 26 L. Ed. 229.

**Party to will contest.**—Where a bill in chancery was filed by a legatee against the person who had married the daughter and residuary devisee of the testator

(there having been no administration in the United States upon the estate), this daughter or her representatives, if she were dead, ought to have been made a party defendant. But if the complainant appears to be entitled to relief, the court will allow the bill to be amended, and even if it be an appeal, will remand the case for this purpose. *Lewis v. Darling*, 16 How. 1, 14 L. Ed. 819.

**55. Misjoinder.**—A bill was filed by two parties, one of whom showed good cause for equitable relief, but the other of whom did not show what interest he had in the subject matter of litigation, or that he had any. The bill was demurred to on several grounds. The court below dismissed the bill generally; and in this state the record was of course capable of being pleaded in bar to a new suit on the merits. The federal supreme court being of the opinion that the only defect in the bill was that it did not show interest in both the parties while it did show cause for equitable relief in one, refused to affirm the decree below, as it would have done had the dismissal been without prejudice, or because a party who showed no interest was a complainant. On the contrary, to prevent what might be great injustice in case of another suit on the merits, by the record as a bar to subsequent proceedings being used, the court reversed the decree and remanded the case with directions to allow the complainant to amend his bill within a reasonable time, or failing to do this to dismiss it without prejudice. *House v. Mullen*, 22 Wall. 42, 22 L. Ed. 838. See, also, *Barney v. Baltimore City*, 6 Wall. 280, 18 L. Ed. 825; *Kendig v. Dean*, 97 U. S. 423, 24 L. Ed. 1061.

**56. Of pleadings demurred to.**—“This cause came on to be heard, on the transcript of the record of the district court of the United States for the district of Mississippi, and was argued by counsel. On consideration whereof, this court is of opinion, that there is error in the judgment of the said district court, in overruling the demurrer of the plaintiffs to the plea of the defendant, and in giving judgment for the defendant; wherefore, it is considered by this court,

directed judgment to be rendered on the demurrer,<sup>57</sup> and left the question of amendment to the discretion of the court below.<sup>58</sup>

8. TO SHOW CONTENTS OF WRITTEN INSTRUMENT.—The mandate may direct an amendment of a pleading so as to set forth the contents of a writing.<sup>59</sup>

9. TO SET UP EQUITABLE RIGHT.—When the facts of a case show the plaintiff to have an equitable right to relief, the supreme court, while it may be unable to afford such relief upon the case made by the bill, may remand the case to the court below for an amendment of the pleadings and such further proceedings as may be consonant with justice.<sup>60</sup>

10. TO PREPARE CASE FOR JUDGMENT.—Where the record exhibits the proceedings in a shape so irregular and equivocal that no final decree can be made, which may not be productive of injustice to one or other of the parties, the decree of the lower court will be reversed, and the cause remanded with directions to that court to allow the parties to amend the pleadings.<sup>61</sup>

that the said judgment be reversed and annulled, and it is hereby reversed and annulled accordingly; and the said cause is remanded to the said district court, with liberty to the parties to amend their pleadings, and that further proceedings may be had therein, according to law." *Mullen v. Torrance*, 9 Wheat. 537, 540, 6 L. Ed. 154.

57. The judgment of the court is that "the judgment of the circuit court be reversed and annulled, and that the cause be remanded to the circuit court, with directions to sustain the demurrer to the first plea, so far as the same is pleaded in bar of the first count, in the plaintiff's declaration, and also to sustain the demurrer to the second plea, and to render judgment in favor of the plaintiff on his said first count, and to award a writ of inquiry of damages." *Sheehy v. Mandeville*, 6 Cranch 253, 266, 3 L. Ed. 215.

58. After the opinion was given, C. Lee moved for a direction to the court below to allow a plea of non assumpsit. The court said they had never given directions respecting amendments, but had left that question to the court below. This court cannot now undertake to say, whether the court below would be justified in granting leave to amend. Reporter's note to. *Sheehy v. Mandeville*, 6 Cranch 253, 267, 3 L. Ed. 215.

59. To show contents of written instrument.—In the superior court of East Florida, the complainant filed a bill, claiming compensation for the nonperformance of certain contracts for the sale of lands in East Florida, referring to the contracts, the contents of which were stated to be set out in the bill of the complainant; which was replied to by the defendants. The contracts were not proved in the cause, by testimony; nor was the nonproduction of them duly accounted for, nor secondary evidence of the contents thereof, so far as practicable, given, before the superior court. The supreme court, for this defect and imperfection in the proceedings, had not sufficient evidence before them to found any final and satisfactory decree; the decree of

the court of appeals of East Florida, and the decree of the superior court of East Florida, are, therefore, reversed, and the cause remanded to the court of appeals, to allow the pleadings to be amended, and the documents referred to, or the contents of the same, to be duly authenticated and proved, etc. *Levy v. Arredondo*, 12 Pet. 218, 9 L. Ed. 1062.

60. To set up equitable right.—*Wiggins Ferry Co. v. Ohio*, etc., R. Co., 142 U. S. 396, 413, 35 L. Ed. 1055; *District of Columbia v. McBlair*, 124 U. S. 320, 31 L. Ed. 449.

Where the evidence is sufficient to show a breach of the law, but the information is not sufficiently certain to authorize a decree, the supreme court will remand the cause to the circuit court, with directions to allow the information to be amended. *The Edward*, 1 Wheat. 261, 4 L. Ed. 86.

"In *Crocket v. Lee*, 7 Wheat. 522, 5 L. Ed. 513, plaintiff filed a bill to obtain a conveyance of land covered by a certificate of settlement right, the legal title to which was in the defendant, and he was decreed by the court below, in conformity with another bill filed by the defendant, to convey to the defendant the land covered by his patent. It was contended in the supreme court that the defendant ought not to be allowed to recover on his cross bill by reason of his failure to make the proper averments with respect to the invalidity of the plaintiff's title. The court adopted the view of the appellant in this particular, but remanded the case with directions to permit the parties to amend their pleadings." *Wiggins Ferry Co. v. Ohio*, etc., R. Co., 142 U. S. 396, 413, 35 L. Ed. 1055.

61. To prepare case for judgment.—*Leeds v. Marine Ins. Co.*, 2 Wheat. 380, 4 L. Ed. 266; *Estho v. Lear*, 7 Pet. 130, 8 L. Ed. 632; *The Divina Pastora*, 4 Wheat. 52, 4 L. Ed. 512.

"In *Estho v. Lear*, 7 Pet. 130, 131, 8 L. Ed. 632, involving the validity of a certain paper purporting to be and which had been recorded as the last will and testament of Kosciuszko, the bill charged



11. **IN FORECLOSURE SUITS.**—Upon the reversal of an order of a lower court confirming an auditor's report in a deed of trust sale, the cause may be remanded with direction to permit the defendant to amend his cross bill and to permit the plaintiff to apply for such order as advisable in regard to his replication.<sup>62</sup>

**T. For Further Proceedings—1. IN GENERAL.**—The court will prefer to remand a case for further proceedings to directing amendments or replacers.<sup>63</sup>

2. **IN CONFORMITY TO DECREE.**—A cause may be remanded for further proceedings in conformity with the decision of the appellate court.<sup>64</sup>

3. **AS REQUIRED BY JUSTICE OF CASE.**—Under the Revised Statutes a cause may be remanded for such further proceedings to be had in the inferior court as the justice of the case may require.<sup>65</sup>

4. **TO CARRY OUT MANDATE.**—The supreme court may direct a district court to take such further proceedings as may be necessary to carry out the instructions in its mandate.<sup>66</sup>

5. **TO PREPARE CASE FOR JUDGMENT.**—Where the ground on which a bill in equity seems to have been dismissed, namely, that it exhibits a case for an action at law only, and not for a suit in equity, is untenable, and the state of the record makes it impossible for the appellate court to decide what, if any, of the relief asked for the complainant is entitled to, the decree of dismissal will be reversed and the case remanded for further proceedings.<sup>67</sup>

that the paper was not a will. The bill made no reference to any other will. The answer insisted that the will referred to in the bill was a valid instrument and operative. Chief Justice Marshall, speaking for the court, said: 'Before the court can decide the intricate questions which grow out of this will, we think it necessary to possess some information which the record does not give.' It appearing that the testator had made another will, which was not in the record, the court said that 'since we are informed of its existence, it would be desirable to see it. We do not think the case properly prepared for decision; and therefore direct that the decree be reversed and the cause remanded, with liberty to the plaintiff to amend his bill.' *United States v. Rio Grande, etc., Irrigation Co.*, 184 U. S. 416, 423, 46 L. Ed. 619.

62. **In foreclosure suits.**—It is a proper proceeding under § 772 of the Revised Statutes of the District of Columbia, for the supreme court of the District, sitting in general term, on reversal of the court, sitting in special term, in ordering a sale under a deed of trust on the report of an auditor without hearing proper evidence, to reverse the order and remand the cause with leave to amend the pleadings. *Grant v. Phoenix Life Ins. Co.*, 121 U. S. 105, 30 L. Ed. 905.

63. **For further proceedings—In general.**—The allowance of a replacer in courts of error seems to have gone into disuse in modern times; and the practice in common-law cases in the supreme court, though otherwise in the courts in some of the states, has usually been, not to direct either amendments or replacers in cases before it, but to reverse the judgment and remand the cause to the court below for further proceedings

there. *Garland v. Davis*, 4 How. 131, 155, 11 L. Ed. 907.

64. **In conformity to decree.**—*Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 661, 34 L. Ed. 295; *Central Nat. Bank v. Stevens*, 169 U. S. 432, 42 L. Ed. 807; *The Sarah*, 8 Wheat. 391, 5 L. Ed. 644; *Union Ins. Co. v. United States*, 6 Wall. 759, 766, 18 L. Ed. 879; *East Tennessee, etc., R. Co. v. Interstate Commerce Commission*, 181 U. S. 1, 45 L. Ed. 719; *The Conqueror*, 166 U. S. 110, 41 L. Ed. 937; *United States v. Averill*, 130 U. S. 335, 32 L. Ed. 977; *Brenham v. German-American Bank*, No. 2, 144 U. S. 549, 36 L. Ed. 402; *Everhart v. Huntsville College*, 120 U. S. 223, 224, 30 L. Ed. 623.

"Ordinarily when the judgment is reversed the order is to remand the case for further proceedings not inconsistent with our opinion." *San Francisco Nat. Bank v. Dodge*, 197 U. S. 70, 114, 49 L. Ed. 669.

Where a perpetual injunction will not afford relief or compensate for damage done and the summary and irregular manner in which the case was tried below leaves the federal supreme court in great doubt, as to what was tried, and on what evidence the cases were heard, the case will be remanded to the lower court for such further proceedings, including leave to amend pleadings, as may be in accordance with equity and with the opinion rendered. *Dainese v. Cooke*, 91 U. S. 580, 584, 23 L. Ed. 251.

65. **As required by justice of case.**—*Little Miami, etc., R. Co. v. United States*, 108 U. S. 277, 280, 27 L. Ed. 724. See *Rev. Stat.*, § 701.

66. **To carry out mandate.**—*United States v. Morant*, 124 U. S. 647, 648, 31 L. Ed. 565.

67. **To prepare case for judgment.**—



6. TO PLEAD STATUTE OF LIMITATIONS.—A cause will not be remanded to permit a defendant to plead the statute of limitations in an action where his attorney had notice by the declaration of the actual date of the accrual of the claim sued on.<sup>68</sup>

7. TO FILE SUPPLEMENTAL PLEADINGS.—A cause may be remanded with directions to permit the filing of supplemental pleadings to avoid injury to a party on appeal, because of the condition of the record.<sup>69</sup>

8. WHERE ILLEGAL EVIDENCE ADMITTED.—Upon the reversal of a lower court because of its admission of illegal evidence, the cause will be remanded for further proceedings.<sup>70</sup>

9. FOR ADMISSION OF EVIDENCE—*a. As to Matters of Record.*—Where the circumstances attending the subject matter of the suit are not well disclosed in the record, the court will remand the case to the circuit court with directions to allow the parties to take further testimony if they should be so advised.<sup>71</sup>

*b. As to Matters Referred to Master.*—Where a circuit court awards to laborers and mechanics a prior lien for a certain amount, upon a master's report that some of the liens did not attach as to some of the items of the amount claimed but did not specify which items, the lower court will be reversed and the cause remanded for further proofs.<sup>72</sup>

*Ridings v. Johnson*, 128 U. S. 212, 218, 32 L. Ed. 401.

68. To plead statute of limitations.—“The record shows that the defendant's attorney had notice, by the declaration, that the plaintiff's claim accrued before a date more than eight years prior to the filing of the plea. Under such circumstances it would not be a fair exercise of discretion not to hold the defendant to his legal status. The judgment is reversed and the case is remanded to the circuit court, with directions to enter a judgment for the plaintiff.” *Retzer v. Wood*, 109 U. S. 185, 188, 27 L. Ed. 900. See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 900.

69. To file supplemental pleadings.—“In the case of *Ballard v. Searls*, 130 U. S. 50, 32 L. Ed. 846, which was an appeal in equity in which a somewhat similar exigency existed, we remanded the cause to the circuit court with instructions to allow the appellant to file such supplemental bill as he might be advised, in the nature of a bill of review, or for the purpose of suspending or avoiding the decree upon the new matter arising from the reversal of the decree on which it was based. There were complications in that case which rendered such a course advisable. A sale had been made under execution, and the purchasers might have acquired rights which a simple reversal of the decree would have embarrassed; and the decree itself was not founded directly upon the other decree which had been reversed, but was rendered on a bill filed to set aside alleged fraudulent conveyances of land which obstructed the execution of that decree. It seemed to us that the necessary investigation to be made would involve the exercise of original jurisdiction by this court, to which it is not competent. Hence we

took the course mentioned, by remanding the cause to the circuit court in order that the requisite ulterior proceedings might be taken there.” *Butler v. Eaton*, 141 U. S. 240, 243, 35 L. Ed. 713. See the title SUPPLEMENTAL PROCEEDINGS.

70. Where illegal evidence admitted.—As the objection to the proof of the instrument sought to be set up in this case is merely technical, and was probably not made at all in the circuit court, it would seem improper to dismiss the bill absolutely. The court is unanimous in reversing the decree; and a majority are of opinion, that the cause ought to be remitted to the circuit court of Virginia, for further proceedings to be had therein. Decree reversed, and remanded for further proceedings. *Drummond v. Magruder*, 9 Cranch 122, 125, 3 L. Ed. 677.

In an action by the United States against an assistant deputy quartermaster general, the defendant pleaded as a set-off a claim against the United States for transportation of troops assigned to him by the owner of a schooner, the district court permitted the assigned account to be given in evidence by the defendant, and allowed other evidence than the certificates of the commanding officer to prove the transportation account, it was held that the judgment below must be reversed, and the cause remanded for further proceedings. *United States v. Robeson*, 9 Pet. 319, 328, 9 L. Ed. 142.

71. Admission of evidence—Matters of record.—*Combs v. Hodge*, 21 How. 397, 16 L. Ed. 115.

72. As to matters referred to master.—This cause arose under the act of the 18th of February, 1879, passed by the state of Texas entitled “An act to protect mechanics, laborers and operatives on railroads against the failure of owners, contractors and subcontractors or agents

c. *Of Contents of Written Instrument.*—Where a contract, referred to in the pleadings in a lower court, was not produced in evidence nor its nonproduction duly accounted for, the cause will be remanded for further proceedings.<sup>73</sup>

d. *Of Evidence to Support Judgment.*—The decree of a circuit court must be reversed upon the sole ground that the evidence which has been sent to the supreme court fails to support the finding upon which it dismissed a bill, and the cause remanded for further hearing, with power in the circuit court to allow such further proof as it shall be advised may be necessary for the proper presentation of the questions to be decided.<sup>74</sup>

e. *To Cure Variance.*—If the merits of the case appeared to justify it, the mandate will direct the permission of further proceedings, where there is a reversal for variance between the pleadings and proof.<sup>75</sup>

10. FOR AN ACCOUNTING—a. *Not Asked for in Lower Court.*—Although not insisted upon in the lower court, yet where it appears to the appellate court that one of the parties is entitled to an accounting, the cause will be remanded for that purpose.<sup>76</sup>

b. *Items Improperly Rejected.*—Where the lower court erroneously rules that

to pay their wages when due, and provide a lien for such wages," and under which the claims were submitted to the master. *Hassall v. Wilcox*, 130 U. S. 493, 494, 32 L. Ed. 1001.

73. *Of contents of written instrument.*—In the superior court of East Florida, the complainant filed a bill claiming compensation for the nonperformance of certain contracts for the sale of lands in East Florida, referring to the contracts; the contents of which are stated to be set out in the bill of the complainant, which was replied to by the defendants. The contracts were not proved in the cause by testimony, nor was the nonproduction of them duly accounted for, on secondary evidence of the contents thereof, as far as practicable, given before the superior court. The supreme court, for this defect and imperfection in the proceedings, had not sufficient evidence before them to found any final and satisfactory decree. The decree of the court of appeals of East Florida, and the decree of the superior court of East Florida, was therefore reversed, and the cause remanded to the court of appeals, to allow the documents referred to, or the contents of the same, to be duly authenticated and proved. *Levy v. Arredondo*, 12 Pet. 218, 9 L. Ed. 1062.

74. *Of evidence to support judgment.*—"This record shows clearly that the case was heard and decided below upon testimony which is not before us. \* \* \* Neither is the case in a condition to be heard understandingly upon the important constitutional questions which have been argued. It comes upon bill, answer and replication alone. \* \* \* Under these circumstances it is apparent that the case has not been prepared by either party with a view to the presentation of these questions, and we are, therefore, unwilling to enter upon their consideration on this appeal."

*Southern v. Hagood*, 131 U. S., appx. ccxii, ccxiii.

75. *To cure variance.*—It is a settled rule, that the decree must conform to the allegations in the pleadings, as well as to the proofs in the cause; therefore, when the question is on the validity of a location, and neither its vagueness nor its certainty are distinctly put in issue by the pleadings, the testimony to that point will be disregarded by the federal supreme court; but if the merits appear to justify it, the cause will be remanded to the court below, with directions to permit the pleadings to be amended. *Crocket v. Lee*, 7 Wheat. 522, 5 L. Ed. 513.

Where in a case in admiralty, the merits are made to appear to the supreme court and further proceedings are wanted to make the allegation in the pleadings and the proofs correspond, the cause will be remanded for further proceedings. *The Sarah*, 8 Wheat. 391, 5 L. Ed. 644.

76. *Accounting—Not asked for in lower court.*—*Finley v. Lynn*, 6 Cranch 238, 3 L. Ed. 211; *Dupont v. Vance*, 19 How. 162, 173, 15 L. Ed. 584.

"In *Finley v. Lynn*, 6 Cranch 238, 3 L. Ed. 211, this court was of opinion that the appellant, whose bill was dismissed by the circuit court, was entitled to an account, on a ground not assumed in the circuit court. This court said: 'The plaintiff probably did not apply for this account in the court below, and it does not appear to have been a principal object of his bill. This court therefore doubted whether it would be most proper to affirm the decree dismissing the bill, with the addition that it should be without prejudice to any future claim for profits, and for the debt due from one store to the other, or to open the decree and direct the account. The latter is deemed the more equitable course. The decree, therefore, is to be reversed, and the cause remanded, with directions to take an ac-



certain accounts should not be allowed, on reversal, it will be directed by the mandate to proceed to a hearing of such items.<sup>77</sup>

11. **ON SUSTAINING DEMURRER.**—Where there is error in the judgment of a district court in overruling a demurrer and giving judgment for one of the parties, the case may be remanded to the said district court, with liberty to the parties to amend their pleadings, and that further proceedings may be had therein, according to law.<sup>78</sup>

12. **ON OVERRULING DEMURRER.**—This case came before the court on a judgment in the circuit court, for the defendant, the avowant in replevin, he having demurred to the pleas of the plaintiff in an action of replevin; the court having reversed the judgment of the circuit court, remanded the cause, with instructions to the circuit court to overrule the demurrer, and permit the defendant, the avowant, to plead.<sup>79</sup>

13. **ON DISMISSAL FOR WANT OF FINALITY.**—The practice in the supreme court, in case the judgment or decree appealed from is not final, is to dismiss the writ of error or appeal for want of jurisdiction, and remand it to the court below to be further proceeded in.<sup>80</sup>

14. **ON CERTIFICATION OF DIVISION OF OPINION.**—See the title **APPEAL AND ERROR**, vol. 2, p. 30.

15. **WHERE TIME NOT ALLOWED FOR PREPARATION OF CASE.**—The lower court will be reversed and the cause remanded for the taking of further evidence because a party is not given sufficient time in which to prepare his case, where the action of the lower court prevents the introduction of material evidence.<sup>82</sup>

16. **IN LAND GRANT CASES**—*a. In General.*—Where the lower court confirms a land claim, upon reversal because of the doubtful character of the claim and the entire want of merits upon the testimony, the mandate will direct a further examination of the cause.<sup>83</sup>

*b. To Make Survey.*—Where a defendant claimed under a statute of limitations and showed possession of certain lands, and the validity of the plea de-

count of the profits of the jewelry store, if the same shall be demanded by the plaintiff." *Dupont v. Vance*, 19 How. 162, 173, 15 L. Ed. 584.

In the case of *Finley v. Lynn*, 6 Cranch 238, 3 L. Ed. 211, the accounting was directed in a suit for the dissolution of a partnership. See, further, the title **PARTNERSHIP**.

The case of *Lewis v. Darling*, 16 How. 1, 14 L. Ed. 819, was remanded for an accounting.

77. **Items wrongly rejected.**—In an action for the recovery of taxes against a railroad company, the mandate may direct the lower court to deduct certain items of loss from the company's gross earnings as a basis of taxation. *Little Miami, etc., R. Co. v. United States*, 108 U. S. 277, 27 L. Ed. 724.

78. **On sustaining demurrer.**—*Mullen v. Torrance*, 9 Wheat. 537, 539, 6 L. Ed. 154.

79. **On overruling demurrer.**—*Lloyd v. Scott*, 4 Pet. 205, 206, 7 L. Ed. 833.

"It is the opinion of the court that the fourth and fifth counts, however informal, have substance enough in them to be maintained against a general demurrer, and that the judgment must be reversed, and the cause remanded for further proceedings." *Day v. Chism*, 10 Wheat. 449, 453, 6 L. Ed. 363.

80. **On dismissal for want of finality.**—*United States v. Girault*, 11 How. 22, 32, 13 L. Ed. 587.

82. **Where time not allowed for preparation of case.**—This suit presents a contest between the United States and the appellee corporations as to the right asserted by the latter to construct over and near the Rio Grande a certain dam and reservoir for the purpose of appropriating the waters of that river in their private business. On August 5, 1899, the case was set for final hearing on Nov. 1, 1899; on October 17, 1899, the United States moved for a continuance until February 5, 1900, that it may collect testimony; the motion was sustained only so far as to set the trial for December 21, 1899; a final order was entered on January 9, 1900. The court was reversed and the cause remanded to permit the United States to introduce further evidence. *United States v. Rio Grande, etc., Irrigation Co.*, 184 U. S. 416, 417, 46 L. Ed. 619.

83. **In land grant cases.**—Where the clear weight of the proof is against the possession or occupation by the grantee of land in California, the date of the grant was altered without any explanation of the alteration, and the genuineness of the signature of the governor to a certificate of approval of the departmental assembly



pended upon whether or not the lands were within plaintiff's patent, on reversal the case was remanded to a circuit court for the purpose of ascertaining the location of the lands by a corrected survey made according to rules laid down by the court.<sup>84</sup>

c. *For Proceedings According to Law*.—A cause may be remanded with directions to pursue according to the acts of congress concerning controversies in regard to public lands.<sup>85</sup>

U. *For Reference*.—Where it becomes necessary to determine upon the reasonableness of a schedule of railroad rates fixed by a state legislature, the cause will be remanded with instructions to refer the case to some competent master to report fully the facts, and to proceed upon such report as equity shall require.<sup>86</sup> The fact that, when the trial court has acted upon the report of the master, the supreme court will be called upon to examine the evidence, is not a sufficient reason for not remanding the case.<sup>87</sup>

V. *For New Trial*.—1. IN GENERAL.—Although a venire de novo is frequently awarded by a court of error, upon a bill of exceptions, to enable parties to amend, and though amendments may, in the sound discretion of the court, upon a new trial, be permitted, the venire de novo is, in no instance, anything more than an order for a new trial, in a cause in which the verdict or judgment is erroneous in matter of law; and is never equivalent to a new suit. No statute of the United States alters the law in this regard.<sup>88</sup>

doubted, the federal supreme court will reverse the decree of the court below confirming the claim, and remit it for further evidence and examination. *United States v. Galbraith*, 22 How. 89, 16 L. Ed. 321.

In a case where the preliminary proceedings to a grant of land in California are not produced in evidence, and the grant and certificate of approval come from the hands of the claimants, no record of them being found among the Mexican archives or in any book, and there is no evidence of possession or occupation deserving notice or consideration, the case will be remanded to the court below for further evidence. *United States v. Pico*, 22 How. 406, 16 L. Ed. 357.

Where neither the grant of land in California, nor the certificate of approval by the departmental assembly, are found among the Mexican archives, nor the record of them upon any book of records, but both papers came from the hands of the claimants, the case will be remanded for further evidence. *United States v. Valjejo*, 22 How. 416, 16 L. Ed. 359.

84. *To make survey*.—*McEwen v. Bulkley*, 24 How. 242, 16 L. Ed. 672.

85. *For proceedings according to law*.—Where two persons appear to have conflicting claims to land in California, and the United States do not appear to have any interest in the matter, and the case is brought to the federal supreme court by proceedings to which the United States are a party, the federal court will remand the record to the court in California, with directions to allow the contesting parties to proceed in the manner pointed out by the act of congress of March 3, 1851, as to litigating claims to land patents from the United States. *United States v. White*, 23 How. 249, 16 L. Ed. 560.

86. *For reference*.—*Chesapeake, etc., Tel. Co. v. Manning*, 186 U. S. 238, 250, 46 L. Ed. 1144; *Owensboro v. Owensboro Waterworks Co.*, 191 U. S. 358, 372, 48 L. Ed. 217. See the titles RAILROADS; REFERENCE.

"Few cases are more difficult or perplexing than those which involve an inquiry whether the rates prescribed by a state legislature for the carriage of passengers and freight are unreasonable. \* \* \* The question then arises what disposition of the case shall this court make. Ought we to examine the testimony, find the facts conclusion? \* \* \* We think this is one of those cases in which it is especially important that there should be a full and clear finding of the facts by the trial court. The questions are difficult, the interests are vast, and therefore the aid of the trial court should be had." *Chicago, etc., R. Co. v. Tompkins*, 176 U. S. 167, 172, 179, 44 L. Ed. 417.

87. "We are aware that the findings made by the master may be challenged when presented to the trial court for consideration, and it may become its duty to examine the testimony to see whether those findings are sustained, as likewise if sustained by the trial court it may become our duty to examine the testimony for the same purpose. But before we are called upon to make such examination we think we are entitled to have the benefit of the services of a competent master and an approval of his findings by the trial court. As we have said, those findings may not be challenged by either party, and if so a large burden will be taken from the appellate court." *Chicago, etc., R. Co. v. Tompkins*, 176 U. S. 167, 180, 44 L. Ed. 417.

88. *For new trial*.—*United States v. Hawkins*, 10 Pet. 125, 9 L. Ed. 369.

2. **WANT OF JURISDICTION OF LOWER COURT.**—A new trial will not be directed where the lower court has no jurisdiction.<sup>89</sup>

3. **MATTERS NOT OF RECORD**—a. *In General.*—Matters not appearing of record will not be decided by an appellate court in rendering decision upon reversal, but the case will be remanded for a new trial.<sup>90</sup>

b. *Stipulation of Parties.*—The supreme court will grant a new trial, instead of assessing damages, upon an agreement of the parties, entered upon the transcript, stating the amount of damages upon alternatives not set out in the verdict—the agreement not being considered as a part of the record.<sup>91</sup>

4. **TO ALLOW AMENDMENTS.**—A new trial may be granted to permit the parties to make amendments.<sup>92</sup>

5. **TRIAL OF FACTS BY COURT.**—The lower court will generally not be reversed where it renders judgment on the facts on the waiver of a jury trial;<sup>93</sup> but, where the lower court renders judgment without a jury trial upon an erroneous statement of facts by the parties, its decision will be reversed and the cause remanded for a new trial.<sup>94</sup> Where a lower court on a finding of facts

**89. Want of jurisdiction of lower court.**—“The court, not having jurisdiction, a *venire facias de novo* (which, in effect, directs the exercise of jurisdiction) ought not to issue.” *Bingham v. Cabbot*, 3 Dall. 19, 42, 1 L. Ed. 491.

**90. Matters not of record.**—See, generally, the title **APPEAL AND ERROR**, vol. 2, p. 205.

Where a question was certified from the circuit court to the federal supreme court, viz: whether a certain letter, written by the cashier of a bank without the knowledge of the directory, though copied at the time of its date in the letter book of the bank, was a legal and valid act of authority; and the record afforded no evidence relevant to the acts and authority of the cashier, or to the practice of the bank in ratifying or rejecting similar acts, the federal court cannot answer the question, and the case must be remanded to the circuit court, to be tried in the usual manner. *United States v. City Bank*, 19 How. 385, 15 L. Ed. 662.

**91. Stipulation of parties.**—“An attempt has been made to obtain from this court a mandate to the circuit court, to enter a judgment in conformity to an agreement of parties entered on the transcript, which states the amount to be adjudged to the plaintiff upon several alternatives. But we are of opinion, that this court can take no notice of that consent; the verdict presents no alternative; and the consent entered on the transcript, or on the minutes of the circuit court, forms no part of the record brought up by this writ of error. Nor will this court be led into the exercise of a power so nearly approaching the province of a jury in assessing damages.” *Lanusse v. Barker*, 3 Wheat. 101, 147, 4 L. Ed. 343.

**92. To allow amendments.**—*United States v. Hawkins*, 10 Pet. 125, 9 L. Ed. 369; *Patterson v. United States*, 2 Wheat. 221, 226, 4 L. Ed. 224; *Barnes v. Williams*, 11 Wheat. 415, 416, 6 L. Ed. 508; *Garland v. Davis*, 4 How. 131, 154, 11 L. Ed. 907.

In *United States v. Hawkins*, 10 Pet.

125, 9 L. Ed. 369, it is stated: “A *venire de novo* is frequently awarded in a court of error, upon a bill of exceptions to enable parties to amend, \* \* \* amendments may, in the sound discretion of the court, upon a new trial, be permitted.”

**93. Trial of facts by court—Jury waived.**—*Flanders v. Tweed*, 9 Wall. 425, 428, 19 L. Ed. 678; *Kearney v. Case*, 12 Wall. 275, 20 L. Ed. 395; *Insurance Co. v. Tweed*, 7 Wall. 44, 51, 19 L. Ed. 65; *Generes v. Bonnemer*, 7 Wall. 564, 19 L. Ed. 287; *Norris v. Jackson*, 9 Wall. 125, 127, 19 L. Ed. 608; *Dirst v. Morris*, 14 Wall. 484, 490, 20 L. Ed. 722; *Richmond v. Smith*, 15 Wall. 429, 437, 21 L. Ed. 200; *Bethell v. Mathews*, 13 Wall. 1, 2, 20 L. Ed. 556; *Insurance Co. v. Folsom*, 18 Wall. 237, 252, 21 L. Ed. 827. See the title **APPEAL AND ERROR**, vol. 1, p. 1028, et seq.

**94. Agreement as to facts.**—“In a case where “it is apparent the parties below supposed that they had made up a case, according to the practice in Louisiana, from the finding of the facts by the court, that would entitle them to a re-examination of it here; but as the court did not make it up, and file it, as of the date of the trial and judgment, it cannot be regarded as a part of the record; and, under the circumstances, the case being an important one, and intended to be carried up here for re-examination, we shall reverse the judgment for a mistrial, and remand it to the court below for a new trial.” *Flanders v. Tweed*, 9 Wall. 425, 431, 19 L. Ed. 678, distinguished in *Reed v. Gardner*, 17 Wall. 409, 411, 21 L. Ed. 665. See, also, *Graham v. Bayne*, 18 How. 60, 15 L. Ed. 265; *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 104, 37 L. Ed. 380.

“The cause was transferred to this court, where the judgment was reversed because the record did not contain any stipulation in writing waiving a trial by jury, and the cause was remanded for further proceedings.” *Tweed's Case*, 16 Wall. 504, 514, 21 L. Ed. 389; *Flanders v. Tweed*, 9 Wall. 425, 19 L. Ed. 678.



without a jury fails to find facts covering all the issues, it will be reversed and the cause remanded for a new trial.<sup>95</sup>

6. TRIAL OF FACTS BY JURY.—a. *Submission to Jury*.—If a cause is not properly submitted to the jury, the case will, on reversal, be remanded for a new trial.<sup>96</sup>

b. *Evidence before Jury*.—The cause may be remanded for a new trial because the court admitted improper evidence to be considered by the jury.<sup>97</sup>

c. *Special Verdict*.—(1) *In General*.—Where the lower court renders judgment upon an invalid special verdict, it will be reversed and the cause remanded for a new trial.<sup>98</sup> It is only when the special verdict is ambiguous or imperfect, or when it finds only the evidence of facts, and not the facts themselves, or finds but a part of the facts in issue, and is silent as to others, that the federal supreme court can regard the finding as a mistrial, and order a venire de novo.<sup>99</sup>

(2) *Insufficient Finding of Facts*.—(a) *Essential Facts*.—Where, in a special verdict, the essential facts are not distinctly found by the jury, although there is sufficient evidence to establish them, the federal supreme court will not render a judgment upon such an imperfect special verdict, but will remand the cause to the court below, with directions to award a venire facias de novo.<sup>1</sup>

95. **Facts covering all issues.**—Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 276, 28 L. Ed. 722; Tradesman's Nat. Bank v. Third Nat. Bank, 112 U. S. 293, 28 L. Ed. 728.

"There must be a new trial. Although there is a special finding of facts, it does not cover the issue as to damages. No damages are found. The action is one for negligence, sounding in damages. Although the complaint alleges that the drawers and the indorser are discharged for want of notice of nonacceptance, and though it is found that the drawers were in good credit when the drafts were discounted, and that the drawers and indorser had become insolvent by the 13th and 19th of October, 1875, there is nothing in the finding of facts on which to base a judgment for any specific amount of damages." Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 276, 293, 28 L. Ed. 722.

96. **Trial of facts by jury—Submission to jury.**—Hodges v. Easton, 106 U. S. 408, 27 L. Ed. 169.

**Erroneous instructions.**—If the court wrongfully instructed the jury on the question of laches, the case will be reversed and remanded for a new trial. United States v. Kirkpatrick, 9 Wheat. 720, 6 L. Ed. 199.

97. **Evidence before jury.**—Pollard v. Dwight, 4 Cranch 421, 2 L. Ed. 666.

98. **Special verdict.**—Hodges v. Easton, 106 U. S. 408, 413, 27 L. Ed. 169. See the title VERDICT.

In this case the special verdict was invalid because the issues were not properly submitted to the jury. Hodges v. Easton, 106 U. S. 408, 413, 27 L. Ed. 169.

99. *Suydam v. Williamson*, 20 How. 427, 441, 15 L. Ed. 978; *Barnes v. Williams*, 11 Wheat. 415, 6 L. Ed. 508; *Carrington v. Pratt*, 18 How. 63, 15 L. Ed. 267; *Graham v. Bayne*, 18 How. 60, 15 L. Ed. 265; *Saltonstall v. Birtwell*, 150 U. S. 417, 419, 37 L. Ed. 1128; *Livingston v. Maryland Ins. Co.*, 6 Cranch 274, 280, 3 L. Ed. 222; *Pren-*

*tice v. Zane*, 8 How. 470, 486, 12 L. Ed. 1160; *Ward v. Cochran*, 150 U. S. 597, 608, 37 L. Ed. 1195.

1. **Insufficient finding of facts.**—*Barnes v. Williams*, 11 Wheat. 415, 6 L. Ed. 508; *Carrington v. Pratt*, 18 How. 63, 15 L. Ed. 267; *Prentice v. Zane*, 8 How. 470, 484, 12 L. Ed. 1160; *Suydam v. Williamson*, 20 How. 427, 441, 15 L. Ed. 978; *Mordecai v. Lindsay*, 19 How. 199, 200, 15 L. Ed. 624; *Stickney v. Wilt*, 23 Wall. 150, 163, 23 L. Ed. 50; *Montgomery v. Anderson*, 21 How. 386, 388, 16 L. Ed. 160; *Smith v. Sac County*, 11 Wall. 139, 162, 20 L. Ed. 102; *Stewart v. Salamon*, 97 U. S. 361, 364, 24 L. Ed. 1044; *Saltonstall v. Birtwell*, 150 U. S. 417, 37 L. Ed. 1128; *Dickinson v. The Planters' Bank*, 16 Wall. 250, 21 L. Ed. 278.

"We are of opinion that the facts set forth in the special findings are not sufficient to support the judgment. The opinion might help the findings out, but cannot be resorted to for that purpose." *Saltonstall v. Birtwell*, 150 U. S. 417, 419, 37 L. Ed. 1128.

"In this case, the jury have found an abandonment, but have not found, whether it was made in due time, or otherwise. The fact is, therefore, found defectively; and for that reason, a venire facias de novo must be awarded." *Chesapeake Ins. Co. v. Stark*, 6 Cranch 268, 273, 3 L. Ed. 220.

"In the *Chesapeake Ins. Co. v. Stark*, 6 Cranch 268, 3 L. Ed. 220, and *Barnes v. Williams*, 11 Wheat. 415, 6 L. Ed. 508, this court have decided that, where in a special verdict the essential facts are not distinctly found by the jury, although there is sufficient evidence to establish them, the court will not render a judgment upon such an imperfect special verdict, but will remand the cause to the court below, with directions to award a venire de novo." *Prentice v. Zane*, 8 How. 470, 484, 12 L. Ed. 1160.

Where a suit was brought by an in-



(b) *For Decision of Case.*—In a case where a special verdict is too imperfect to enable it to decide on the case, the judgment of the circuit court must be reversed, and the cause remanded to that court, with directions to award a venire de novo.<sup>2</sup>

(3) *Issues on New Trial.*—Whether the federal supreme court will follow the practice prevailing in some of the states and accompany its mandate by a direction to restrict the next trial to such issues as were not cured by the answers of the jury to special questions, is not decided.<sup>3</sup>

d. *Entry of Verdict.*—Where the judgment below was entered properly, the federal supreme court will not remand the case for a new trial because of the verbal mistake of the clerk in using a superfluous word in entering the verdict.

dorsee upon a promissory note, and the special verdict found that the original consideration of the note was fraudulent on the part of the payee, but omitted to find whether the holder had given a valuable consideration for it or received it in the regular course of business, and the court below gave judgment for the defendant, the federal supreme court could not decide whether that judgment was erroneous or not, and would have been compelled to remand the case. *Prentice v. Zane*, 8 How. 470, 12 L. Ed. 1160.

**Finding of mere evidence of fact.**—The claim of the plaintiff being founded upon a bequest of certain slaves, it was essential to a recovery at law, that the assent of the executor to the legacy should be proved. Although, in the opinion of the court, there was sufficient evidence in the special verdict from which the jury might have found the fact, yet they have not found it, and the court could not, upon a special verdict, intend it. The special verdict was defective in stating the evidence of the fact, instead of the fact itself. It was impossible, therefore, that a judgment could be pronounced for the plaintiff. So, as to the defendant's defense under the statute of limitations, the special verdict did not find any facts by which the court could ascertain at what time the right of action accrued. It was not stated, that the plaintiff and defendant were ever resident in the same state, at the same time. The case was, therefore, too imperfectly stated to enable the court to decide the questions upon which the opinions of the judges of the circuit court were opposed and the cause was remanded to that court, with directions to award a venire facias de novo. *Barnes v. Williams*, 11 Wheat. 415, 416, 6 L. Ed. 508.

**2. For decision of case.**—*Harden v. Fisher*, 1 Wheat. 300, 303, 4 L. Ed. 96. See ante, "In General," III. V. 6, c. (1).

This is an action of ejectment, brought by the defendants in error, in the circuit court for the district of New York, to recover certain lands which they claim as the heirs of Donald Fisher, deceased. A special verdict was found in the case, which shows that Donald Fisher was a British subject residing in the city of New York, and departed this life in the

year 1798, leaving the lessors of the plaintiffs in ejectment his heirs at law, who are also British subjects. The plaintiffs, being thus found to be British subjects, are incapable of maintaining an action for real estate in the state of New York, unless they are enabled to do so by the 9th article of the treaty between the United States and Great Britain, made in the year 1794, which provides that British subjects, holding lands in the United States, and their heirs, so far as respects those lands, and the legal remedies incident thereto, should not be considered as aliens. The jurors find that Donald Fisher was, on the first day of January in the year 1777, seised in his demesne, as of fee, of the lands and tenements in the declaration mentioned, and was in the actual possession thereof, and continued so seised and possessed until the rendering the judgment hereinafter mentioned. The verdict does not find that Donald Fisher held his title, until the treaty of 1794 was made, and although nothing is found to show that he has parted with it, yet the court cannot presume that he did not part with it. The verdict ought to have shown that the title was in Donald Fisher when the treaty was made, and continued in him to the time of his death. *Harden v. Fisher*, 1 Wheat. 300, 303, 4 L. Ed. 96.

**3. Issues on new trial.**—The counsel for defendants in error "insisted that the order of reversal, if one be made, should be accompanied by a direction to the court below to restrict the next trial to such issues as are not covered by the answers of the jury to special questions. In support of this position, we have been referred to several adjudications which seem to recognize the authority of the court, when setting aside a judgment, to restrict the subsequent trial to such issues as were not passed upon by the jury at the first trial. Whether this contention be sound or not, we need not now determine, for the reason that the grounds upon which it rests have no existence, where, as here, the case, as to the issues triable by jury, was not submitted to the jury in the mode required by law. There is, then, no alternative but to reverse the judgment, with directions that a trial be had upon all the material issues of fact."

As the verdict was amendable in the court below, the amendment will be regarded as made.<sup>4</sup>

7. JUDGMENT ON DEMURRER TO EVIDENCE.—Where a demurrer to evidence is fatally defective and judgment has, notwithstanding, been rendered upon it for the party demurring, by the court below, the judgment will be reversed in the federal supreme court, and a new trial awarded.<sup>5</sup>

8. JUDGMENT ERRONEOUS IN AMOUNT OF RECOVERY.—Where an error in the amount recovered is apparent upon the record, and it could not have been remedied by an amendment of the pleadings, the federal supreme court will, of its own motion, in the interests of justice, direct that it be corrected, and, if necessary, order a new trial or further proceedings for that purpose.<sup>6</sup>

9. JUDGMENT ON INVALID REMITTITUR.—Where a jury awards damages in excess of the proofs and the court renders judgment upon a remittitur, if the supreme court holds the remittitur to be unauthorized and invalid, it will reverse the lower court and remand the cause with directions to set aside the verdict and grant a new trial.<sup>7</sup>

10. ON DIVISION OF OPINION OF APPELLATE COURT.—See elsewhere.<sup>8</sup>

**W. For Entry of Judgment**—1. WHERE FACTS APPEAR OF RECORD.—Where the facts appear of record, the mandate may direct the particular judgment to be entered.<sup>9</sup>

2. WHERE STATUTE OF LIMITATIONS NOT PLEADED.—See elsewhere.<sup>10</sup>

3. ON DEMURRER.—Where a judgment overruling a demurrer is reversed, the cause will be remanded to the lower court with directions to enter judgment upon the demurrer for the defendant, unless the plaintiff withdraw the demurrer and proceed to trial, within such time and upon such terms as the circuit court may direct.<sup>11</sup>

4. ON STIPULATION OF PARTIES.—The mandate may direct the entry of a

*Hodges v. Easton*, 106 U. S. 408, 412, 27 L. Ed. 169.

4. Entry of verdict.—*Shaw v. Railroad Co.*, 101 U. S. 557, 25 L. Ed. 892.

5. Judgment on demurrer to evidence.—*Fowle v. Alexandria*, 11 Wheat. 320, 6 L. Ed. 484. See the title DEMURRER TO EVIDENCE, vol. 5, p. 289.

6. Judgment erroneous in amount of recovery.—*Mills v. Scott*, 99 U. S. 25, 25 L. Ed. 294.

7. Judgment on invalid remittitur.—This was an action for damages for death by wrongful act under Revised Statutes of Arizona, §§ 2145-2147, against a railroad company. The deceased left a widow, four children, and a father and mother. The jury returned a verdict for the plaintiff for \$50,000, of which they awarded \$8,000 to the widow, \$8,000 to each child, and \$5,000 to either parent of the deceased. After the defendant had moved for a new trial, the widow, in whose name alone the action was brought, filed a remittitur, by which she undertook to reduce her share to \$6,000, the share of each child to \$3,000, and the shares of the parents to one dollar each, and the whole verdict to \$18,002. The widow could not compromise or release the rights even of her own minor children. She certainly could not release, in whole or in part, the rights of her father-in-law and mother-in-law. The jury, prompted by sympathy, for the widow and children, rendered damages which are clearly ex-

cessive, and, but for the remittitur, the judge before whom the trial was had would have ordered a new trial. As the federal supreme court now holds the remittitur to have been unauthorized and invalid, the proper order, without considering other questions argued at the bar, will be judgment reversed, and cause remanded to the supreme court of the territory, with directions to cause the verdict to be set aside and a new trial had. *Southern Pac. Co. v. Tomlinson*, 163 U. S. 369, 372, 41 L. Ed. 193.

8. On division of opinion of appellate court.—See the title APPEAL AND ERROR, vol. 2, p. 396.

9. Entry of judgment.—Where facts appear of record.—*United States v. Fossat*, 20 How. 413, 15 L. Ed. 944.

10. Where statute of limitations not pleaded.—See ante, "To Plead Statute of Limitations," III, T, 6.

11. On demurrer.—"The answer expressly denies that the plaintiff is a holder for value of the coupons. The language is, that it 'denies that plaintiff was at the institution of this action, or now is, the owner for value of any of the bonds or coupons in said petition declared on.' Instead of meeting this allegation by an issue of fact, the plaintiff by demurring admits its truth; and we do not see how, upon the pleadings, he can be deemed a holder for value." *County of Dallas v. MacKenzie*, 94 U. S. 660, 663, 24 L. Ed. 182.



judgment according to the stipulation of such parties as are before the appellate court.<sup>12</sup> The stipulation may be made after appeal.<sup>13</sup>

5. ON FINDING OF FACTS BY COURT.—The mandate of an appellate court may direct the entry of judgment upon a special finding of facts by the lower court,<sup>14</sup> if the finding covers all the issues,<sup>15</sup> and is sufficient to support the

12. On stipulation of parties.—“The appellant now moves that the foregoing part of the decree, from which the appeal was taken, be reversed in accordance with the stipulation of the parties, and that the cause be remanded with instructions to enter a decree in favor of the complainant as agreed. This motion is granted and the decree reversed without costs; and the cause is remanded with instructions to proceed in accordance with the foregoing stipulation of the parties to this appeal, but without prejudice to the rights of the other parties to the suit.” *Bond v. Davenport*, 123 U. S. 619, 622, 31 L. Ed. 279. See ante, “As to Facts Not of Record,” III, I; “On Stipulation of Parties,” III, O.

13. Made after appeal.—Where since the appeal, the parties have come to an adjustment of the controversy, as appears by a stipulation on file, the decree of the lower court will be reversed, and the entry will be that it was reversed by consent, and that the cause is remanded, with directions that a decree be entered in the circuit court for the complainant, as prayed in the bill of complaint, it being stated in the mandate that the decree here is entered by consent of the parties, as appears by the stipulation, which will be recorded in the case. *Woodman Pebbling Machine Co. v. Guild*, 154 U. S. 597, 21 L. Ed. 743.

14. On finding of facts by court.—*Fort Scott v. Hickman*, 112 U. S. 150, 164, 28 L. Ed. 636; *National Bank v. Insurance Co.*, 95 U. S. 673, 679, 24 L. Ed. 563; *Fairfield v. County of Gallatin*, 100 U. S. 47, 25 L. Ed. 544; *Wright v. Blakeslee*, 101 U. S. 174, 25 L. Ed. 1048; *People's Bank v. National Bank*, 101 U. S. 181, 25 L. Ed. 907; *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924; *Lincoln v. French*, 105 U. S. 614, 26 L. Ed. 1189; *Ottawa v. Carey*, 108 U. S. 110, 27 L. Ed. 669; *Kirkbride v. Lafayette County*, 108 U. S. 208, 27 L. Ed. 705; *Retzer v. Wood*, 109 U. S. 185, 27 L. Ed. 900; *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 27 L. Ed. 1020; *East St. Louis v. Zebley*, 110 U. S. 321, 28 L. Ed. 162; *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 30 L. Ed. 920; *Allen v. St. Louis Bank*, 120 U. S. 20, 40, 30 L. Ed. 573; *Stanley v. Schwalby*, 162 U. S. 255, 40 L. Ed. 960; *Bates County v. Winters*, 112 U. S. 325, 28 L. Ed. 744. See the title APPEAL AND ERROR, vol. 2, p. 388.

“We can only direct such judgment as is authorized by the facts specially found by the court below. Rev. Stat., § 701.” *Pullman's Palace Car Co. v. Metropoli-*

*tan St. R. Co.*, 157 U. S. 94, 112, 39 L. Ed. 632.

“It conclusively appearing, upon the facts found by the court below, that the original plaintiffs cannot maintain their action, it is ordered, in accordance with the precedents of *Fort Scott v. Hickman*, 112 U. S. 150, 28 L. Ed. 636, and *Allen v. St. Louis Bank*, 120 U. S. 20, 30 L. Ed. 573, that the judgment be reversed, and the case remanded to the circuit court, with directions to enter judgment for the original defendant.” *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 264, 30 L. Ed. 920.

Judgment for particular party.—“This court has the power, under § 701 of the Revised Statutes, to direct such judgment to be entered as the special finding requires. In cases like the present one, the proper practice is to direct a judgment for the defendant, instead of awarding a new trial.” *Fort Scott v. Hickman*, 112 U. S. 150, 165, 28 L. Ed. 636.

“As this was a case of a special finding which ascertained all the facts of the case, there is no reason for awarding a new trial. *Allen v. St. Louis Bank*, 120 U. S. 20, 40, 30 L. Ed. 573. Judgment reversed and case remanded to the circuit court, with directions to enter judgment for the original defendant.” *Seeberger v. Schweyer*, 153 U. S. 609, 614, 38 L. Ed. 839; *Redfield v. Parks*, 132 U. S. 239, 252, 33 L. Ed. 327.

Upon waiver of jury.—“As the case was heard upon a stipulation waiving a jury and upon an agreed statement of facts, it is our duty, in reversing, to direct that the proper judgment be entered below.” *Meyer v. Richards*, 163 U. S. 385, 415, 41 L. Ed. 199.

The case was tried by the court, without the intervention of a jury, upon the stipulation of the parties. The fact having been established, against the presumption upon which the court based its judgment that the trustees never reconveyed the premises or any part thereof to the plaintiff, the title remains in them, and with it the right of possession. Judgment should, therefore, have been ordered for the defendants. It follows that the judgment of the circuit court must be reversed, and the cause be remanded with directions to enter judgment in their favor. *Lincoln v. French*, 105 U. S. 614, 617, 26 L. Ed. 1189.

15. Where finding covers all issues.—*People's Bank v. National Bank*, 101 U. S. 181, 25 L. Ed. 907; *Wright v. Blakeslee*, 101 U. S. 174, 25 L. Ed. 1048.

The special finding of facts by the cir-



judgment.<sup>16</sup> Where the special finding embraces only a part of the issues, a different rule prevails.<sup>17</sup>

6. ON FORMER VERDICT.—The rendition of judgment on a former verdict, found at a special term of the supreme court of the District of Columbia upon correct instructions but set aside by the court at the general term upon a different view of the law, will not be directed upon the reversal of the latter judgment.<sup>18</sup>

7. TO CONFORM TO OPINION.—The mandate may direct the entry of a judgment in conformity to the decision of the appellate court.<sup>19</sup>

8. FOR PARTICULAR PARTY.—An appellate court, on reversing a judgment of a lower court, may order such judgment for either party as the justice of the case may require.<sup>20</sup> When the error of the lower court is a conclusion of law,

the circuit court is, under § 649 of the Revised Statutes, equivalent to the special verdict of a jury, *Norris v. Jackson*, 9 Wall. 123, 19 L. Ed. 608; *Copelin v. Insurance Co.*, 9 Wall. 461, 467, 19 L. Ed. 739; *Insurance Co. v. Folsom*, 18 Wall. 237, 249, 21 L. Ed. 827; *Retzer v. Wood*, 109 U. S. 185, 27 L. Ed. 900, and, if such special finding covers all the issues raised by the pleadings, the federal supreme court has the power, under § 701 of the Revised Statutes, to direct such judgment to be entered as the special finding requires. In cases like the present one, the proper practice is to direct a judgment for the defendant, instead of awarding a new trial. *Fort Scott v. Hickman*, 112 U. S. 150, 164, 28 L. Ed. 636.

Where a circuit court makes a special finding of all the facts in a case and enters an erroneous judgment thereon, the supreme court has power on remand to direct what judgment shall be entered. *Fort Scott v. Hickman*, 112 U. S. 150, 28 L. Ed. 636.

16. Sufficient to support judgment.—“We are of opinion that the facts set forth in the special findings are not sufficient to support the judgment. The findings do not show what the collector charged the plaintiff; nor sufficiently describe the articles imported; nor does it appear from the record under what provisions of the tariff act of March 3, 1883, 22 Stat. 488, c. 121, the parties claimed respectively. The opinion might help the findings out, but cannot be resorted to for that purpose.” *Saltonstall v. Birtwell*, 150 U. S. 417, 419, 37 L. Ed. 1128; *Dickinson v. The Planters' Bank*, 16 Wall. 250, 21 L. Ed. 278.

17. Finding of part of issues.—*Fort Scott v. Hickman*, 112 U. S. 150, 165, 28 L. Ed. 636.

18. On former verdict.—This was an action brought at a special term of the supreme court of the District of Columbia upon two promissory notes, to which the defendant pleaded the statute of limitations. At the first trial, the court ruled that a certain written instrument relied on by the plaintiff was insufficient to take the case out of the statute, and a verdict and judgment were rendered for the defendant, which, upon a bill of exceptions of

the plaintiff, were set aside at the general term. At the second trial, the judge, against the objection and exception of the defendant, instructed the jury that this instrument was evidence of a new promise, which took the notes sued on out of the statute of limitations. A verdict and judgment were rendered for the plaintiff, and a bill of exceptions to this instruction was tendered and allowed. This judgment was affirmed in general term, and the defendant sued out this writ of error. Upon the reversal of the court below, the federal supreme court was asked to direct judgment to be entered upon a verdict at the former trial, which was returned under correct instructions as to the sufficiency of the instrument as an acknowledgment, but set aside upon an erroneous view of the law. It was held, that, as the exceptions taken by the plaintiff at the first trial were before the court and passed upon at the second trial when the court sustained the exceptions and ordered a second trial, the case stood as if it had never been tried before; and only the rulings at the second trial could be brought to the federal court. *Shepherd v. Thompson*, 122 U. S. 231, 30 L. Ed. 1156, distinguishing *Coughlin v. District of Columbia*, 106 U. S. 7, 27 L. Ed. 74, on the ground, that, as no bill of exceptions had been allowed, the proceedings of the court at the first trial were not before the general term at the second trial, and consequently not passed upon.

19. To conform to opinion.—*Barney v. Winona, etc., R. Co.*, 117 U. S. 228, 27 L. Ed. 858; *Harrison v. Perea*, 168 U. S. 311, 42 L. Ed. 478; *United States v. Foscat*, 20 How. 413, 427, 15 L. Ed. 944.

20. For particular party.—*Cragin v. Lovell*, 109 U. S. 194, 27 L. Ed. 903, citing *Rev. Stat.*, § 701; *Insurance Cos. v. Boykin*, 12 Wall. 433, 20 L. Ed. 442; *Slacum v. Pomeroy*, 6 Cranch 221, 3 L. Ed. 205; *Ottawa v. Carey*, 108 U. S. 110, 27 L. Ed. 669; *Norris v. Jackson*, 9 Wall. 125, 19 L. Ed. 608; *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 540, 27 L. Ed. 1020; *National Bank v. Insurance Co.*, 95 U. S. 673, 679, 24 L. Ed. 563; *Fairfield v. County of Gallatin*, 100 U. S. 47, 25 L. Ed. 544; *Wright v. Blakeslee*, 101 U. S.

and not a finding of facts, the supreme court may direct the entry of a particular judgment for a particular party.<sup>21</sup>

9. IN PATENT CASES.—Where in an action for damages for infringement of a patent the lower court allows the amount of profits which might have been realized by the defendant, with reasonable diligence, such court will be reversed and the case remanded to enter judgment for profits actually realized.<sup>22</sup>

10. IN CRIMINAL CASES—*a. Erroneous Sentence.*—In many jurisdictions it has been held that the appellate court has the power, when there has been an erroneous sentence, to remand the case to the trial court for sentence according to law.<sup>23</sup>

*b. Conviction on Indictment of Several Counts.*—If a judgment, entered upon a general verdict of guilty on an indictment consisting of several counts, is erroneous as to one of the counts only, it will be reversed as to such count alone and the cause will be remanded to the trial court for sentence on the count as

174, 25 L. Ed. 1048; *People's Bank v. National Bank*, 101 U. S. 181, 25 L. Ed. 907; *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924; *Lincoln v. French*, 105 U. S. 614, 26 L. Ed. 1189; *Kirkbride v. Lafayette County*, 108 U. S. 208, 27 L. Ed. 705; *Retzer v. Wood*, 109 U. S. 185, 27 L. Ed. 900; *East St. Louis v. Zebbley*, 110 U. S. 321, 28 L. Ed. 162; *Fort Scott v. Hickman*, 112 U. S. 150, 165, 28 L. Ed. 636; *Allen v. St. Louis Bank*, 120 U. S. 20, 30, 40, 30 L. Ed. 573; *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 264, 30 L. Ed. 920; *Saltonstall v. Birtwell*, 150 U. S. 417, 419, 37 L. Ed. 1128; *Chesapeake Ins. Co. v. Stark*, 6 Cranch 268, 273, 3 L. Ed. 220; *Harden v. Fisher*, 1 Wheat. 300, 303, 4 L. Ed. 96; *Barnes v. Williams*, 11 Wheat. 415, 6 L. Ed. 508; *McArthur v. Porter*, 1 Pet. 626, 7 L. Ed. 290; *Ex parte French*, 91 U. S. 423, 23 L. Ed. 249; *Ryan v. Carter*, 93 U. S. 78, 81, 23 L. Ed. 807; *Hodges v. Easton*, 106 U. S. 408, 411, 27 L. Ed. 169; *Tyre & Spring Works Co. v. Spalding*, 116 U. S. 541, 545, 546, 29 L. Ed. 720; *Raimond v. Terrebonne Parish*, 132 U. S. 192, 33 L. Ed. 309; *Lloyd v. McWilliams*, 137 U. S. 576, 34 L. Ed. 788.

*In action on municipal bond.*—A circuit court having erroneously rendered judgment against the city of Ottawa, Illinois, on its bonds, was reversed and directed to render judgment for the city. *Ottawa v. Carey*, 108 U. S. 110, 27 L. Ed. 669.

*In action on sheriff's bond.*—Where a suit was brought in a circuit court against a sheriff and his sureties upon the sheriff's official bond, in which judgment was given for the defendant, on reversal the mandate directed the circuit court to enter judgment for the plaintiffs. *Leggett v. Humphreys*, 21 How. 66, 16 L. Ed. 50.

*On counterclaim.*—The conclusion of the supreme court in this case is, that the judgment awarded the lessees on their counterclaim is erroneous and must be reversed and that the cause should be remanded with directions to the court below to enter judgment in favor of the plaintiff in error for the amount of rent due to it. *Chicago, etc., R. Co. v. Hoyt*, 149 U. S. 1, 17, 37 L. Ed. 625.

21. *On reversal for error of law.*—*Fort Scott v. Hickman*, 112 U. S. 150, 28 L. Ed. 636; *Allen v. St. Louis Bank*, 120 U. S. 20, 30 L. Ed. 573; *Seeberger v. Schweyer*, 153 U. S. 609, 614, 38 L. Ed. 839.

"The special findings of fact were equivalent to a special verdict, and the question thereon was whether they required a judgment for the plaintiff or the defendant. This was a matter of law, the ruling on which can be reviewed by this court." *Retzer v. Wood*, 109 U. S. 185, 188, 27 L. Ed. 900.

Where a suit was brought on a policy of insurance on a vessel and freight for total loss, and the jury found the whole amount due with interest and \$5,000 besides, it was held that the judgment must be reversed and the cause remanded with directions to enter a judgment for the plaintiff for the residue found by the jury, with interest, after disallowing the \$5,000 and the interest thereon. *Insurance Co. v. Piaggio*, 16 Wall. 378, 390, 21 L. Ed. 358.

22. *In patent cases.*—In a suit to recover damages for the infringement of a certain patent, the measure of damages for use of the patent is the amount of profits received by the unlawful use of the machine, as this is, in general, the damage done to the owner of the patent; and if a decree is entered for the estimated amount of profits which the defendant, with reasonable diligence, might have realized, instead of what, in fact, he did realize, the decree for damages will be reversed at the cost of the defendants in error, as founded on an erroneous estimate, and the cause remitted to the circuit court with instructions to enter a decree for the amount of the profits realized by the defendant from the reasonable use of the patent. *Dean v. Mason*, 20 How. 198, 15 L. Ed. 878. See the title PATENTS.

23. *In criminal cases—Erroneous sentence.*—*Murphy v. Massachusetts*, 177 U. S. 155, 157, 44 L. Ed. 711; *Reynolds v. United States*, 98 U. S. 145, 168, 25 L. Ed. 244; *In re Bonner*, 151 U. S. 242, 38 L. Ed. 149.

to which no error was committed and for further proceedings as to the other counts.<sup>24</sup>

11. **JUDGMENT AND INTEREST.**—The mandate may direct the rendition of judgment with interest thereon.<sup>25</sup>

12. **JUDGMENT AND COSTS.**—See elsewhere.<sup>26</sup>

**X. For Arrest of Judgment.**—A judgment rendered on default on a declaration setting forth no cause of action, will be reversed and remanded with direction to arrest judgment.<sup>27</sup>

**Y. For Issuance of Execution.**—When the supreme court has executed its power in a case and its final decree or judgment requires some further act to be done, it will not issue an execution, but will send a special mandate to the court below to award it.<sup>28</sup>

**Z. For Dismissal of Proceedings**—1. **AFTER VACATION OF AFFIRMANCE.**—Where the supreme court vacates a previous order dismissing an appeal from a decree upon a bill in equity and reverses the decree, the mandate will direct the dismissal of the bill.<sup>29</sup>

2. **AGAINST SEVERAL JOINT DEFENDANTS.**—Where a judgment is based upon a cause of action of such a nature that it might work injustice to one of several joint defendants, if it were to remain intact as against him, while reversed for error as to the other defendants, it will be reversed in toto and a new trial granted in regard to all the defendants;<sup>30</sup> but, in a case where there is a failure to prove a cause of action against one defendant while no such failure exists as to the others, there is no special reasons for a total reversal, but, on the contrary, justice requires that plaintiff have the liberty of entering judgment upon his verdict against the other defendants.<sup>31</sup>

**24. Conviction on indictment of several counts.**—*Carter v. McClaughry*, 183 U. S. 365, 46 L. Ed. 236; *United States v. Eaton*, 169 U. S. 331, 352, 42 L. Ed. 767.

In *Ballew v. United States*, 160 U. S. 187, 40 L. Ed. 388, it was found that a judgment entered upon a general verdict of guilty on an indictment consisting of several counts was erroneous as respects one of the counts alone, and for this cause the judgment was not reversed in toto, but was only set aside as to the count in regard to which error had been committed, and the case was remanded to the trial court for sentence on the count as to which no error was found to have arisen, and for further proceedings as to the other count. *Selvester v. United States*, 170 U. S. 262, 267, 42 L. Ed. 1029.

In *Putnam v. United States*, 162 U. S. 687, 40 L. Ed. 1118, where distinct sentence of concurrent imprisonment had been imposed under separate counts of an indictment, reversible error having been found to exist as to one of the counts only, the judgment was affirmed as to the count where there was no error and was reversed as to the other, and the cause was remanded for further proceedings with respect to the count as to which error had been committed. *Selvester v. United States*, 170 U. S. 262, 268, 42 L. Ed. 1029.

**25. Judgment and interest.**—*Wright v. Blakeslee*, 101 U. S. 174, 25 L. Ed. 1048; *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924; *Pullman's Palace Car Co. v. Metropolitan St. R. Co.*, 157 U. S. 94, 39

L. Ed. 632; *Fisher v. Shropshire*, 147 U. S. 133, 37 L. Ed. 109.

In *Chicago, etc., R. Co. v. Hoyt*, 149 U. S. 1, 37 L. Ed. 625, the direction was for interest from the date of the judgment.

**26. Judgment and costs.**—See ante, "As to Allowance of Costs," III, M.

**27. For arrest of judgment.**—*Slacum v. Pomery*, 6 Cranch 221, 3 L. Ed. 205; *Cragin v. Lovell*, 109 U. S. 194, 199, 27 L. Ed. 903.

**28. For issuance of execution.**—*Sibbald v. United States*, 12 Pet. 488, 9 L. Ed. 1167.

**29. For dismissal—After vacation of affirmance.**—The appeal in this case was dismissed in *New Orleans Flour Inspectors v. Glover*, 160 U. S. 170, 40 L. Ed. 382, and the order of dismissal was vacated in *New Orleans Flour Inspectors v. Glover*, 161 U. S. 101, 40 L. Ed. 632, with direction to dismiss the bill. See *Dinsmore v. Southern Express Co.*, 183 U. S. 115, 46 L. Ed. 111. See the title **APPEAL AND ERROR**, vol. 2, p. 410.

**30. Against several joint defendants.**—*Washington Gas Light Co. v. Lansden*, 172 U. S. 534, 556, 43 L. Ed. 543. See the title **APPEAL AND ERROR**, vol. 2, p. 382.

**31. Washington Gas Light Co. v. Lansden**, 172 U. S. 534, 556, 43 L. Ed. 543; *Pennsylvania R. Co. v. Jones*, 155 U. S. 333, 354, 39 L. Ed. 176.

The judgment of the general term of the supreme court of the District of Columbia was reversed, and the case re-



3. OF BILL FOR INJUNCTION.—The mandate may direct the dismissal of a bill for injunction, if it is devoid of equity upon its face and it cannot be given validity by subsequent evidence,<sup>32</sup> or by an amendment.<sup>33</sup> The direction for dismissal may be made before answer filed or proof taken.<sup>34</sup>

4. OF CROSS BILL.—As a general rule where a case is remanded to dismiss an original bill, a direction will also be given to dismiss a cross bill;<sup>35</sup> but, where the cross bill asks affirmative relief, the case may be remanded for dismissal of the original bill and for further proceedings on the cross bill.<sup>36</sup>

5. FOR WANT OF JURISDICTION—*a. In General.*—Where the court below has no jurisdiction of a case in any form of proceeding, the regular course, if the

mandated with directions to set aside the judgment of the special term, and permit the plaintiffs to elect to become nonsuited as against the Pennsylvania Railroad Company, and take judgment on the verdict against the other defendants, and, if they do not so elect, then to set aside the verdict and order a new trial generally. *Pennsylvania R. Co. v. Jones*, 155 U. S. 333, 354, 39 L. Ed. 176.

32. *Of bill for injunction.*—*Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 485, 44 L. Ed. 856; *Castner v. Coffman*, 178 U. S. 168, 183, 44 L. Ed. 1021. See the title *INJUNCTIONS*, vol. 6, pp. 1059, 1061.

In the case at bar the averments of the bill and the proof show that no supplementary evidence could be offered which would alter the indubitable conclusion that no exclusive right exists in the complainants, and the bill, upon its face, is devoid of equity. The circuit court of appeals reversed the decree of the circuit court and remanded the cause, with directions to dismiss the bill. Held, there was not error. *Castner v. Coffman*, 178 U. S. 168, 169, 184, 44 L. Ed. 1021.

33. *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 485, 495, 44 L. Ed. 856; *Castner v. Coffman*, 178 U. S. 168, 44 L. Ed. 1021.

34. *Before answer put in.*—"Does this doctrine apply to a case where a temporary injunction is granted pendente lite upon affidavits and immediately upon the filing of a bill? We are of opinion that this must be determined from the circumstances of the particular case. If the showing made by the plaintiff be incomplete; if the order for the injunction be reversed, because injunction was not the proper remedy, or because under the particular circumstances of the case, it should not have been granted; or if other relief be possible, notwithstanding the injunction be refused, then, clearly, the case should be remanded for a full hearing upon pleadings and proofs. But if the bill be obviously devoid of equity upon its face, and such invalidity be incapable of remedy by amendment; or if [in a patent case] the patent manifestly fail to disclose a patentable novelty in the invention. \* \* \* to save a protracted litigation, the court may \* \* \* order the bill to be dismissed." *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 485, 495,

44 L. Ed. 856, distinguishing *Smith v. Vulcan Iron Works*, 165 U. S. 518, 41 L. Ed. 810.

"This question is not necessarily concluded by *Smith v. Vulcan Iron Works*, 165 U. S. 518, 41 L. Ed. 810, since in that case the interlocutory injunction was granted after answer and replication filed, a full hearing had upon pleadings and proofs, and an interlocutory decree entered adjudging the validity of the patent, the infringement and injunction, and a reference of the case to a master to take an account of profits and damages. In that case we held that, if the appellate court were of opinion that the plaintiff was not entitled to an injunction because his bill was devoid of equity, such court might, to save the parties from further litigation, proceed to consider and decide the case upon its merits, and direct a final decree dismissing the bill." *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 485, 494, 44 L. Ed. 856.

The court, in *Brill v. Peckham Motor Truck, etc., Co.*, 189 U. S. 57, 60, 47 L. Ed. 706, refused to decide how far it could go in anticipation of action by the lower court in reversing such court in ordering a preliminary injunction, but left the injunction to be dealt with as if no decree had been rendered in the appellate court.

35. *Cross bill—Dismissed with original.*—"As the bill must be dismissed there seems to be no reason why the cross bill should not be dismissed according to the general rule in such cases. *Dows v. Chicago*, 11 Wall. 108, 20 L. Ed. 65. It is true that the cross bill is not merely in aid of the defense and that relief has been given upon a cross bill in such a case, notwithstanding the dismissal of the bill." *United States v. California, etc., Land Co.*, 192 U. S. 355, 360, 48 L. Ed. 476; *Holgate v. Eaton*, 116 U. S. 33, 42, 29 L. Ed. 538. See the title *CROSS BILLS*, vol. 5, p. 144.

36. *Where affirmative relief asked.*—"Where the cross bill asks affirmative relief, and is therefore not a pure cross bill, the dismissal of the original bill may not dispose of the cross bill, which may be retained for a complete determination of the cause. *Holgate v. Eaton*, 116 U. S. 33, 29 L. Ed. 538, illustrates this. There the bill and cross bill were heard together, and it was held that the original bill must

judgment or decree is for the defendant, is to direct the cause to be dismissed;<sup>31</sup> but, if the judgment or decree is for the plaintiff, the supreme court will reverse the judgment or decree and remand the cause with proper directions.<sup>38</sup>

b. *Appellate Jurisdiction*.—If a circuit court assume to act upon a case appealed to it from a district court, in which it has no jurisdiction, it will be reversed and directed to dismiss the appeal.<sup>39</sup>

c. *On Removal of Cause*.—(1) *Where Lower Court Assumes Jurisdiction*.—When a suit, which has been removed from a state court, is brought to the supreme court by appeal or writ of error, and it does not appear on the face of the record that the citizenship of the parties<sup>40</sup> and the amount involved in the controversy<sup>41</sup> were sufficient to give the circuit court jurisdiction upon the removal, the judgment or decree of the circuit court will be reversed, without inquiry into the merits,<sup>42</sup> at the costs of the party responsible for the wrongful removal,<sup>43</sup> and the cause sent back with instructions to remand it to the state

be dismissed, but that relief might be accorded on the cross bill. The cross bill was not filed merely as a means of defense, but of obtaining affirmative relief, and the defeat of the bill sustained the disposition of the cause on the cross bill." *Bowker v. United States*, 186 U. S. 135, 141, 46 L. Ed. 1090.

**37. For want of jurisdiction—Judgment for defendant.**—When a plea to the jurisdiction, in abatement, is overruled by the court upon demurrer, and the defendant pleads in bar, and upon these pleas the final judgment of the court is in his favor—if the plaintiff brings a writ of error, the judgment of the court upon the plea in abatement is before the federal supreme court, although it was in favor of the plaintiff—and if the court erred in overruling it, the judgment must be reversed, and a mandate issued to the circuit court to dismiss the case for want of jurisdiction. *Scott v. Sandford*, 19 How. 393, 15 L. Ed. 691. See the title APPEAL AND ERROR, vol. 2, p. 303.

**38. Judgment for plaintiff.**—*Stickney v. Wilt*, 23 Wall. 150, 163, 23 L. Ed. 50; *Fishback v. Pacific Exp. Co.*, 161 U. S. 101, 40 L. Ed. 632; *Union Ins. Co. v. United States*, 6 Wall. 759, 760, 18 L. Ed. 879; *Armstrong's Foundry*, 6 Wall. 766, 769, 18 L. Ed. 882; *United States v. Hart*, 6 Wall. 770, 772, 18 L. Ed. 914; *The Caroline*, 7 Cranch 496, 500, 3 L. Ed. 417; *The Sarah*, 8 Wheat. 391, 394, 5 L. Ed. 644. See the title APPEAL AND ERROR, vol. 2, p. 377.

**39. Appellate jurisdiction.**—In this case the decree of a circuit court rendered under a petition of review to a district court, must be reversed, and inasmuch as the circuit court has no jurisdiction of the subject matter in that form of proceeding, and as it is now too late to take an appeal from the district court to the circuit court, the cause must be remanded with directions to dismiss the petition. *Stickney v. Wilt*, 23 Wall. 150, 164, 23 L. Ed. 50. See the title ADMIRALTY, vol. 1, p. 183.

**In proceedings in admiralty.**—"Admiralty cases have more than once been appealed to this court in which it appeared

that the circuit court had no jurisdiction of the case, in consequence of irregularities in the district court; and in such cases it has been held by this court that it is the regular course to reverse the decree of the circuit court, and to direct the circuit court to remand the cause to the district court for further proceedings." *Cleveland Ins. Co. v. Globe Ins. Co.*, 98 U. S. 366, 375, 25 L. Ed. 201.

Where the district court of the United States, sitting in admiralty, decreed that a sum of money was due, but the amount to be paid was dependent upon other claims that might be established, this was not such a final decree as would justify an appeal to the circuit court. The circuit court, therefore, had no jurisdiction, and its judgment, affirming the decree of the district court, and remanding the case to that court, was erroneous. The decree of the circuit court must be reversed, and the case remanded to that court, with directions to dismiss the case for want of jurisdiction. *Montgomery v. Anderson*, 21 How. 386, 16 L. Ed. 160.

Where the decree of the district court, in a case of admiralty jurisdiction, was not a final decree, the circuit court, to which it was carried by appeal, had no power to act upon the case, nor could it consent to an amendment of the record by an insertion of a final decree by an agreement of the counsel in the case; nor can this court consent to such an amendment. The district court having ordered a report to be made, the case must be sent back from here to the circuit court, and from there to the district court, in order that a report may be made according to the reference. *Mordecai v. Lindsay*, 19 How. 199, 15 L. Ed. 624.

**40. On removal of cause—Citizenship.**—See the titles COURTS, vol. 4, p. 936; REMOVAL OF CAUSES.

**41. Amount in controversy.**—See the title COURTS, vol. 4, p. 974.

**42. Reversal without inquiry as to merits.**—See post, "Without Prejudice to Other Action," III, Z, 6.

**43. At cost of moving party.**—See the title APPEAL AND ERROR, vol. 2, p. 419.



court from which it was improperly removed.<sup>44</sup>

(2) *Where Lower Court Dismisses Cause on Merits.*—If a federal court, into which a cause has been wrongfully removed from a state court, dismisses it on its merits, it will be reversed and the cause remanded with directions for its dismissal for want of jurisdiction.<sup>45</sup>

d. *Where Jurisdiction May Be Given by Amendment.*—Where a bill in equity does not upon its face give the court jurisdiction but jurisdiction may be given by amendment, the mandate will not direct its dismissal.<sup>46</sup>

6. WITHOUT PREJUDICE TO OTHER ACTION—*a. Dismissal for Want of Jurisdiction.*—(1) *In General.*—See elsewhere in this title.<sup>47</sup>

(2) *Equitable Jurisdiction.*—Where a court, sitting as a court of equity, wrongfully takes jurisdiction of a cause cognizable in a court of law, it will be reversed and the cause remanded with direction to dismiss the bill without prejudice.<sup>48</sup>

b. *Dismissal without Consideration of Merits.*—When a case is dismissed without a consideration of its merits, it is usual for the lower court to express in its decree that the dismissal is without prejudice. The omission of that qualification, in a proper case, will be corrected by the supreme court by reversal on appeal and the case remanded for dismissal without prejudice.<sup>49</sup>

44. **With direction to remand to state court.**—*Northern Pac. R. Co. v. Walker*, 148 U. S. 391, 37 L. Ed. 494; *Mattingly v. Northwestern Virginia R. Co.*, 158 U. S. 53, 57, 39 L. Ed. 894; *Jackson v. Allen*, 132 U. S. 27, 34, 33 L. Ed. 249; *Hancock v. Holbrook*, 112 U. S. 229, 231, 232, 28 L. Ed. 714; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 389, 28 L. Ed. 462; *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827; *Walter v. Northeastern R. Co.*, 147 U. S. 370, 374, 37 L. Ed. 206; *Cates v. Allen*, 149 U. S. 451, 464, 37 L. Ed. 804; *Morris v. Gilmer*, 129 U. S. 315, 329, 32 L. Ed. 690; *Graves v. Corbin*, 132 U. S. 571, 33 L. Ed. 462; *Tennessee v. Union, etc., Bank*, 152 U. S. 454, 464, 38 L. Ed. 511; *Torrence v. Shedd*, 144 U. S. 527, 36 L. Ed. 528; *Martin v. Snyder*, 148 U. S. 663, 37 L. Ed. 602; *Postal Tel. Cable Co. v. Alabama*, 155 U. S. 482, 487, 39 L. Ed. 231; *Neel v. Pennsylvania Co.*, 157 U. S. 153, 39 L. Ed. 654; *Peper v. Fordyce*, 119 U. S. 469, 30 L. Ed. 435; *Thayer v. Life Ass'n*, 112 U. S. 717, 28 L. Ed. 864; *Laidly v. Huntington*, 121 U. S. 179, 30 L. Ed. 883; *Stevens v. Nichols*, 130 U. S. 230, 32 L. Ed. 914; *East Tennessee, etc., R. Co. v. Interstate Commerce Commission*, 181 U. S. 1, 45 L. Ed. 719; *Defiance Water Co. v. Defiance*, 191 U. S. 184, 48 L. Ed. 140. See act of Feb. 25, 1889, c. 236, 25 Stat. 693.

45. **Where lower court dismisses cause on merits.**—*Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 389, 28 L. Ed. 462; *Blacklock v. Small*, 127 U. S. 96, 105, 32 L. Ed. 70.

"As the circuit court had no jurisdiction, but dismissed the bill upon another ground, we reverse its decree, with a direction to dismiss the bill for want of jurisdiction." *Whittemore v. Amoskeag Nat. Bank*, 134 U. S. 527, 530, 33 L. Ed. 1002.

"The decree of the circuit court which, on its face, appears to be a dismissal of the bill on the merits, must be reversed, and the case remanded, with directions to

that court to enter a decree dismissing the bill for want of jurisdiction, and without prejudice to plaintiff's right to bring any suit she may be advised in the proper court." *Barney v. Baltimore City*, 6 Wall. 280, 288, 18 L. Ed. 825. See post, "Without Prejudice to Another Action," III, Z, 6.

**General dismissal.**—"The decree of the circuit court, dismissing the bill generally, might be considered a bar to an action at law, and should therefore be reversed and the cause remanded with directions to enter a decree dismissing the bill for want of jurisdiction, without prejudice to the right of the plaintiff to sue at law." *Rogers v. Durant*, 106 U. S. 644, 27 L. Ed. 303; *Horsburg v. Baker*, 1 Pet. 232, 7 L. Ed. 125; *Barney v. Baltimore City*, 6 Wall. 280, 18 L. Ed. 825; *Kendig v. Dean*, 97 U. S. 423, 24 L. Ed. 1061.

46. **Where jurisdiction may be given by amendment.**—See ante, "To Show Jurisdiction," III, S, 5.

47. **Without prejudice to other action—Dismissal for want of jurisdiction.**—See ante, "For Want of Jurisdiction," III, Z, 5.

48. **Equitable jurisdiction.**—The facts in this case show a legal cause of action enforceable in a court of law. The courts below erred in considering and determining the legal controversy in a suit in equity, but should have dismissed complainant's bill without prejudice to its right to bring an action at law. *Barney v. Baltimore City*, 6 Wall. 280, 18 L. Ed. 825; *Kendig v. Dean*, 97 U. S. 423, 24 L. Ed. 1061; *Rogers v. Durant*, 106 U. S. 644, 27 L. Ed. 303. The decree of the supreme court of the territory is reversed and the cause is remanded to that court with directions to amend its decree by directing the district court to dismiss the bill without prejudice to the right of the complainant to sue at law. *Raton Waterworks Co. v. Raton*, 174 U. S. 360, 364, 43 L. Ed. 1005.

49. **Dismissal without consideration of merits.**—*Durant v. Essex Co.*, 7 Wall. 107,



c. *Matters Not Presented to Appellate Court*.—The dismissal will be without prejudice as to matters not presented in the appellate court.<sup>50</sup>

**AA. On Second Appeal.**—On an appeal from a decree entered in exact accordance with a mandate on a former appeal, if the decree of the lower court does not conform to the mandate, the case will be again remanded with appropriate directions for the correction of the errors.<sup>51</sup>

#### IV. To What Courts Directed.

**A. United States Courts**—1. **IN GENERAL.**—When cases are brought to the supreme court from the circuit courts of appeals, it is called on to review the judgments of those courts, in revision of the judgments of the courts below, but the mandate goes to the court of first instance, and is there carried into effect, though the courts of appeals may have sent their own mandates down before the cases were brought to the supreme court.<sup>52</sup>

2. **ON CHANGE OF TERRITORIAL JURISDICTION.**—On a division of the judicial district in which a case arises, while an appeal is pending in the supreme court, if there is nothing more in the case than a decree of the supreme court af-

109, 19 L. Ed. 154; *Miles v. Caldwell*, 2 Wall. 35, 45, 17 L. Ed. 755; *Carneal v. Banks*, 10 Wheat. 181, 192, 6 L. Ed. 298; *Dandridge v. Washington*, 2 Pet. 370, 378, 7 L. Ed. 454; *Peirsoll v. Elliott*, 6 Pet. 95, 100, 8 L. Ed. 332; *Gaylords v. Kelshaw*, 1 Wall. 81, 83, 17 L. Ed. 612; *Barney v. Baltimore City*, 6 Wall. 280, 289, 18 L. Ed. 825; *Hobson v. McArthur*, 16 Pet. 182, 195, 10 L. Ed. 930; *Lacassagne v. Chapuis*, 144 U. S. 119, 126, 36 L. Ed. 368; *Horsburg v. Baker*, 1 Pet. 232, 7 L. Ed. 125; *Kendig v. Dean*, 97 U. S. 423, 24 L. Ed. 1061; *Rogers v. Durant*, 106 U. S. 644, 27 L. Ed. 303; *Scott v. Neely*, 140 U. S. 106, 117, 35 L. Ed. 358; *Keith v. Clark*, 97 U. S. 454, 456, 24 L. Ed. 1071; *House v. Mulen*, 22 Wall. 42, 22 L. Ed. 838; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 28 L. Ed. 462; *Goodman v. Niblack*, 102 U. S. 556, 563, 26 L. Ed. 229; *Swan Land, etc., Co. v. Frank*, 148 U. S. 603, 612, 37 L. Ed. 577. See the title RES ADJUDICATA.

Where there is a decree of a circuit court which, on its face, appears to be a dismissal of a bill on the merits, it must be reversed, and the case remanded, with directions to that court to enter a decree dismissing the bill for want of jurisdiction, and without prejudice to plaintiff's right to bring any suit she may be advised in the proper court. *Barney v. Baltimore City*, 6 Wall. 280, 288, 18 L. Ed. 825.

Where an appellate court decides a case on the ground that the inferior court had no jurisdiction, it in some mode indicates that it was not a decision on the merits, to prevent the judgment being used as a bar in some court which might have jurisdiction. *Keith v. Clark*, 97 U. S. 454, 456, 24 L. Ed. 1071.

**General dismissal.**—"The circuit court had no jurisdiction of this case in the name of complainant, but as the decree below dismissed the bill generally, that decree is reversed at the costs of appellant, and the cause remanded with a direction to dismiss the bill for want of ju-

risdiction and without prejudice." *Plant Investment Co. v. Jacksonville, etc., R. Co.*, 152 U. S. 71, 77, 38 L. Ed. 358.

**The decree dismissing the bill absolutely** must be so modified as to declare that it is without prejudice to an action at law, and, as so modified, it is affirmed, with costs. *Lacassagne v. Chapuis*, 144 U. S. 119, 126, 36 L. Ed. 368.

**Dismissal of bill—Action at law.**—If a circuit court sustains a demurrer to the plaintiff's bill and dismisses the case on its merits, it will be reversed and the case remanded with directions to dismiss without prejudice to the right of the plaintiff to bring an action at law. *Swan Land, etc., Co. v. Frank*, 148 U. S. 603, 37 L. Ed. 577.

"The decree of the circuit court, dismissing the bill generally, might be considered a bar to an action at law, and should therefore be reversed, and the cause remanded with directions to enter a decree dismissing the bill for want of jurisdiction, without prejudice to the right of the plaintiff to sue at law." *Rogers v. Durant*, 106 U. S. 644, 646, 27 L. Ed. 303.

**50. Matters not presented to appellate court.**—M. obtained a judgment in ejectment against C. in the circuit court of Missouri in a proceeding under the Missouri laws. C. filed a bill on the equity side of the court to enjoin the action of M.'s judgment. Upon appeal to the federal supreme court, the question as to the allowance of improvements claimed by C. was not presented. Held, that upon reversal of the lower court, it will be directed to dismiss the bill without prejudice to any remedy of C. for compensation for the improvements. *Miles v. Caldwell*, 2 Wall. 35, 17 L. Ed. 755.

**51. On second appeal.**—*Humphrey v. Baker*, 103 U. S. 736, 737, 26 L. Ed. 456. See the title APPEAL AND ERROR, vol. 2, p. 412.

**52. To what court directed—United States courts.**—Where both the circuit court and the circuit court of appeals are

firming or reversing the decree below, the case will be remanded to the district in which the property in controversy is situated, and in which the case would have been brought if the new district had then existed; but, if the case involves matters best to be passed on by the judge who rendered the decree, and the terms of the act justify it, it will be remanded to the original trial judge though his new district be other than that in which the case would ordinarily arise.<sup>53</sup>

**B. State Courts.**—See elsewhere.<sup>54</sup>

**C. Territorial Courts.**—This subject has been treated elsewhere.<sup>55</sup>

**D. Courts of District of Columbia.**—The supreme court of the District of Columbia sitting in general term, on reversal of a decree of the court in special term, may remand the cause to the court sitting in special term for further proceedings.<sup>56</sup>

## V. Construction of Mandate.

**A. By Appellate Court.**—Either upon an application for a writ of mandamus, or upon a new appeal, it is for the supreme court to construe its own mandate, and to act accordingly.<sup>57</sup> And an additional order may be made in order that the lower court may better understand the mandate.<sup>58</sup>

**B. Reasonably and Equitably.**—The mandate is to be interpreted according to the subject matter of the proceeding on appeal, and, if possible, so as not to cause injustice.<sup>59</sup> The construction must be reasonable.<sup>60</sup>

**C. Reference to Decree and Record.**—To ascertain the true intention of the decree and mandate of the supreme court, its decree and the decree of the court below must be taken into consideration.<sup>61</sup>

**D. Construction in Particular Cases**—1. **CORRECTING DESCRIPTION OF PROPERTY.**—Where an appeal was taken for the sole purpose of correcting the

reversed, the mandate will issue to the circuit court to dismiss the cause. *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 239, 40 L. Ed. 940. See the title APPEAL AND ERROR, vol. 1, p. 489.

**53. On change of territorial jurisdiction.**—Where a case was appealed from the circuit court of West Virginia, and on ground of error remanded to the circuit court of the northern district of that state for further proceeding, notwithstanding the northern and southern districts of that state were created while the case was pending in the supreme court and ordinarily the case would be properly tried in the southern district, a motion to amend the decree so that the case might be sent to the southern districts was denied in view of the fact that the act creating these districts provided that causes submitted in which evidence had been taken should be proceeded with and disposed of in the northern districts, and the court considered it best that the matters involved in the case should be passed on by the judge who rendered the original decree. But the court said if there had been nothing more in the case than a decree by it, affirming or reversing the decree below, the case would have been remanded to the district in which the property in controversy was situated, and in which the case would have been brought if the new district had then existed. *Hatfield v. King*, 186 U. S. 178, 180, 46 L. Ed. 1112. See the title APPEAL AND ERROR, vol. 1, p. 545.

**54. State courts.**—See the title APPEAL AND ERROR, vol. 1, p. 795.

**55. Territorial courts.**—See the title APPEAL AND ERROR, vol. 1, p. 545.

**Admission of territory pending appeal.**—See the title APPEAL AND ERROR, vol. 1, pp. 528, 545.

**56. Courts of District of Columbia.**—*Grant v. Phoenix Life Ins. Co.*, 121 U. S. 105, 113, 30 L. Ed. 905.

**57. Construction of mandate—By appellate court.**—In *re Sanford Fork, etc., Co.*, 160 U. S. 247, 256, 40 L. Ed. 414; *Sibbald v. United States*, 12 Pet. 488, 493, 9 L. Ed. 1167; *West v. Brashear*, 14 Pet. 51, 10 L. Ed. 350; *Supervisors v. Kennicott*, 94 U. S. 498, 24 L. Ed. 260; *Gaines v. Rugg*, 148 U. S. 228, 238, 244, 37 L. Ed. 432; *Campbell v. Pratt*, 5 Wheat. 429, 5 L. Ed. 126.

**58. By additional order to lower court.**—*United States v. Adams*, 7 Wall. 463, 19 L. Ed. 249.

**59. Equitable construction.**—*Supervisors v. Kennicott*, 94 U. S. 498, 499, 24 L. Ed. 260; *Story v. Livingston*, 13 Pet. 359, 10 L. Ed. 200; *Chaires v. United States*, 3 How. 611, 11 L. Ed. 749; *Milwaukie, etc., R. Co. v. Soutter*, 2 Wall. 510, 17 L. Ed. 900.

**60. Reasonable construction.**—*Chaires v. United States*, 3 How. 611, 11 L. Ed. 749; *Milwaukie, etc., R. Co. v. Soutter*, 2 Wall. 510, 17 L. Ed. 900.

**61. Reference to decree and record.**—*Mitchel v. United States*, 15 Pet. 52, 84, 10 L. Ed. 658; *Sibbald v. United States*, 12 Pet. 488, 493, 9 L. Ed. 1167; *West v.*



description of property sold under a decree of court, it was proper to construe the mandate as in effect nothing more than an order for such a correction, leaving the remainder of the decree to stand.<sup>62</sup>

2. **DIRECTING AN ACCOUNTING OF RENTS AND PROFITS.**—A mandate directing an accounting of rents and profits of land has reference only to rents and profits actually received by the person directed to account.<sup>63</sup>

## VI. Recall, Amendment and Modification.

**A. Power of Court.**—The supreme court may recall its mandate, amend its former judgment and remand the proceedings to the lower court for further proceedings.<sup>64</sup> It cannot be done in all cases, however.<sup>65</sup>

**B. Grounds for**—1. **IN GENERAL.**—The supreme court will amend its mandate where it does not conform to the judgment or decree,<sup>66</sup> or is defective

Brashear, 14 Pet. 51, 10 L. Ed. 350; Supervisors v. Kennicott, 94 U. S. 498, 24 L. Ed. 260; Story v. Livingston, 13 Pet. 359, 10 L. Ed. 200; Gaines v. Rugg, 148 U. S. 228, 238, 244, 37 L. Ed. 432.

"The opinion delivered by the supreme court, at the time of rendering its decree, may be consulted to ascertain what was intended by its mandate." In re Sanford Fork, etc., Co., 160 U. S. 247, 256, 40 L. Ed. 414.

The meaning of the mandate may be ascertained from the instrument itself; but the reasons which induced the court to make it, are to be found in the evidence contained in the original record. Mitchel v. United States, 15 Pet. 52, 84, 10 L. Ed. 658.

The mandate of the supreme court to the circuit court must be its guide. It is the duty of the circuit court to carry it into execution, and not to look elsewhere for authority to change its meaning. But when the circuit court is referred to testimony to ascertain the amount to be decreed, and are authorized to take more evidence on the point, it may sometimes happen that there will be some uncertainty and ambiguity in the mandate; and in such a case, the court below have unquestionably the right to resort to the opinion of the supreme court, delivered at the time of the decree, in order to assist them in expounding it. West v. Brashear, 14 Pet. 51, 10 L. Ed. 350.

**62. Order correcting description of property.**—Mackall v. Richards, 116 U. S. 45, 47, 29 L. Ed. 558.

**63. Accounting of rents and profits.**—Where by a decree of the federal supreme court, the defendants were ordered "to make up, state and settle, before a commissioner or commissioners to be appointed by the circuit court of the District of Columbia for the county of Alexandria, an account of the rents and profits of the tract of land referred to in the proceedings, since the 27th day of March, 1809, and that they pay over the same to the complainants, John Dunlop & Co., or to their lawful agent or attorney." The commissioners appointed by the circuit court to execute this part of the decree of the supreme court made a report, in

which they state, "that it did not appear to them that the said William Hepburn and John Dundas, or the legal representatives of the said Dundas, ever received any rents or profits of the land from the 27th day of March, 1809, until the date of the report; but that the reasonable rents and profits of the said land, in its untenable situation, from the said 27th day of March, 1809, to the 27th day of March, 1816, with due care, would be equal to \$2,077.60," and the court below on this report being of opinion that under the decree of the supreme court, the defendants were only to be accountable for the rents and profits actually received, and it was decreed that the bill, so far as it seeks a recovery of rents and profits, should be dismissed, and an appeal was prayed to the supreme court from this decree, that court affirmed the decree of the lower court as in strict conformity with the decree and mandate of the superior court. Dunlop v. Hepburn, 3 Wheat. 231, 4 L. Ed. 377.

**64. Recall, amendment and modification—Power of court.**—Bank of Commerce v. Tennessee, 163 U. S. 416, 426, 41 L. Ed. 211.

**Of order for absolute judgment.**—The supreme court may modify an order for an absolute judgment so far as to permit a trial in the circuit court on issues not decided by that court in the former trial and permit the court below, in its discretion, to hear evidence on that point, and, if necessary, to allow an amendment of the pleading to present it properly. Supervisors v. Stanley, 105 U. S. 305, 316, 26 L. Ed. 1044.

**Of mandate to state court.**—See the 1st APPEAL AND ERROR, vol. 1, p. 796.

**65. No power in all cases.**—Where a petition was filed to so alter a former mandate of the court, as to direct lands in Florida, which had not been offered for sale under the President's proclamation, to be included within a survey, as well as those lands which had been so offered, the supreme court held that it had no power to grant the relief prayed. Sibbald v. United States, 2 How. 455, 11 L. Ed. 337.

**66. Grounds for conformity to decree.**



in its directions.<sup>67</sup> Where the decree and mandate correctly represents what the court decided, a motion for recall and modification of the mandate will be denied.<sup>68</sup>

2. **WANT OF JURISDICTION.**—Where the supreme court takes jurisdiction of a writ of error in a case and affirms the judgment, and later its want of jurisdiction is discovered, the court will vacate its judgment and recall the mandate.<sup>69</sup>

3. **COLLUSIVE SUIT.**—Where a suit is shown to have been collusive, the supreme court will vacate its decree, dismiss the appeal and recall the mandate issued in the cause.<sup>70</sup>

4. **CORRECTION OF ERROR IN TRANSCRIPT.**—The supreme court will not recall a mandate in order to correct an error in the printed transcript of the record, where it would be necessary to recall the mandate sent to the inferior court, to set aside the decree rendered at the last term, to rehear the cause and make a new decree.<sup>71</sup>

**C. Time Allowed for.**—The judgments of the supreme court cannot be changed at a subsequent term, in matters of law, whether attempted on motion, or a new writ of error, or appeal, on the mandate to the court below,<sup>72</sup> ex-

—Where a surveyor refused to survey certain lands according to the decree of the supreme court because the mandate was not directed to him but to the lower court instead, it was ordered that the mandate be amended to conform to the judgment of the court. *Sibbald v. United States*, 12 Pet. 488, 496, 9 L. Ed. 1167.

67. **Defective in directions.**—*United States v. De Morant*, 124 U. S. 647, 31 L. Ed. 565.

68. **Where mandate represents decision.**—*Phipps v. Sedgwick*, 131 U. S., appx. cxxxix, 24 L. Ed. 595.

A motion to amend a mandate will be denied, if it is based on a misconception of the meaning of the judgment and mandate, and the terms of the mandate do not imply the consequences suggested by counsel. *Central Nat. Bank v. Stevens*, 171 U. S. 108, 109, 43 L. Ed. 97.

69. **Want of jurisdiction.**—"It is urged, however, that this court took jurisdiction of the writ of error in *Cannon v. United States*, 116 U. S. 55, 29 L. Ed. 561, and affirmed the judgment on a conviction under the same § 3 of the act of 1882. The question of jurisdiction was not considered in fact in that case, nor alluded to in the decision, nor presented to the court by the counsel for the United States, nor referred to by either party at the argument or in the briefs. Probably both parties desired a decision on the merits. The question was overlooked by all the members of the court. But, as the case was decided at the present term, and the want of jurisdiction in it is clear, we have decided to vacate our judgment, and recall the mandate and dismiss the writ of error for want of jurisdiction, in order that the reported decision may not appear to be a precedent for the exercise of jurisdiction by this court in a case of the kind." *Snow v. United States*, 118 U. S. 346, 354, 30 L. Ed. 207.

70. **Collusive suit.**—*Gardner v. Good-*

*year Dental Vulcanite Co.*, 131 U. S., appx. ciii, civ, 21 L. Ed. 141.

**On compromise.**—Where on motion to dismiss an appeal, it appears that, before the decree in the circuit court was appealed from, the parties to the suit had compromised all matters of difference between them, with the understanding that the suit should go on to the final hearing and determination, both in the circuit court and in the supreme court, as if the compromise had not been made, a motion to vacate the decree of affirmance and to dismiss the appeal will be allowed and an order made to recall the mandate which has been issued to the circuit court. *Gardner v. Goodyear Dental Vulcanite Co.*, 131 U. S., appx. ciii, 21 L. Ed. 141. See the title **APPEAL AND ERROR**, vol. 2, p. 295.

71. **Error in transcript of record.**—*Le More v. United States*, 131 U. S., appx. lxxv, 19 L. Ed. 201.

72. **Time allowed for.**—*United States Bank v. Moss*, 6 How. 31, 40, 12 L. Ed. 331; *Sibbald v. United States*, 12 Pet. 488, 491, 9 L. Ed. 1167; *Ex parte Story*, 12 Pet. 339, 343, 9 L. Ed. 1108; *Boyce v. Grundy*, 9 Pet. 275, 290, 9 L. Ed. 127; *Davis v. Packard*, 8 Pet. 312, 323, 8 L. Ed. 957; *The Santa Maria*, 10 Wheat. 431, 442, 6 L. Ed. 359; *Martin v. Hunter*, 1 Wheat. 304, 354, 4 L. Ed. 97; *Noonan v. Bradley*, 12 Wall. 121, 129, 20 L. Ed. 279; *Skillem v. May*, 6 Cranch 267, 3 L. Ed. 220; *Rice v. Minnesota*, etc., R. Co., 21 How. 82, 16 L. Ed. 31; *Phipps v. Sedgwick*, 131 U. S., appx. cxxxix, 24 L. Ed. 595.

"No principle is better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments, for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes, *Cameron v. M'Roberts*, 3 Wheat. 591, 4 L. Ed. 467; *Bank v. Wistar*, 3 Pet. 431, 7 L. Ed. 731; *Sibbald v. United States*, 12

cept for clerical errors,<sup>73</sup> and irregularities in some cases.<sup>74</sup> It is beyond the power of the court, however, at a subsequent term to alter a decree from one of dismissal, with its legal consequences, to one of affirmance.<sup>75</sup>

### VII. Proceedings in Lower Court.

**A. In General.**—The reversal by an appellate court, of an order of dismissal in a lower court, reinstates the proceeding in the latter court as of the date

Pet. 488, 9 L. Ed. 1167, or to reinstate a cause dismissed by mistake; *The Palmyra*, 12 Wheat. 1, 10, 6 L. Ed. 531, from which it follows, that no change or modification can be made, which may substantially vary or affect it in any material thing.

\*\*\* Whatever was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it upon any matter decided on appeal for error apparent; or intermeddle with it, further than to settle so much as has been remanded. After a mandate, no rehearing will be granted, and on a subsequent appeal, nothing is brought up, but the proceeding subsequent to the mandate. *Himely v. Rose*, 5 Cranch 313, 3 L. Ed. 111; *Browder v. McArthur*, 7 Wheat. 58, 59, 5 L. Ed. 397; *The Santa Maria*, 10 Wheat. 431, 443, 6 L. Ed. 359." *Illinois v. Illinois Cent. R. Co.*, 184 U. S. 77, 91, 46 L. Ed. 440. See, also, *Phillips v. Negley*, 117 U. S. 665, 674, 29 L. Ed. 1013.

**73. Clerical errors.**—*Sibbald v. United States*, 12 Pet. 488, 9 L. Ed. 1167; *Hemmenway v. Fisher*, 20 How. 255, 15 L. Ed. 799; *United States Bank v. Moss*, 6 How. 31, 38, 12 L. Ed. 331; *Elizabeth v. American Nicholson Pavement Co.*, 131 U. S., appx. cxlviii, cxlix, 24 L. Ed. 1059.

**Error by clerk of court.**—Where error has been committed by the clerk of the circuit court in entering up the mandate of the federal supreme court, it is undoubtedly in the power of the supreme court to amend such a clerical error at a subsequent term. *Hemmenway v. Fisher*, 20 How. 255, 15 L. Ed. 799.

**Omission of interest on affirmance.**—Where the clerk of the court had omitted to enter the judgment of this court, allowing to the defendant in error, on the affirmance of the judgment of the circuit court, interest at the rate of six per centum per annum, as damages, and the mandate of this court, although issued, had not been presented to the circuit court; the court will order the judgment to be reformed, allowing interest at the rate of six per cent. The omission is a mere clerical error. *Bank v. Wistar*, 3 Pet. 431, 7 L. Ed. 731.

**Erroneous title of cause.**—Where the appellants erroneously entitle the cause and a mandate is issued to the court be-

low under this erroneous designation, the mandate will be recalled and a new mandate issued in conformity with the title of the cause in the court below. *Killian v. Ebbinghaus*, 111 U. S. 798, 799, 28 L. Ed. 593.

**Entered in form not intended.**—A motion made in a case to amend a mandate so as to conform to the opinion delivered by the court at a previous term was denied because no mandate had in fact ever been issued in the case; but the court said: "We have no doubt of our power at any time to amend a decree which has by inadvertence or mistake been entered in a different form from that in which we intended it. As said by Mr. Justice Strong, delivering the opinion of the court in the case of *Insurance Co. v. Boon*, 95 U. S. 117, 125, 24 L. Ed. 395: 'It is familiar doctrine that courts always have jurisdiction over their records to make them conform to what was actually done at the time.'" *Elizabeth v. American Nicholson Pavement Co.*, 131 U. S., appx. cxlviii, 24 L. Ed. 1059.

**74. Irregularities.**—*United States Bank v. Moss*, 6 How. 31, 38, 12 L. Ed. 331; *Ex parte Crenshaw*, 15 Pet. 119, 123, 10 L. Ed. 682.

**Want of parties.**—"A mistaken entry of a mandate, in a case where the parties were not at all before the court, may be revoked at a subsequent term, the hearing having been irregular and a nullity. *Ex parte Crenshaw*, 15 Pet. 119, 10 L. Ed. 682." *United States Bank v. Moss*, 6 How. 31, 38, 12 L. Ed. 331.

**Appeal not granted.**—Where the evidence shows that no appeal to the supreme court had been granted by the court below, and that the cause was not before it when an order was passed, at the instance of the appellee, to docket and dismiss the case, made at a subsequent term; in order to correct the irregularity in the order given, it will rescind and annul the decree of dismissal, and recall and cancel the mandate issued thereon. *United States v. Gomez*, 23 How. 326, 340, 16 L. Ed. 552; *The Secretary v. McGarran*, 9 Wall. 298, 309, 19 L. Ed. 579.

**75. Changing judgment of dismissal to affirmance.**—In *Schell v. Dodge*, 107 U. S. 629, 630, 27 L. Ed. 601, the court said: "The difficulty now is that we have no power to vary the judgments or mandates after the close of the term, no special right to do so in these cases having been reserved. It has always been held by this court that it has no power, after the term



of the order of dismissal.<sup>76</sup> The docketing and dismissing a case on appeal removes the bar to further proceedings in the lower court;<sup>77</sup> if, in the condition of the case, there is nothing to prevent further proceedings.<sup>78</sup>

**B. Powers and Duties on Remand**—1. *IN GENERAL*.—The authority of the lower court extends only to executing the mandate.<sup>79</sup> After an appeal has been taken to the supreme court, the power of a circuit court over its decree ceases, and thereafter such court has only such powers as are conferred by the mandate of the supreme court.<sup>80</sup>

2. *CONFORMITY TO MANDATE*—a. *In General*.—It is the duty of the lower court to comply with the mandate of the appellate court.<sup>81</sup>

has passed, and a cause has been dismissed or otherwise finally disposed of here, to alter its judgment in such a particular as that now asked for, the change of a dismissal of a writ of error, with its legal consequences, to an affirmance of a judgment below, with its legal consequences, and not an error of mere form, or a clerical error, or a misprison of the clerk, or the like. *Jackson v. Ashton*, 10 Pet. 480, 9 L. Ed. 502; *United States Bank v. Moss*, 6 How. 31, 38, 12 L. Ed. 331."

**76. Proceedings in lower court—Reinstatement.**—It was so held on reversal, in a case where a district court dismissed a petition of intervention in a proceeding, on a tax lien on the ground that the petition presented no claim against either the property involved or the parties. *United States Trust Co. v. New Mexico*, 183 U. S. 535, 539, 46 L. Ed. 315.

**77. Docketing and dismissing removes bar.**—The only effect of docketing and dismissing a case under the sixty-third rule of the federal supreme court is to enable the party to proceed to execute his judgment in the court below. It removes the bar to further proceedings in that court, which the appeal created, and does nothing more. *United States v. Pacheco*, 20 How. 261, 263, 15 L. Ed. 820. See the title *APPEAL AND ERROR*, vol. 2, p. 236.

**78.** "A motion to docket and dismiss a case from the failure of the appellant to file the record within the time required by the rule of this court, when granted, is not an affirmance of the judgment of the court below. It remits the case to the court, to have proceedings to carry that judgment into effect, if in the condition of the case there is nothing to prevent it. That is for the consideration of the judge in the court below, with which this court has nothing to do, unless his denial of such a motion gives to the party concerned a right to the writ of mandamus." *United States v. Gomez*, 23 How. 326, 16 L. Ed. 552.

**79. Powers and duties on remand—To execute mandate.**—*Ex parte Story*, 12 Pet. 339, 9 L. Ed. 1108; *Sibbald v. United States*, 12 Pet. 488, 9 L. Ed. 1167; *West v. Brashear*, 14 Pet. 51, 10 L. Ed. 350; *United States Bank v. Moss*, 6 How. 31, 40, 12 L. Ed. 331; *Corning v. Troy Iron & Nail Factory*, 15 How. 451, 14 L. Ed. 763; *Noonan v. Bradley*, 12 Wall. 121, 129, 20

L. Ed. 279; *Tyler v. Maguire*, 17 Wall. 253, 283, 21 L. Ed. 576; *Stewart v. Salamon*, 97 U. S. 361, 24 L. Ed. 1044; *Durant v. Essex Co.*, 101 U. S. 555, 25 L. Ed. 961; *Mackall v. Richards*, 112 U. S. 369, 28 L. Ed. 737; *Mackall v. Richards*, 116 U. S. 45, 29 L. Ed. 558; *Hickman v. Fort Scott*, 141 U. S. 415, 35 L. Ed. 775; *Gaines v. Rugg*, 148 U. S. 228, 242, 37 L. Ed. 432. See the title *APPEAL AND ERROR*, vol. 2, p. 416.

The lower court has power simply to proceed to execute, not to change the decree of the appellate court in any way. *Kingsbury v. Buckner*, 134 U. S. 650, 33 L. Ed. 1047.

The court below can only execute the mandate of the federal supreme court. It has no authority to disturb the decree, and can only settle what remains to be done. *Chaires v. United States*, 3 How. 611, 11 L. Ed. 749.

**80. Power conferred by mandate.**—*Durant v. Essex Co.*, 101 U. S. 555, 556, 25 L. Ed. 961.

**81. Conformity to mandate.**—In *re Potts*, 166 U. S. 263, 41 L. Ed. 994; *Martin v. Hunter*, 1 Wheat. 304, 4 L. Ed. 97; *Sibbald v. United States*, 12 Pet. 488, 9 L. Ed. 1167; *Milwaukie, etc., R. Co. v. Soutter*, 2 Wall. 510, 17 L. Ed. 900; *Skillearn v. May*, 6 Cranch 267, 3 L. Ed. 220; *Ex parte Story*, 12 Pet. 339, 9 L. Ed. 1108; *Chaires v. United States*, 3 How. 611, 618, 11 L. Ed. 749; *Whyte v. Gibbes*, 20 How. 541, 542, 15 L. Ed. 1016; *Sibbald v. United States*, 2 How. 455, 11 L. Ed. 337; *Tyler v. Maguire*, 17 Wall. 253, 283, 21 L. Ed. 576.

Undoubtedly it is the duty of all inferior courts to yield a prompt obedience to the mandate of the supreme court, or, in other words, to treat as conclusive the judgment of the latter upon the law and facts presented to it in appropriate form for consideration. Any other conduct would be subversive of the relation which the constitution intends that inferior tribunals shall hold to that court. But the obedience thus due is not a blind obedience, acting upon the letter of the judgment affirmed, or mandate ordered, without any consideration of the rights of persons not parties to the litigation in which the judgment was entered. In the *Matters of Howard*, 9 Wall. 175, 183, 19 L. Ed. 634.



**The inferior court is bound by the decree**, as the law of the case; and must carry it into execution according to the mandate; they can examine it for no other purpose than execution; nor give any other or further relief; nor review it upon any matter decided on appeal, for error apparent; nor intermeddle with it further than to settle so much as has been remanded.<sup>82</sup> The lower court, when its decree is affirmed and the mandate filed there, must record the order of the appellate court and proceed with the execution of the decree.<sup>83</sup>

b. *Presumption of Conformity*.—The lower court is presumed not to intentionally evade or disobey the mandate.<sup>84</sup>

c. *Mandate Based on Mistake*.—Where a mandate has plainly been framed, as regards a minor point, on a supposition which is proved by the subsequent course of things to be without base, it must not be acted upon so as to work manifest injustice.<sup>85</sup>

d. *Mandate Issued on Second Appeal*.—Where a second appeal is taken, on the ground that the mandate, issued on the original appeal, was not properly executed by the lower court in a single particular, but no complaint was made of its action, in the other particulars, it is not error for the lower court, on issuance of the second mandate, to follow the original decree in those particulars in which its action was not alleged as error.<sup>86</sup>

e. *Time of Compliance*.—The lower court need not give immediate consideration to a motion for judgment in accordance with a mandate, but may take such motion under advisement until a motion day, where it is engaged in regular business.<sup>87</sup>

**82. Mandate is law of case.**—*Sibbald v. United States*, 12 Pet. 488, 9 L. Ed. 1167; *In re Potts*, 166 U. S. 263, 265, 41 L. Ed. 994; *Texas, etc., R. Co. v. Anderson*, 149 U. S. 237, 37 L. Ed. 717; *Fuller v. United States*, 182 U. S. 562, 568, 45 L. Ed. 1230; *Durant v. Essex Co.*, 101 U. S. 555, 556, 25 L. Ed. 961.

When a case has been once decided by the supreme court on appeal, and remanded to a circuit court, whatever was before the former court, and disposed of by its decree, is considered as finally settled. The circuit court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded. *In re Sandford Fork, etc., Co.*, 160 U. S. 247, 255, 40 L. Ed. 414.

**Where the mandate is unambiguous**, the lower court cannot look elsewhere for authority. *West v. Brashear*, 14 Pet. 51, 10 L. Ed. 350.

**Jurisdiction not shown by pleadings.**—On receipt of the mandate it is the duty of the subordinate court to carry it into execution even though the jurisdiction does not appear in the pleadings. *Story v. Livingston*, 13 Pet. 359, 10 L. Ed. 200.

**83. To record and execute mandate.**—“On a mandate from this court affirming a decree, the circuit court can only record our order and proceed with the execution of its own decree as affirmed. It has no power to rescind or modify what we have established. Our judgment by a divided

court is just as much our judgment for all the purposes of the case in hand as if it had been unanimous. The result of the appeal to us was an affirmance of what had been done below. After the appeal had been taken, the power of the court below over its own decree was gone. All it could do after that was to obey our mandate when it was sent down.” *Durant v. Essex Co.*, 101 U. S. 555, 556, 25 L. Ed. 961.

**84. Presumption of conformity.**—In the *Matter of Howard*, 9 Wall. 175, 182, 19 L. Ed. 634.

**85. Mandate based on mistake.**—While the lower court is bound to follow the instructions given to it by the mandate, yet if the mandate is plainly framed, as regards a minor point, on a supposition which is proven to be without base, the mandate must not be so followed as to work manifest injustice. On the contrary, it must be construed otherwise and reasonably. *Chaires v. United States*, 3 How. 611, 11 L. Ed. 749; *Milwaukie, etc., R. Co. v. Soutter*, 2 Wall. 510, 17 L. Ed. 900.

**86. Mandate issued on second appeal.**—Where a second appeal was taken on ground that the boundaries of land, sold under a decree of court, were erroneously fixed but no complaints were made about the terms of sale or the manner in which the sale was made, under a former decree of the supreme court, it was right for the court to follow the old decree in the particulars not passed upon on the second appeal. *Mackall v. Richards*, 116 U. S. 45, 47, 29 L. Ed. 558. See post, “Matters Settled on Former Appeal,” VII, B, 6.

**87. Time of compliance.**—*In re Hall*, 167 U. S. 38, 42 L. Ed. 69.

3. JURISDICTIONAL QUESTIONS.—a. *As to Lower Court.*—It is too late to question the jurisdiction of a circuit court, after the cause has been sent back by mandate.<sup>88</sup> The lower court cannot dismiss a case for want of jurisdiction, after the supreme court has acted thereon.<sup>89</sup> A mandate, showing an amendment of record by consent which gives jurisdiction, precludes subsequent objections to jurisdiction in the lower court.<sup>90</sup>

b. *As to Appellate Court.*—The lower court cannot deny the jurisdiction of an appellate court from which the mandate issued.<sup>91</sup>

4. REVIEW OF DECISION OF APPELLATE COURT.—The directions of the appellate court on remanding a cause are not open to review by the lower court.<sup>92</sup>

5. MATTERS LEFT OPEN BY MANDATE.—The lower court may consider any matters left open by the mandate;<sup>93</sup> but, where the merits of a case have been acted upon in the appellate court, the lower court cannot reconsider them.<sup>94</sup>

88. Jurisdictional questions.—As to lower court.—*Skilern v. May*, 6 Cranch 267, 3 L. Ed. 220; *In re Washington, etc.*, R. Co., 140 U. S. 91, 35 L. Ed. 339; *Gaines v. Rugg*, 148 U. S. 228, 241, 37 L. Ed. 432; *Aspen Min., etc., Co. v. Billings*, 150 U. S. 31, 37, 37 L. Ed. 986; *Ex parte Story*, 12 Pet. 339, 9 L. Ed. 1108; *Sibbald v. United States*, 12 Pet. 488, 9 L. Ed. 1167; *Chaires v. United States*, 3 How. 611, 11 L. Ed. 749; *Whyte v. Gibbs*, 20 How. 541, 15 L. Ed. 1016; *Noonan v. Bradley*, 12 Wall. 121, 129, 20 L. Ed. 279. See the title APPEAL AND ERROR, vol. 2, p. 416.

89. After determination by appellate court.—*Skilern v. May*, 6 Cranch 267, 3 L. Ed. 220; *Kennedy v. Bank*, 8 How. 586, 611, 12 L. Ed. 1209; *Gaines v. Bugg*, 148 U. S. 228, 241, 37 L. Ed. 432.

"In *Skilern v. May*, 6 Cranch 267, 3 L. Ed. 220, a final decree had been pronounced, and by writ of error removed to the supreme court, who reversed the decree, and after the cause was sent back to the circuit court, it was discovered to be a cause not within the jurisdiction of the court; but a question arose whether in that court it could be dismissed for want of jurisdiction, after the supreme court had acted thereon. The opinion of the judges being opposed on that question, it was certified to the supreme court for their decision. And this court held, that the circuit court was bound to carry the decree into execution, although the jurisdiction of that court be not alleged in the pleadings." *Kennedy v. Bank*, 8 How. 586, 611, 12 L. Ed. 1209.

"This is an appeal from a decree entered by the circuit court in conformity with the mandate from the circuit court of appeals for the eighth circuit. That court took jurisdiction, passed upon the case, and determined by its judgment that the appeal had been properly taken. If error was committed in so doing, it is not for the circuit court to pass upon that question. The circuit court could not do otherwise than carry out the mandate from the court of appeals, and could not refuse to do so on the ground of want of jurisdiction in itself or in the appellate court." *Aspen Min., etc., Co. v. Billings*, 150 U. S. 31, 37, 37 L. Ed. 986.

90. Mandate showing jurisdiction.—Where an amendment to the record was made by consent of counsel in the supreme court, which amendment set forth the jurisdiction of the circuit court, a mandate containing that amendment ought to have prevented any subsequent objection to its jurisdiction in the circuit court. *Kennedy v. Bank*, 8 How. 586, 12 L. Ed. 1209.

91. As to appellate court.—*Tyler v. Maguire*, 17 Wall. 253, 21 L. Ed. 576. See the title APPEAL AND ERROR, vol. 1, p. 795.

92. Reviewing decision of appellate court.—*Texas, etc., R. Co. v. Anderson*, 149 U. S. 237, 241, 37 L. Ed. 717; *United States v. Steamship Co.*, 104 U. S. 480, 481, 26 L. Ed. 850.

Where the judgment of a circuit court is made final by the order of the supreme court, it is not subject to be reviewed by a circuit court of appeals in the exercise of its equitable powers or otherwise. *Texas, etc., R. Co. v. Anderson*, 149 U. S. 237, 241, 37 L. Ed. 717.

93. Matters left open by mandate.—*In re Sanford Fork, etc., Co.*, 160 U. S. 247, 40 L. Ed. 414; *Ex parte The Union Steamboat Co.*, 178 U. S. 317, 319, 44 L. Ed. 1084; *Hinckley v. Morton*, 103 U. S. 764, 26 L. Ed. 458; *Mason v. Pewabic Min. Co.*, 153 U. S. 361, 38 L. Ed. 745.

"The circuit court may consider and decide any matters left open by the mandate of this court." *In re Sanford Fork, etc., Co.*, 160 U. S. 247, 256, 40 L. Ed. 414.

On partial reversal.—Where the judgment in favor of the defendants upon a special finding by the circuit court, embracing only part of the issues, was reversed here, and the case remanded, "with instructions to proceed in conformity with the opinion," held, that the court below is precluded from adjudging in favor of the defendants upon the facts set forth in that finding, but can in all other respects proceed in such manner as, in its opinion, justice may require. *Ex parte French*, 91 U. S. 423, 23 L. Ed. 249, distinguished in *Fort Scott v. Hickman*, 112 U. S. 150, 165, 28 L. Ed. 636.

94. On decision on mandate.—*Smith v. Vulcan Iron Works*, 165 U. S. 518, 41 L.



6. **MATTERS SETTLED ON FORMER APPEAL.**—Questions determined on appeal are not subject to subsequent litigation in the lower court.<sup>95</sup> Where on a prior appeal the compensation of a receiver has been fixed to be paid from a fund in a circuit court, such court cannot in pursuance of an order of a state court change the amount of his compensation.<sup>96</sup>

7. **MATTERS ARISING AFTER ORIGINAL DECREE.**—If, since the original decree, anything has happened which makes it improper to carry the decree into execution, resort must be had to some form of original proceeding appropriate

Ed. 810; *In re Sanford Fork, etc., Co.*, 160 U. S. 247, 40 L. Ed. 414; *Great Western Tel. Co. v. Burnham*, 162 U. S. 339, 40 L. Ed. 991; *Ex parte Story*, 12 Pet. 339, 9 L. Ed. 1108; *Skillern v. May*, 6 Cranch 267, 3 L. Ed. 220; *Southard v. Russell*, 16 How. 547, 14 L. Ed. 1052; *Ex parte Dubuque & Pac. Railroad*, 1 Wall. 69, 17 L. Ed. 514; *Stewart v. Salamon*, 97 U. S. 361, 24 L. Ed. 1044; *Gaines v. Rugg*, 148 U. S. 228, 37 L. Ed. 432.

"When the merits of a case have been once decided by this court on appeal, the circuit court has no authority, without express leave of this court, to grant a new trial, a rehearing or a review, or to permit new defenses on the merits to be introduced by amendment of the answer." *In re Potts*, 166 U. S. 263, 267, 41 L. Ed. 994.

**Same.—To admit new party.**—At the time when a decree was made in the district court of Louisiana, in a case before it, the complainant was dead; the executrix was afterwards admitted, by the district court, to become a party to the suit, and prosecuted an appeal to the supreme court, where the decree of the district court was reversed on the merits; and the case was sent back to the district court on a mandate, requiring the decree of the supreme court to be carried into effect. The decease of the plaintiff, before the decree, and his having left other heirs besides the executrix, was offered in the form of a supplemental answer to the original bill, to the district court, when acting under the mandate of the supreme court, to show error in the proceedings of that court, with a view to bring the case again before the supreme court, in order to have a re-examination and a reversal of the decree of the court; the district court refused to permit the evidence of the matters alleged to be entered on the records of the court, or to sign a bill of exceptions, stating that the same had been offered. In the case of *Skillern v. May*, 6 Cranch 267, 3 L. Ed. 220, it was said: "As it appeared that the merits of the case had been finally decided in this court, and that its mandate required only the execution of the decree, the circuit court was bound to carry that decree into execution, although the jurisdiction of the court was not alleged in the pleadings." In the case now before the court, the merits of the controversy were finally decided by

the federal supreme court, and its mandate to the district court required only the execution of the decree. On the authority of this case, the refusal to allow the defendant to file a supplemental answer and plea was sustained. *Ex parte Story*, 12 Pet. 339, 9 L. Ed. 1108.

**Same.—To allow pleadings to merits.**—The rejoinder, which the circuit court permitted the defendant to file in this case, tendered no issue of fact, but one of law merely. Every question of law in the case had been covered by a former judgment of the supreme court. The proper action of the circuit court upon the mandate of the supreme court was to enter judgment on the pleadings in favor of the plaintiff, and proceed to an assessment of his damages. The rejoinder of the defendant allowed to be filed after the judgment of reversal sought again to draw in question the very matter which had been already finally adjudged by the federal supreme court in the same case. *Chaffin v. Taylor*, 116 U. S. 567, 570, 572, 29 L. Ed. 727.

**Same.—What amounts to decision on merits.**—Where a circuit court of appeals, acting under § 7 of the act of 1891, upon an appeal from an interlocutory decree of a circuit court granting an injunction and ordering an accounting in a patent case, dismissed the appeal and entered a final decree, it was held that the appellate court passed upon the merits of the case. *Smith v. Vulcan Iron Works*, 165 U. S. 518, 41 L. Ed. 810.

**95. Matters settled on former appeal.**—*Latta v. Granger*, 167 U. S. 81, 86, 42 L. Ed. 85; *Duncan v. Gegan*, 101 U. S. 810, 813, 25 L. Ed. 875.

**96.** The record now presented shows that after our decision at the last term, in which, among other things, *Hinckley*, the appellant, was allowed \$10,000 for his services as receiver from the time of his appointment in the *Kelly* suit, he went into the state court and had that suit reinstated. He then applied to that court to fix his compensation as receiver. That was done, and resulted in an allowance to him of something more than \$24,000. As soon as that order in his favor was made, he filed an intervening petition in the circuit court, asking that the amount so allowed him might be paid out of the fund in the circuit court belonging to the *Morton* suit. This was refused, and from the order to that effect, which was a final



to relief on that account. It cannot be done by way of defense to the enforcement of the decree or mandate.<sup>97</sup>

8. MATTERS REFERRED TO IN MANDATE.—Where the federal supreme court has affirmed title to lands in Florida, and referred, in its decree, to a particular survey, it would not be proper for the court below to open the case for a rehearing, for the purpose of adopting another survey.<sup>98</sup>

9. MATTERS CONCLUDED BY PLEADINGS.—A mandate directing a division of damages, in conformity with the decree of the supreme court in a collision suit between the two vessels, does not require the lower court to permit one of the vessels to recoup against the other one-half of the damages recovered against the petitioner by the owners of the cargo, where the petitioner is concluded by the pleadings from asking such relief.<sup>99</sup>

10. RIGHTS OF PERSONS NOT EMBRACED IN MANDATE.—The lower court is not estopped from considering the rights of persons not parties to the judg-

decree on the intervening petition, this appeal was taken. Held, the question of compensation to the receiver, so far as the fund in the circuit court is concerned, was settled on the former appeal. If the state court has funds in its hands out of which its judgment can be paid, it has full power to order the payment, but the liability of the fund in the circuit court to the receiver has already been fully discharged. The court below was right, therefore, in refusing the prayer of the appellant in his intervening petition, and its order to that effect is affirmed. *Hinckley v. Morton*, 103 U. S. 764, 765, 26 L. Ed. 458.

97. *Matters arising after original decree.*—"A motion was made by Mackall in the court below after the mandate was received for leave to file what was called a 'supplemental bill,' but which was in reality a supplemental answer to the original bill, setting up new defenses growing out of matters occurring since the original decrees. This was properly denied. No discretion was left in that court to grant such a motion. The order of this court was in effect to enter the precise decree which has been made. If, since the original decree, the debts have been paid, or anything else has happened which makes it improper to carry the decree into execution, resort must be had to some form of original proceeding appropriate to relief on that account. It cannot be done by way of defense before decree upon our mandate." *Mackall v. Richards*, 116 U. S. 45, 47, 29 L. Ed. 558. See post, "Objections First Made after Issuance of Mandate," VII, B, 11.

98. *Matters referred to in mandate.*—*Chaires v. United States*, 3 How. 611, 11 L. Ed. 749, citing *Sibbald v. United States*, 12 Pet. 488, 9 L. Ed. 1167.

99. *Matters concluded by pleadings.*—The steamer C., owned by the respondent, collided with the propeller N., owned by the petitioner. The C., for herself and as bailee of her cargo, filed a libel against the N. for \$70,000. Subsequently certain underwriters of the cargo of the C. filed an intervening petition, and the owners

of the N. filed a cross libel against the C. for \$3,000 damages. No answer was filed to this cross libel. The district court found the N. to have been solely in fault; but the circuit court of appeals reversed it on the ground that the C. was solely in fault. The case was then brought to the supreme court (*The New York*, 175 U. S. 187, 44 L. Ed. 126), both vessels found to have been in fault, the lower courts reversed and the cause remanded with directions for a division of damages. Thereupon the district court entered a decree dividing the damages sustained by the steamers, requiring the N. to pay the C. \$13,083.33. The underwriters of the cargo, who had intervened, received their share, and the C. received the residue as trustee. The owners of the N. applied for a mandamus to compel the district court to divide the damages of the cargo, which was denied on the ground that if the court below erred the remedy was by appeal (*Ex parte The Union Steamboat Co.*, 178 U. S. 317, 44 L. Ed. 1084). The case came before the federal supreme court on a second certiorari. Held, the district court did not err in refusing to permit the petitioner to recoup any sum that it might pay to the owners or underwriters of the cargo of the C., from any sum that was due from the N. for damages sustained to the C.; as, in the original suit, the N. made no claim to a division of damages, to assert its own innocence and guilt of the C.—it sought to escape and not to divide liability. The original suit, in which the N. made no claim to a division of damages, was between the N. and the C., with the underwriters of the cargo as intervenors (*The New York*, 175 U. S. 187, 44 L. Ed. 126). After pleading its entire want of liability in the original suit, in which the mandate issued for a division of damages, the N. cannot under such mandate and on such pleadings recoup against the C. for any amount it might be compelled to pay the underwriters of the cargo of the C. *The Conemaugh*, 189 U. S. 363, 47 L. Ed. 854, continued in *Erie R. Co. v. Erie, etc., Transp. Co.*, 204 U. S. 220, 51 L. Ed. 450. See the title COLLISION, vol. 3, p. 937.

ment of the appellate court.<sup>1</sup>

11. **OBJECTIONS FIRST MADE AFTER ISSUANCE OF MANDATE.**—An objection cannot be made for the first time, after appeal and remand of the cause.<sup>2</sup>

12. **PARTIAL AFFIRMANCE OF CASE.**—Where the lower court is reversed in part only and the cause remanded for further proceedings in regard to specific facts, the lower court is confined to such facts and cannot question matters as to which it had not been reversed.<sup>3</sup> The vacation of an accounting on appeal,

1. **Rights of persons not embraced in mandate.**—The judgment of an inferior court, when affirmed by the federal supreme court, is only conclusive as between the parties upon the matters involved. Viewed simply as an adjudication between them, it is not open to question. It does not conclude the rights of third parties not before the court, or in any respect affect their rights. Accordingly where a decree of a circuit court of the United States, affirmed by the superior court, had determined that the complainants and certain intervening claimants were entitled to a fund in the hands of the receiver of the court, and ordered the distribution of the fund among them, it was held that it did not preclude third parties from proceeding by bill to assert their claims to share in the fund, before its distribution; and to prevent such distribution, before their claims could be considered and determined, they were entitled, upon presenting a prima facie case, to a restraining order or injunction from the court. In the Matter of Howard, 9 Wall. 175, 19 L. Ed. 634.

2. **Objections first made after issuance of mandate.**—In *New Orleans v. Gaines*, 138 U. S. 595, 614, 34 L. Ed. 1102, the objection that the judgment was obtained after the death of one of the parties was not allowed to be made. The court said: "This cause went to a decree; that decree was appealed to this court, the appeal was heard, and the amount of the judgments for rents and revenues was sustained, and the matter was referred back to the court below to make a single inquiry. It was then too late, as it seems to us, if the suits for price had been commenced before the present suit, to raise for the first time the objection now made. But the fact is, that those suits were commenced after the present suit, and the objection, if taken at all, was one to be taken in those suits, and not in this."

Where an assignee of a claim upon a foreign government, holding it under an assignment supposed to be good, but afterwards adjudged invalid, prosecuted the claim to a successful result, and was subjected to costs and expenses in protecting the fund from rival claimants, and thereby preserving it, he was entitled to a reimbursement of these costs and expenses by the true owner, upon a final settlement of accounts between them. An objection that the executors of the assignee had distributed a portion of the money in the regular course of administration, should have been made when the

cause was before the supreme court upon its merits. After a mandate has gone down, and the cause come before the circuit court for a settlement of accounts, the objection comes too late. *Williams v. Gibbs*, 20 How. 535, 15 L. Ed. 1013. See ante, "Matters Arising after Original Decree," VII, B, 7.

3. **Partial affirmance of case.**—Where the lower court is approved in one part of its decisions and disapproved in another, and the case is remanded for further proceedings, on the part disapproved, it cannot admit evidence to impeach that part of its decision which has been approved. *Gaines v. Rugg*, 148 U. S. 228, 229, 37 L. Ed. 432.

Where case is affirmed in all but one respect.—In the case of *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 36 L. Ed. 1018, "the decree then under review was affirmed in all respects except one, and as to that one the cause was remanded for further investigation of the facts upon which it depended. The case involved the asserted ownership by the Illinois Central Railroad Company of certain piers, docks and wharves constructed by it on the lake front of the city of Chicago \* \* \* The state contended that the structures in question were erected, without authority of law, on lands belonging to it, and that the decree now before us was erroneous in not so declaring. The railroad company contended that the mandate of this court on the former appeal left open for consideration by the circuit court only one question, namely, whether those structures extended beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on Lake Michigan; and that that issue of fact having been found in its favor, the circuit court could not properly have passed any other decree than one confirming the company's title to such structures. \* \* \* (The court held) that upon the return of this cause to the circuit court, nothing was before that court except to inquire whether the structures erected by the railroad company, and specifically described in the opinion and mandate of this court, extended into the lake beyond the point of practical navigability, having reference to the manner in which commerce in vessels was conducted on the lake. That matter, and nothing more, had been or could have been determined by the final decree of the circuit court." *Illinois v. Illinois Cent. R. Co.*, 184 U. S. 77, 78, 92, 46 L. Ed. 440.



as to specific particulars only, does not empower the lower court in proceedings on remand to question other statements of the accounts not vacated.<sup>4</sup>

13. **DIRECTION TO ENTER SPECIFIC JUDGMENT.**—On a mandate from the supreme court, containing a specific direction to an inferior court to enter a specific judgment, the latter court has no authority to do anything but to execute the mandate;<sup>5</sup> but where a case is remanded with directions to render a decree making a fair reduction of a claim, a decree entered which, from the evidence, does not appear unfair, will be deemed a sufficient compliance with the mandate.<sup>6</sup>

14. **DIRECTIONS TO ENTER JUDGMENT FOR PARTICULAR PARTY.**—When a lower court is reversed and the case remanded with direction to enter judgment for a particular party, the court has no authority but to execute the mandate.<sup>7</sup>

15. **DIRECTING DIVISION OF DAMAGES.**—Where in a collision case, the lower court rendered a judgment for the appellant for a certain sum, upon reversal and remand directing division of damages, the lower court correctly renders judgment for each party, in one-half the sum of the original judgment.<sup>8</sup>

4. **Partial vacation of accounting.**—See the cases growing out of what is known as "the Hot Springs litigation," phases of which are reported in *Hot Springs Cases*, 92 U. S. 698, 23 L. Ed. 690; *Rector v. Gibbon*, 111 U. S. 276, 28 L. Ed. 427; *Lawrence v. Rector*, 137 U. S. 139, 34 L. Ed. 600; and *Goode v. Gaines*, 145 U. S. 141, 36 L. Ed. 654. *Goode v. Gaines* covered also fourteen other cases, one of which, *Rugg v. Gaines*, is involved in No. 13 original; and another of which, *Latta v. Gaines*, is involved in No. 12 original. Under the mandate from this court what it remained for the circuit court to do was only the taking of an account in the manner indicated by this court. This court, in its opinion, overruled all the objections taken to the title the land involved, and to say that its decree virtually reversed the whole decree of the circuit court is to say that it has done that which it said in its opinion ought not to be done. Under its opinion, it intended to reverse only a part of the decree, and that is all that it did. It substantially affirmed that part of the decree below which related to the title, and virtually only modified the entire decree, and that only in respect to taking the account. The lower court had no power to admit evidence to impeach the title. *Gaines v. Rugg*, 148 U. S. 228, 229, 241, 37 L. Ed. 432. See, also, *Latta v. Granger*, 167 U. S. 81, 86, 42 L. Ed. 85; *Latta v. Neubert*, 167 U. S. 87, 42 L. Ed. 87.

5. **Direction to enter specific judgment.**—In *re Washington, etc.*, R. Co., 140 U. S. 91, 96, 35 L. Ed. 339, citing *Ex parte Dubuque & Pac. Railroad*, 1 Wall. 69, 17 L. Ed. 514; *Durant v. Essex Co.*, 101 U. S. 555, 556, 25 L. Ed. 961.

6. **Remand for reduction of claim.**—Where the supreme court held that the government was not entitled to free transportation of its troops and property over certain railroad but only the free use of the road, and remanded the case to the court of claims with directions to enter a new decree awarding compensa-

tion to the road with a fair deduction for such use, it was held that a judgment for the amount previously found according to the ordinary tariff rates less the deduction of one-third, deemed by the war department an equivalent of any charge for the use of the road, sufficiently complied with the mandate, the evidence failing to show that the deduction was unfair. *United States v. Atchison, etc.*, R. Co., 154 U. S. 637, 24 L. Ed. 757.

7. **Directions to enter judgment for particular party.**—"When this court, under the 24th section of the judiciary act, reverses a judgment on a case stated and brought here on error, remanding the case, with a mandate to the court below to enter judgment for the defendant, the court below has no authority but to execute the mandate, and it is final in that court. Hence such court cannot, after entering the judgment, hear affidavits or testimony and grant a rule for a new trial; and if it does grant such rule, a mandamus will issue from this court ordering it to vacate the rule." *Ex parte Dubuque & Pac. Railroad*, 1 Wall. 69, 17 L. Ed. 514; *Gaines v. Bugg*, 148 U. S. 228, 242, 37 L. Ed. 432.

**Action to recover land.**—Where in an action, under the laws of Iowa, to recover land—the plaintiff averring that he claims and is entitled to the land, the defendant denying such right of possession but setting up no title in himself—there has been a reversal in the federal supreme court and a mandate "to enter judgment for the defendant below," an entry by the court below that the defendant "hath right to the lands claimed in the declaration" is erroneous. The judgment should have been that the plaintiff hath no title. Reversal and mandate accordingly. *Litchfield v. Railroad Co.*, 7 Wall. 270, 19 L. Ed. 150.

8. **Directing division of damages.**—Where a decree in the circuit court which, assuming that the fault in a collision case was with the libelled vessel alone, gave \$15,000 damages to the libellant, was re-



16. **DIRECTING RESTITUTION**—a. *Inquiry as to Liens*.—A general decree of restitution, absolute in terms, is to be carried into effect according to those terms, and excludes all inquiry between the litigating parties as to liens or claims not favored by the original decree, but which might have been, if they had been previously brought to the notice of the court.<sup>9</sup>

b. *Inquiry as to Duties*.—Where a mandate of the supreme court directs a restitution of certain property in controversy, which previous to appeal has been delivered to one of the parties upon a stipulation for the payment of the appraised value, according to the future decree of the court, the lower court in executing the mandate should allow the amount of duties paid on the property by said party in possession, to be deducted from the appraised value.<sup>10</sup>

c. *Inquiry as to Damages*.—Whenever damages are claimed by the libellant or the claimant in the original proceedings, if a decree of restitution and costs only passes, it is a virtual denial of damages, and an inquiry into damages cannot be entertained by the court below, after the cause is remanded for execution by the mandate of the federal supreme court.<sup>11</sup>

17. **PERMITTING AMENDMENTS**—a. *As to Clerical Errors*.—After its judgment has been reversed and a different one directed to be entered, the lower court may correct the record of the judgment in regard to mere clerical errors;<sup>12</sup> but it cannot so alter the record as to make a materially different one from the one directed to be entered.<sup>13</sup>

b. *As to Jurisdictional Averments*.—Where the jurisdiction of a circuit court depends upon the diverse citizenship of the parties and it is not averred in the pleadings,<sup>14</sup> the supreme court cannot amend the record so as to show the facts;<sup>15</sup> but the court below may, in its discretion, allow the pleading to be amended when the case is remanded.<sup>16</sup>

versed in the supreme court, which held "that both vessels were in fault, and that the damages ought to be equally divided;" and remanded the case with a mandate, directing that a decree should be entered "in conformity with this opinion," held, there having been no allegation in any pleadings, nor any proofs that the libelled vessel had sustained injury, that a decree was rightly entered against her for \$7,500. *The Sapphire*, 18 Wall. 51, 21 L. Ed. 814.

9. **Decree of restitution—Inquiry**.—After a general decree of restitution in the federal supreme court, the captors, or purchasers under them, cannot set up in the court below new claims for equitable deductions, meliorations and charges, even if such claims might have been allowed, had they been asserted before the original decree. *The Santa Maria*, 10 Wheat. 431, 6 L. Ed. 359. See the title **APPEAL AND ERROR**, vol. 2, p. 388.

10. **Inquiry as to duties**.—*The Santa Maria*, 10 Wheat. 431, 6 L. Ed. 359.

11. **Inquiry as to damages**.—*Canter v. American Ins. Co.*, 3 Pet. 307, 7 L. Ed. 688.

12. **Permitting amendments—As to clerical errors**.—*Hickman v. Fort Scott*, 141 U. S. 415, 35 L. Ed. 775.

13. **Material alteration**.—"It is simply an application by petition to a court of law, after its judgment has been reversed, and a different judgment directed to be entered, to so change the record of the original judgment as to make a case materially different from that presented to the court of review. The application

derives no strength from the fact that it was by petition, and not by motion supported by affidavits." *Hickman v. Fort Scott*, 141 U. S. 415, 418, 35 L. Ed. 775.

14. **As to jurisdictional averments—Of citizenship**.—See the title **COURTS**, vol. 4, p. 996.

15. **Amendment in supreme court**.—See ante, "To Show Jurisdiction," III, S. 5.

16. **Amendment in lower court**.—*Continental Ins. Co. v. Rhoad*, 119 U. S. 237, 240, 30 L. Ed. 380; *King Bridge Co. v. Otoe County*, 120 U. S. 225, 30 L. Ed. 623; *Halsted v. Buster*, 119 U. S. 341, 30 L. Ed. 462; *Peper v. Fordyce*, 119 U. S. 469, 30 L. Ed. 435; *Everhart v. Huntsville College*, 120 U. S. 223, 30 L. Ed. 623; *Menard v. Goggan*, 121 U. S. 253, 30 L. Ed. 914; *Metcalf v. Watertown*, 128 U. S. 586, 590, 32 L. Ed. 543; *Cameron v. Hodges*, 127 U. S. 322, 32 L. Ed. 132; *Denny v. Pironi*, 141 U. S. 121, 35 L. Ed. 657; *Great Southern, etc., Co. v. Jones*, 177 U. S. 449, 44 L. Ed. 842; *Mexican Cent. R. Co. v. Duthie*, 189 U. S. 76, 47 L. Ed. 715. See the title **APPEAL AND ERROR**, vol. 2, p. 375.

"If the citizenship of the defendants was, in fact, such at the commencement of the suit as to give the circuit court jurisdiction, it will be in the power of that court, when the case gets back, to allow the necessary amendment to be made and then proceed to trial. This whole subject was recently considered at the present term in *Continental Ins. Co. v. Rhoads*, 119 U. S. 237, 30 L. Ed. 380, and it is only necessary to refer now to the opinion in that case and the authorities there cited

c. *Of Pleadings Excepted to.*—Where a circuit court rendered judgment in favor of the plaintiff on his exceptions to the defendant's answer, the defendant declining to further plead, and the judgment was reversed and remanded with directions for further proceedings consistent with the opinion of the supreme court, it was in the discretion of the lower court to allow the pleading to be amended by the plaintiff.<sup>17</sup>

d. *Of Pleadings Demurred to.*—After a cause is remanded to the inferior court, such court may receive additional pleas, or admit amendments to those already filed, even after the appellate court has decided such pleas to be bad upon demurrer.<sup>18</sup> Amendments may also be made on remand after the reversal of a judgment sustaining a demurrer to pleadings.<sup>19</sup>

18. *PERMITTING SUPPLEMENTAL PLEADINGS*—a. *As to Matters Pertinent to Proceedings on Mandate.*—On remand of a case, a supplemental answer may be put in for the purpose of bringing to the notice of the lower court matters relied on, in the adjustment of accounts between the parties, by way of charges to be deducted from the amount claimed by one of them, where pertinent to the proceedings directed.<sup>20</sup>

b. *As to Matters Arising Prior to Decision on Appeal.*—Where the merits of a controversy have been acted upon by an appellate court and remanded with directions for execution, a lower court has no power to permit the filing of a supplemental answer to show the death of a party prior to the action in the appellate court.<sup>21</sup>

for the reasons of this judgment." *Halsted v. Buster*, 119 U. S. 341, 342, 30 L. Ed. 462.

17. *Of pleadings excepted to.*—"The case being thus left open, by the opinion and mandate of this court, and by the general rules of practice in equity, for further proceedings, with a right in the plaintiffs to file a replication, putting the cause at issue, the circuit court might, in its discretion, allow amendments of the pleadings for the purpose of more fully or clearly presenting the facts at issue between the parties. *Marine Ins. Co. v. Hodgson*, 6 Cranch 206, 218, 3 L. Ed. 200; *Neale v. Neales*, 9 Wall. 1, 19 L. Ed. 590; *Hardin v. Boyd*, 113 U. S. 756, 28 L. Ed. 756. The case is quite different, in this respect, from those in which the whole case, or all but a subsidiary question of accounting, had been brought to and decided by this court upon the appeal, as in the cases principally relied on by the petitioner. *Stewart v. Salamon*, 94 U. S. 434, 24 L. Ed. 275, and *Stewart v. Salamon*, 97 U. S. 361, 24 L. Ed. 1044; *Gaines v. Rugg*, 148 U. S. 228, 37 L. Ed. 432; *Ex parte Dubuque & Pac. Railroad*, 1 Wall. 69, 17 L. Ed. 514; *In re Washington, etc., R. Co.*, 140 U. S. 91, 35 L. Ed. 339." *In re Sanford Fork, etc., Co.*, 160 U. S. 247, 259, 40 L. Ed. 414.

18. *Of pleadings demurred to.*—*Marine Ins. Co. v. Hodgson*, 6 Cranch 206, 3 L. Ed. 200.

19. *Reversal of judgment sustaining demurrer.*—The case having been brought up from the circuit court of Mississippi, on a writ of error, and the judgment of the circuit court, on the demurrer, in favor of the defendant, and against the United States, having been reversed by the su-

preme court, the case will be in the circuit court as if the demurrer had been overruled; and will be subject to additional pleadings, or an amendment of the present pleadings, according to the rules and practice of the circuit court, and on such terms as it may impose. *United States v. Boyd*, 15 Pet. 187, 10 L. Ed. 706.

20. *Permitting supplemental pleadings.*

—"An objection has been made by the counsel for the appellant, Williams, in respect to the order of the court below, permitting a supplemental answer. We suppose this question rather a matter of practice than otherwise, resting in the discretion of the court below, and as a matter of convenience preparatory to the taking of the account before the master. The answer—and, for aught we see, the object in view might as well have been attained by a petition to the court, stating the facts—was put in for the purpose of bringing to the notice of the court the matters relied on in the adjustment of the accounts, and by way of charges to be deducted from the amount claimed. The proceeding enabled the court to give in advance directions to the master in making the settlement, and thereby narrow the grounds of controversy before him, and facilitate the hearing. It could work no prejudice to either party, for no claim by way of abatement of the account thus set up in the answer or petition should be allowed by the court, but what was pertinent to the subject of examination before the master." *Williams v. Gibbs*, 20 How. 535, 541, 15 L. Ed. 1013.

21. *As to matters arising prior to decision on appeal.*—*Ex parte Story*, 12 Pet. 339, 9 L. Ed. 1108.



c. *As to Matters Arising after Original Decree.*—See elsewhere in this title.<sup>22</sup>

19. GRANTING NEW TRIAL.—a. *For Cause Shown.*—In ordinary cases, a new trial cannot be granted by the court below, except for good cause, and in the exercise of its sound judgment, and it is not within its powers, in entering the judgment of the supreme court, to award a new trial.<sup>23</sup>

b. *Where Judgment Directed for Particular Party.*—The lower court has no power to grant a new trial where it is directed to enter judgment for a particular party and proceed to execute the mandate.<sup>24</sup>

c. *On Reversal of Verdict for Instructions Given.*—Where a verdict in favor of a plaintiff is reversed, on a bill of exceptions to instructions given to the jury, there must be a new trial awarded by the lower court.<sup>25</sup>

d. *Cases in Court of Claims.*—(1) *In General.*—The court of claims has power to grant a new trial, the same be done within two years next after the final disposition, although the case may have been decided on appeal in the federal supreme court, and its mandate have been issued.<sup>26</sup> The decision to grant or refuse a new trial cannot be reversed by the supreme court.<sup>27</sup>

(2) *On Remand for Proceedings According to Right of Case.*—Where a cause is remanded to it with the direction for further proceedings in conformity

22. *As to matters arising after original decree.*—See ante, "Matters Arising after Original Decree," VII, B, 7.

23. *Granting new trial.*—*Smale v. Mitchell*, 143 U. S. 99, 109, 36 L. Ed. 90. See the title NEW TRIAL. And see ante, "For New Trial," III, V.

*In ejectment cases.*—This rule cannot apply to an action of ejectment, where the party is entitled by the law of the state in which the action arose to a new trial without showing cause, and in regard to which the trial court possesses no discretion. The judgment entered in an action of ejectment in such case, by direction of the supreme court, stands subject to the same control by the lower court as if thus rendered in the first instance. *Smale v. Mitchell*, 143 U. S. 99, 109, 36 L. Ed. 90.

*Where more than one trial allowed by statute.*—At first sight the decision in *Ex parte Dubuque & Pac. Railroad*, 1 Wall. 69, 17 L. Ed. 514, would seem to be an authority to the contrary, but upon examination it appears that the new trial there depended upon the discretion of the court, and there was no statute at that time in Iowa which gave the party a right to a new trial as a matter of course. It appears from the record in that case, that after the mandate had gone down, and judgment had been entered in obedience to it, affidavits were presented and a motion made for a new trial, which was granted by the court; and that subsequently a mandate was issued by the supreme court commanding the court below to vacate the order. That case, therefore, as correctly stated by counsel, falls within the class where the litigation was ended with the first trial, and its decision does not apply to those cases of ejectment where more than one trial is directly allowed by statute. *Smale v. Mitchell*, 143 U. S. 99, 109, 36 L. Ed. 90.

*Illinois statute.*—It is provided by Revised Statutes of Illinois, ch. 45, § 35, that: "At any time within one year after a judgment, either upon default or verdict in the

action of ejectment, the party against whom it is rendered, his heirs or assigns, upon the payment of all costs recovered therein, shall be entitled to have the judgment vacated, and a new trial granted in the cause." This statute applies to the proceeding by a circuit court on the mandate of the supreme court in a cause removed from a state court. *Smale v. Mitchell*, 143 U. S. 99, 101, 36 L. Ed. 90.

24. *Judgment directed for particular party.*—*Ex parte Dubuque & Pac. Railroad*, 1 Wall. 69, 17 L. Ed. 514. See ante, "Directions to Enter Judgment for Particular Party," VII, B, 14.

25. *On reversal of verdict for instructions given.*—When a case is reversed upon a bill of exceptions and remanded, if it be upon a special verdict, or case agreed, the court above will proceed to give judgment; but when a verdict in favor of a plaintiff is reversed, on a bill of exceptions to instructions given to the jury, there must be a new trial awarded by the court below. *Hudson v. Guestier*, 6 Cranch 281, 285, 3 L. Ed. 224.

26. *Cases in court of claims.*—*Ex parte Russell*, 13 Wall. 664, 20 L. Ed. 632; *Young v. United States*, 95 U. S. 641, 24 L. Ed. 467.

When the court of claims on a motion for a new trial under § 2 of the act of June 25th, 1868, has not reached the consideration of the motion on its merits, but has dismissed it under an assumption that they had no jurisdiction to grant it, mandamus directing the court to proceed with the motion is the proper remedy. *Ex parte Russell*, 13 Wall. 664, 20 L. Ed. 632.

27. *Review of decision on motion for new trial.*—The decision of the court of claims awarding, on the motion of the United States, a new trial, while a claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, cannot be reviewed here. *Young v. United States*, 95 U. S. 641, 24 L. Ed. 467.



with law and justice, the court of claims may grant a new trial and try the cause *de novo*.<sup>28</sup>

20. GRANTING REHEARING.—Where the supreme court has passed upon the merits of a case, its consent must be obtained before a circuit court can grant a rehearing.<sup>29</sup>

21. GRANTING STAY OF PROCEEDINGS.—For treatment of this subject, see elsewhere.<sup>30</sup>

22. COMPELLING RESTITUTION.—Where money or property has changed hands by force of a judgment or decree, if the judgment is reversed, it is the duty of the inferior court, on the cause being remanded, to restore the parties to their rights.<sup>31</sup>

23. PERMITTING RECOUPMENT.—See elsewhere in this title.<sup>32</sup>

24. CREATION OF LIENS.—Where the mandate directs the entry of a money judgment to be levied on personal property, the lower court cannot create a lien upon specific real property.<sup>33</sup>

25. SELLING PROPERTY.—On the affirmance of its judgment for the payment of money to be levied on goods in the hands of an administrator, the lower court cannot sell real estate to pay such judgment.<sup>34</sup>

26. AWARDED COSTS ON REVERSED JUDGMENT.—The court below, upon a mandate sent down on reversal of its judgment, may award execution for the costs of the appellant in that court.<sup>35</sup> But when a case is dismissed for want

28. A remand for proceedings according to right of case.—Where on certain facts found by the court of claims—it refusing to find as a fact a certain allegation which the petitioner in the suit requested it to find—that court has given judgment against the petitioner, and the petitioner has taken the record to the federal supreme court, which, upon consideration of the case found, reverses the judgment of the court of claims and remands the cause “for further proceedings in conformity with law and justice,” there is nothing which prevents the court of claims from setting aside the findings of fact which it had made on the first trial and from trying the case *de novo*. *Ex parte Medway*, 23 Wall. 504, 23 L. Ed. 160.

29. Granting rehearing.—*In re Potts*, 166 U. S. 263, 41 L. Ed. 994; *Sibbald v. United States*, 12 Pet. 488, 9 L. Ed. 1167. See post, “Patent Cases,” VII, B, 28, b.

30. Stay of proceedings.—See the title SUPERSEDEAS AND STAY OF PROCEEDINGS.

31. Compelling restitution.—*Erwin v. Lowry*, 7 How. 172, 184, 12 L. Ed. 655; *Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 218, 35 L. Ed. 151. See the title APPEAL AND ERROR, vol. 2, p. 388.

“The power is inherent in every court, whilst the subject of controversy is in its custody, and the parties are before it, to undo what it had no authority to do originally, and in which it, therefore, acted erroneously, and to restore, as far as possible, the parties to their former position. Jurisdiction to correct what had been wrongfully done must remain with the court so long as the parties and the case are properly before it, either in the first instance or when remanded to it by an ap-

pellate tribunal.” *Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 219, 35 L. Ed. 151.

“The same doctrine has been fully recognized by this court in *United States Bank v. Bank*, 6 Pet. 7, 8, 17, 8 L. Ed. 299. In that case the court, after observing that the party against whom an erroneous judgment has been enforced does not lose his remedy against the party to the judgment, said: ‘On the reversal of the judgment the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost; and the mode of proceeding to effect this object must be regulated according to circumstances.’” *Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 220, 35 L. Ed. 151.

32. Permitting recoupment.—See ante, “Matters Concluded by Pleadings,” VII, B, 9.

33. Creation of liens.—*Boyce v. Grundy*, 9 Pet. 275, 9 L. Ed. 127.

34. Selling property.—*Boyce v. Grundy*, 9 Pet. 275, 9 L. Ed. 127.

35. Awarding costs on reversed judgment.—*Riddle v. Mandeville*, 6 Cranch 86, 3 L. Ed. 161. See the title APPEAL AND ERROR, vol. 2, p. 418.

Costs taxed *nunc pro tunc*.—After the receipt of the mandate from the supreme court, the circuit court may allow costs to be taxed *nunc pro tunc*. *Sizer v. Many*, 16 How. 98, 14 L. Ed. 861.

On direction for entry of judgment.—In all cases of reversal, if the federal supreme court direct the court below to enter judgment for the plaintiff in error, the court below will, of course, enter the judgment with the costs of that court. *McKnight v. Craig*, 6 Cranch 183, 3 L. Ed. 193.

of jurisdiction in a circuit court to entertain the action, or render the judgment entered, the power of that court to award costs is gone.<sup>36</sup>

27. ALLOWANCE OF INTEREST ON JUDGMENTS—*a. Where Not Allowed by Appellate Court.*—The lower court cannot allow interest on a judgment, where the judgment of the appellate court does not.<sup>37</sup>

*b. Where Left Open by Mandate.*—When its allowance or disallowance is a question left open by the mandate, the lower court may allow interest on its decree.<sup>38</sup>

*c. On Partial Reversal.*—Where the decree of a lower court granting a recovery for separate items is reversed in part, the lower court in rendering a decree after the case has been remanded may allow interest on the part not reversed, from the date of the original decree.<sup>39</sup> On a reversal in part of a decision of a lower court on an award and a direction in the mandate to enter up judgment on the award to the extent affirmed, the lower court may allow interest on such part of the award from the time the award was made, where the items of the award were separable.<sup>40</sup>

**36. On dismissal for want of jurisdiction.**—*Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 219, 35 L. Ed. 151; *The Mayor v. Cooper*, 6 Wall. 247, 250, 18 L. Ed. 851; *Hornthall v. The Collector*, 9 Wall. 560, 566, 19 L. Ed. 560; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 387, 28 L. Ed. 462.

**37. Allowance of interest on judgments.**—Where the original judgment omitted to name interest, and the supreme court merely affirmed the judgment with costs and the mandate of the court contained its judgment, it was proper for the court below to issue an execution for the amount of the judgment and costs, leaving out interest, and it would have been error to have included it. *Games v. Rugg*, 148 U. S. 228, 229, 242, 37 L. Ed. 432. See, also, *Early v. Rogers*, 16 How. 599, 14 L. Ed. 1074; *In re Washington, etc., R. Co.*, 140 U. S. 91, 35 L. Ed. 339. See the title APPEAL AND ERROR, vol. 2, p. 404.

**38. Left open by mandate.**—The cause was heard in the circuit court and a decree rendered, which, upon appeal to the federal supreme court by the bank, was reversed and the cause remanded, with a direction to enter a decree in conformity with the opinion. The circuit court rendered a decree, providing, among other things, that the plaintiff recover the sum of \$12,084.85, together with interest thereon from date of decree. The defendant then prosecuted an appeal to the supreme court, assigning as error that the circuit court included, in the recovery against the bank, interest on complainants' portion of the money. The contention was that the allowance of the interest was inconsistent with the mandate of the supreme court. Held, there was no error in this. *In re City Nat. Bank*, 153 U. S. 246, 248, 249, 38 L. Ed. 705.

**39. On partial reversal.**—The claims of the intervenors are for the rental of rolling stock, from the 1st of August, 1883, to the 1st of January, 1885. The order which was entered by this court was that the decrees be "reversed and the cases remanded with instructions to strike out

all allowances for rental prior to December 1, 1883, the time when the receiver was appointed at the instance of the mortgagees, and to allow the rentals as fixed for the time subsequent." All that the court had to do was to deduct from the amount allowed to each intervenor one-third of the amount allowed for the year ending August 1, 1884. In each of the reports as well as the decrees, the rentals due from August 1, 1884, to January 1, 1885, had been stated; and on receiving our mandates the circuit court interpreted them as in effect affirming so much of the decrees as allowed these amounts to the intervenors, and its new decrees awarded interest thereon from the date of the former decrees. Held, the court committed no error. *Kneeland v. American Loan, etc., Co.*, 138 U. S. 509, 511, 34 L. Ed. 1052.

**40. Partial reversal of decision on award.**—A decree appealed from confirmed an award against the Republic of Columbia after rejecting certain items, and ordered interest to be paid on the remainder from a certain date, the date fixed for payment by the award. In the supreme court other items of the award were disallowed and a decree was made reversing the decree below and remanding the case, "with directions to enter a decree confirming the award for and up to a certain sum." The circuit court thereupon entered a decree for that sum, with interest from the above mentioned date. The giving of interest was the error alleged; the only question was whether the decree of the supreme court prohibits the allowance of interest. Nothing was said upon the subject either in the decree or in the discussion of the case. In the opinion, however, the items were treated as separate matters; "some of which," it was said, "may be disallowed without affecting the rest." The only ground suggested for reversal was the inclusion of the separable items. It was held that it was competent for the court to award interest. *Ex parte The*



d. *On Direction to Execute Judgment According to State Law.*—Where a decree of a circuit court in a certain state was affirmed and it was directed to proceed with the collection of its money decree with interest as similar decrees bore in such state, it was right when the mandate went down for the circuit court to order that the decree be executed by the collection of the money found to be due and interest under the established rule of that state.<sup>41</sup>

28. *IN PARTICULAR CASES*—a. *Ejectment Cases.*—Where the supreme court sent a mandate to a circuit court, directing it to put a party into possession of certain lands, which were the subject of an ejectment suit, it was held right in that court not to extend the possession farther than the land originally recovered in ejectment, although other lands were afterwards drawn into the controversy.<sup>42</sup>

b. *Patent Cases.*—Where, on the dismissal of a suit for the infringement of a patent, the lower court was reversed because the patent was valid, and the cause remanded for further proceedings in conformity to the decision of the appellate court, the lower court cannot, without leave of the appellate court, grant a rehearing on the ground of newly discovered evidence.<sup>43</sup>

**C. Admiralty Cases.**—See elsewhere in this title.<sup>44</sup>

### VIII. Enforcement of Mandate.

**A. In General.**—As respects the federal courts, it is well settled that where the mandate leaves nothing to the judgment or discretion of the court below, and that court mistakes or misconstrues the decree or judgment of the supreme court and does not give full effect to the mandate, its action may be controlled, either upon a new appeal or writ of error if involving a sufficient amount, or by writ of mandamus to execute the mandate of the supreme court.<sup>45</sup>

**B. By Second Appeal**—1. *IN GENERAL.*—Second appeals have always been allowed to bring up proceedings subsequent to the mandate and not settled by the terms of the mandate itself,<sup>46</sup> and the decision of an inferior court on matters left open by the mandate can only be reviewed by a new appeal.<sup>47</sup>

Republic of Columbia, 195 U. S. 604, 49 L. Ed. 338.

41. *On direction to execute judgment according to state law.*—"The courts of Illinois have uniformly held that money decrees carry interest at the rate of six per cent per annum, the statutory rate for judgments. For this reason it was right for the circuit court, when our mandate went down, to order that the decree affirmed be executed by the collection of the money found to be due, and interest, which, under the established rule in the state, will be at six per cent." *Railroad Co. v. Turrill*, 101 U. S. 836, 25 L. Ed. 1009.

Under a mandate directing the allowance of interest at the same rate as upon decrees of the state of Michigan, seven per centum may be allowed. *The Cone-maugh*, 189 U. S. 363, 368, 47 L. Ed. 854.

42. *In particular cases—Ejectment cases.*—The federal supreme court having sent a mandate to a circuit court to put a party in possession of certain lands which were the subject of an ejectment suit, it was right in the circuit court not to extend the possession further than the land originally recovered in ejectment, although other lands were afterwards drawn into the controversy. Where a defendant in ejectment aliens the prop-

erty in dispute whilst the proceedings are pending, a possession by the vendee will not justify a plea of the statute of limitations. The supreme court having issued an order, after the expiration of the demise, that the circuit court should place the plaintiff in possession, such an order proceeded on principles governing a court of equity, and the circuit court was bound to conform to it. *Walden v. Bodley*, 9 How. 34, 13 L. Ed. 36. See, also, *Chaires v. United States*, 3 How. 611, 11 L. Ed. 749.

43. *Patent cases.*—In *re Potts*, 166 U. S. 263, 267, 41 L. Ed. 994.

44. *Admiralty cases.*—See ante, "In Admiralty Cases," III, P.

45. *Enforcement of mandate.*—In *re Blake*, 175 U. S. 114, 117, 44 L. Ed. 94.

46. *By second appeal.*—*Hinckley v. Morton*, 103 U. S. 764, 765, 26 L. Ed. 458; *Supervisors v. Kennicott*, 94 U. S. 498, 24 L. Ed. 260; *Tyler v. Magwire*, 17 Wall. 253, 21 L. Ed. 576.

*Matters reviewable by second appeal.*—See the title *APPEAL AND ERROR*, vol. 2, p. 412, et seq.

47. *Decision of matters left open by mandate.*—Where a case has been decided by the supreme court and remanded to the circuit court, the circuit court may consider and decide any matters left open



2. **REQUISITES**—a. *Jurisdictional Amount Involved*.—The amount in dispute must be sufficient to give jurisdiction.<sup>48</sup>

b. *Finality of Decree*.—When a case is sent to the court below by a mandate from the supreme court, no appeal will lie from any order or decision of the court until it has passed its final decree in the case.<sup>49</sup>

c. *Substantial Error*.—An appeal will not lie from a decree entered in the inferior court in accordance with the mandate,<sup>50</sup> but where the lower court commits any substantial error in the execution of the mandate of the supreme court, a second appeal will lie to correct the error.<sup>51</sup>

3. **HEARING AND DETERMINATION**—a. *Scope of Hearing*.<sup>52</sup>—Where a sec-

by the mandate of the supreme court; and its decision of such matters can be reviewed by a new appeal only. In re Sanford Fork, etc., Co., 160 U. S. 247, 255, 40 L. Ed. 414; In re Potts, 166 U. S. 263, 265, 41 L. Ed. 994; Ex parte The Union Steamboat Co., 178 U. S. 317, 319, 44 L. Ed. 1084. See the title MANDAMUS, ante, p. 1.

48. **Jurisdictional amount**.—City Bank v. Hunter, 152 U. S. 512, 515, 38 L. Ed. 534.

Where a judgment in a patent case was affirmed by the federal supreme court with a blank in the record for costs, and the circuit court afterwards taxed these costs at a sum less than two thousand dollars, and allowed a writ of error to the supreme court, this writ must be dismissed on motion. Sizer v. Many, 16 How. 98, 14 L. Ed. 861.

49. **Final decree**.—United States v. Fossatt, 21 Wall. 445, 446, 16 L. Ed. 186; Chace v. Vasquez, 11 Wheat. 429, 6 L. Ed. 511; Corning v. Troy Iron & Nail Factory, 15 How. 451, 14 L. Ed. 768, citing The Palmyra, 10 Wheat. 502, 6 L. Ed. 376.

**Confirmation of grant of land**.—After the authenticity of a grant of land is ascertained in the federal supreme court, and a reference has been made to the district court, to determine the external bounds of the grant, in order that the final confirmation may be made, an appeal cannot be claimed until the whole of the directions of the supreme court are complied with, and that decree made. United States v. Fossatt, 21 How. 445, 451, 16 L. Ed. 186.

**Mere entry of mandate on records**.—Where after a decision of the supreme court it appears that the mandate only was entered on the records of the district court, no action being had thereon, there was no ground for an appeal in this cause from the said district court. United States v. Fremont, 18 How. 30, 40, 15 L. Ed. 302.

50. **No substantial error**.—Stewart v. Salamon, 97 U. S. 361, 24 L. Ed. 1044; Hinckley v. Morton, 103 U. S. 764, 26 L. Ed. 458; Humphrey v. Baker, 103 U. S. 736, 26 L. Ed. 456; Texas, etc., R. Co. v. Anderson, 149 U. S. 237, 37 L. Ed. 717; Aspen Min., etc., Co. v. Billings, 150 U. S. 31, 37, 37 L. Ed. 986.

**Decree in exact accordance with mandate**.—"In Stewart v. Salamon, 97 U. S. 361, 24 L. Ed. 1044, this rule was promulgated: 'An appeal will not be entertained by this court from a decree entered in a circuit court or other inferior court in exact accordance with our mandate upon a previous appeal. Such a decree, when entered, is in effect our decree, and the appeal would be from ourselves to ourselves.'" Mackall v. Richards, 116 U. S. 45, 46, 29 L. Ed. 558.

51. **Where there is substantial error**.—Cook v. Burnley, 11 Wall. 672, 674, 20 L. Ed. 84.

**Correcting substantial errors in execution of mandate**.—"Where the subordinate court commits any substantial error in executing the mandate of the supreme court, it is well settled law that a second writ of error or appeal, as the case may be, will lie to correct the error, and to cause the mandate to be executed according to its tenor and effect. McMicken v. Perin, 20 How. 133, 135, 15 L. Ed. 857; Roberts v. Cooper, 20 How. 467, 481, 15 L. Ed. 969." Cook v. Burnley, 11 Wall. 672, 674, 20 L. Ed. 84.

**Misconstruction of decree of court**.—"When a case has been once decided by this court on appeal, and remanded to the circuit court \* \* \*, if the circuit court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount) or by a writ of mandamus to execute the mandate of this court." In re Sanford Fork, etc., Co., 160 U. S. 247, 255, 40 L. Ed. 414; Perkins v. Fourniquet, 14 How. 313, 330, 14 L. Ed. 435; In re Washington, etc., R. Co., 140 U. S. 91, 35 L. Ed. 339; City Bank v. Hunter, 152 U. S. 512, 38 L. Ed. 534; In re City Nat. Bank, 153 U. S. 246, 38 L. Ed. 705; In re Potts, 166 U. S. 263, 265, 41 L. Ed. 994.

52. **Hearing and determination**—Scope of hearing.—As to the rule that a second appeal brings up for consideration only the proceedings subsequent to the mandate, and the application of the rule as to persons and matters concluded by the former judgment, see the title APPEAL AND ERROR, vol. 2, p. 412.

As to extent that original proceedings

ond appeal is made to the supreme court to have it construed and execute its mandate, it is limited to the construction and execution of the same.<sup>53</sup>

b. *Decision on Hearing*.—Where an appeal is taken from a decree entered on a mandate upon a previous appeal, the supreme court will, on the application of the appellee, examine the decree entered, and if it conformed to the mandate, dismiss the case, with costs.<sup>54</sup> If it does not, the case will be remanded with appropriate directions for the correction of the error.<sup>55</sup> But it will not reverse a decree of the lower court, although an error had been committed in proceeding under the mandate, where no benefit would result to the appellant from a reversal.<sup>56</sup>

**C. By Mandamus.**—See elsewhere.<sup>57</sup>

### IX. Relief against Mandate.

After a mandate has gone down from the supreme court to a circuit court, it is not allowable for the plaintiff to appeal from the judgment of the circuit court and supreme court to a court of chancery, upon the merits of the legal titles involved in the controversy they had adjudicated.<sup>58</sup>

**MANDATORY.**—As to mandatory injunctions, see the title *INJUNCTIONS*, vol. 6, p. 1026. As to mandatory statutes, see, generally, the title *STATUTES*. See, also, *MAY*.

**MANIA TRANSITORI.**—See the title *INSANITY*, vol. 8, p. 1073.

**MANNER OF DEMAND.**—See *CIRCUMSTANCES OF DEMAND*, vol. 3, p. 785.

**MANORS.**—See note 1.

**MANSLAUGHTER.**—See the title *HOMICIDE*, vol. 6, p. 700.

**MANUFACTURE—MANUFACTURES.**—"The primary meaning of the word 'manufacture' is something made by hand, as distinguished from a natural growth; but as machinery has largely supplanted this primitive method, the word is now ordinarily used to denote an article upon the material of which labor has been expended to make the finished product."<sup>2</sup>

are examinable, see the title *APPEAL AND ERROR*, vol. 2, p. 415.

As to scope of hearing of case that has been before the circuit court of appeals on second appeal, see the title *APPEAL AND ERROR*, vol. 1, p. 497.

**53. In ejectment cases.**—The supreme court having sent a mandate to a circuit court to put a party into possession of certain lands which were the subject of an ejectment suit and on second appeal the question arose whether the circuit court had properly executed the mandate, the supreme court held that beyond the land recovered in the ejectment, it had no power to act under this mandate; that it was its duty to do what the circuit court ought to have done. *Walden v. Bodley*, 9 How. 34, 48, 13 L. Ed. 36.

**54. Decision on hearing.**—*Hinckley v. Morton*, 103 U. S. 764, 765, 26 L. Ed. 458; *Mackall v. Richards*, 116 U. S. 45, 46, 29 L. Ed. 558; *Stewart v. Salamon*, 97 U. S. 361, 24 L. Ed. 1044; *Humphrey v. Baker*, 103 U. S. 736, 737, 26 L. Ed. 456.

**Affirmance of decree in conformity with mandate.**—Where the decree appealed from is in strict accordance with the mandate of the court on the former appeal, it will be affirmed. *Dunlop v. Hepburn*, 3 Wheat. 231, 4 L. Ed. 377.

**55. Decree not in conformity with mandate.**—*Mackall v. Richards*, 116 U. S. 45,

46, 29 L. Ed. 558; *Humphrey v. Baker*, 103 U. S. 736, 737, 26 L. Ed. 456.

**56. No benefit from reversal.**—*Campbell v. Pratt*, 2 Pet. 354, 7 L. Ed. 449.

**57. By mandamus.**—See the title *MANDAMUS*, ante, p. 1.

**58. Relief against mandate.**—*Ballance v. Forsyth*, 24 How. 183, 16 L. Ed. 733.

**1. Manors.**—The words *manors* and "proprietary tenths" have the same meaning throughout the act of 1779 of Pennsylvania, an act for vesting the estate of proprietaries of Pennsylvania in the commonwealth; they always designate the same lands; when used in reference to quit rents, they have the same meaning as when used in reference to the arrears of purchase money. *Kirk v. Smith*, 9 Wheat. 241, 278, 6 L. Ed. 81. See the title *PUBLIC LANDS*.

**2. Tide Water Oil Co. v. United States**, 171 U. S. 210, 216, 43 L. Ed. 139.

**Manufacture.**—"In *Lawrence v. Allen*, 7 How. 785, 794, 12 L. Ed. 913, the process of manufacturing was defined to be 'making an article either by hand or machinery into a new form, capable of being used and designed to be used in ordinary life.' A like view of what constitutes an article of manufacture had been previously announced by the Court of King's Bench: 'The word *manufacture* has been generally understood to denote



**MANUFACTURING CORPORATIONS.**—As to the nature of manufacturing corporations, see the title **CORPORATIONS**, vol. 4, p. 630.

either a thing made which is useful for its own sake and vendable as such,' etc. *Rex v. Wheeler*, 2 B. & Ald. 349. In *Holden v. Clancy*, 58 Barb. 590, the test of whether an article was **manufactured** is thus defined: 'A **manufacture** is defined as the process of making anything by art, or of reducing materials into a form fit for use by the hand or by machinery; and it seems to imply a proceeding wherein the object or intention of the process is to produce the article in question. The residuum or refuse of various kinds of **manufactories** is more or less valuable for certain purposes, and may be, and often is, the subject of sale; but it is not expected that the skill and attention of the **manufacturer** is to be devoted to the quality of the refuse material. This is not the object of the process, and its quality is wholly subordinate and disregarded, when attention to it would interfere with the most profitable mode or material to be used in the process which is the main object of the **manufacturer**.' See *Seeberger v. Castro*, 153 U. S. 32, 35, 38 L. Ed. 624.

**Complete manufacture.**—"It may be said generally, although not universally, that a complete **manufacture** is either the ultimate product of prior successive **manufactures**, such as a watch spring, or a penknife, or an intermediate product which may be used for different purposes, such for instance as pig iron, iron bars, lumber or cloth; while a **partial manufacture** is a mere stage in the development of the material toward an ultimate and predestined product, such, for instance, as the different parts of a watch which need only to be put together to make the finished article. If, for instance, the wheels, chain, springs, dial, hands and case of a watch were all imported from abroad, and merely put together in this country, we do not think it could be said that the watch was wholly **manufactured** within the United States." *Tide Water Oil Co. v. United States*, 171 U. S. 210, 217, 43 L. Ed. 139.

**Patent laws.**—Where it is stated in application for a patent that: "I claim the above-described new **manufacture** of the deodorized heavy hydrocarbon oils, suitable for lubricating and other purposes." "The word **manufacture** in this sentence is one which is used with equal propriety to express the process of making an article, or the article so made. 'The **manufacture** of hydrocarbon oils' means primarily the making of hydrocarbon oils. It may mean the thing made also." *Merrill v. Yeomans*, 94 U. S. 568, 570, 24 L. Ed. 235. "The word is used in the English and American patent laws. It includes machinery which is to be used and is not the object of sale, and substances (such, for example, as medicines) formed by chem-

ical processes when the vendible substance is the thing produced, and that which operates preserves no permanent form.' 'It includes any new combination of old materials constituting a new result or production, in the form of a vendible article, not being machinery. The contriver of a new commodity which is not properly a machine or a composition of matter can obtain a patent therefor as for a new **manufacture**. And, although it might properly be regarded as a machine or a composition of matter, yet if the claim to novelty rests on neither of these grounds, and if it constitutes an essentially new merchantable commodity, it may be patented as a new **manufacture**.'" *Murphy v. Arnson*, 96 U. S. 131, 134, 24 L. Ed. 773, quoting from *Bouvier's Law Dictionary*.

"The various nostrums vended all over the land, with or without the certificate of the Patent Office, are **manufactures**. Beer may well be said to be **manufactured** from malt and other ingredients, whiskey from corn, or cider from apples. The fact that the identity of the original article or articles is lost, and that a new form or a new character is assumed, is not material in determining whether, within the popular idea, as embodied in the customs act, the article in question is a **manufacture** from its original elements." *Murphy v. Arnson*, 96 U. S. 131, 134, 24 L. Ed. 773.

**Revenue laws.**—As to the meaning of the word **manufactures** as used in the revenue laws, see the title **REVENUE LAWS**.

**As to whether a jail can be classed with manufactures**, see **JAIL**, vol. 7, p. 530.

**Producer and manufacturer distinguished.**—"The word 'producer' does not differ essentially in its legal aspects from the word **manufacturer**, except that it is more commonly used to denote a person who raises agricultural crops and puts them in a condition for the market. In the case of sugar a process of strict **manufacture** is also involved in converting the cane into its final product. In a number of cases arising in this court under the revenue laws, it is said that the word **manufacture** is ordinarily used to denote an article upon the material of which labor has been expended to make the finished product. That such product is often the result of several processes, each one of which is a separate and distinct **manufacture**, and usually receives a separate name." *Allen v. Smith*, 173 U. S. 389, 399, 43 L. Ed. 741. See, also, *Tide Water Oil Co. v. United States*, 171 U. S. 210, 216, 43 L. Ed. 139. See the title **BOUNDRIES**, vol. 3, p. 511.

**Manufacture and commerce distinguished.**—See the title **INTERSTATE AND FOREIGN COMMERCE**, vol. 7, p. 289.



**MANUMISSION.**—Manumission is the giving of liberty to one who has been in just servitude, with the power of acting, except as restrained by law.<sup>1</sup>

**MANURE.**—See note 2.

**MANUSCRIPT.**—See the title COPYRIGHT, vol. 4, p. 604.

**MAPS.**—See the titles BOUNDARIES, vol. 3, p. 468; COPYRIGHT, vol. 4, p. 614; DOCUMENTARY EVIDENCE, vol. 5, p. 444.

**MARGARINE.**—See note 3.

**MARGINS.**—See the title GAMBLING CONTRACTS, vol. 6, p. 538.

**MARINE.**—See note 4.

1. *Fenwick v. Chapman*, 9 Pet. 461, 472, 9 L. Ed. 193. See the title SLAVERY AND INVOLUNTARY SERVITUDE.

2. *Manure.*—As to “expressly used for manure,” see EXPRESSLY, vol. 6, p. 213.

3. *Margarine.*—See *Tilghman v. Procter*, 102 U. S. 707, 708, 26 L. Ed. 279; *Tilghman v. Procter*, 125 U. S. 136, 139, 31 L. Ed. 664.

4. *Marine risk—Wreck by ice.*—Where a charter party provided that the “marine risk” was to be borne by the vessel owners and the “war risk” by the government, the wreck of the vessel by ice was to be regarded as loss under a “marine risk” especially where the vessel owners manned the vessel and the captain made the voyage under orders of a United States officer, without protest, though he did not consider it safe to do so. *Raybold v. United States*, 15 Wall. 202, 206, 21 L. Ed. 57.

*Same—Wrecked crossing bar.*—A vessel wrecked by stranding on bar in attempt to cross a bar when the water was low and in the full face of a high wind, has been held to be a loss under a “marine risk” and not a war risk within the meaning of a charter party by which the

vessel owners were to bear the marine risk and the government the war risk. *Morgan v. United States*, 14 Wall. 531, 535, 20 L. Ed. 738.

*Same—Vessel detained on suit on bottomry bond.*—Where a charter party stipulated that a vessel while in the service of the government should be kept, “tight, staunch, and strong,” at the cost of the owners, and that the time lost by any deficiency in these respects should not be paid for by the United States, “the war risk to be borne by the United States, the marine risk by the owners,” a detention of the vessel by a United States marshal on libel by the holder of a bottomry bond executed by the captain to pay for repairs to vessel in stopping a leak was incident to the marine risk which the owners had expressly assumed, it was a fruit of that peril, and the United States was not liable for a per diem during time of detention. *Goodwin v. United States*, 17 Wall. 515, 517, 21 L. Ed. 669.

*Marine insurance.*—As to marine risk as used in insurance, see the title MARINE INSURANCE.

*Marine protest.*—See the title MARINE INSURANCE.

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#### CROSS REFERENCES.

See the title *INSURANCE*, vol. 7, p. 66, and cross references there given. And see, also, the titles *ADMIRALTY*, vol. 1, p. 119; *BLOCKADE*, vol. 3, p. 364; *BOTTOMRY AND RESPONDENTIA*, vol. 3, p. 448; *EMBARGO AND NONINTERCOURSE LAWS*, vol. 5, p. 732; *GENERAL AVERAGE*, vol. 6, p. 549; *MARITIME LIENS*; *PRIZE*; *SHIPS AND SHIPPING*.

#### I. History and Origin.

The contract of marine insurance sprung from the law maritime, and derives all its material rules and incidents therefrom. It was unknown to the common law.<sup>1</sup>

1. **History and origin.**—*Insurance Co. v. Dunham*, 11 Wall. 1, 31, 20 L. Ed. 90. "The contract of marine insurance is an exotic in the common law. And we know the fact, historically, that its first appearance in any code or system of

laws was in the law maritime as promulgated by the various maritime states and cities of Europe. It undoubtedly grew out of the doctrine of contribution and general average, which is found in the maritime laws of the ancient Rhodians."

## II. Purpose and Nature.

Contracts of marine insurance are enforced to indemnify the owner of a marine adventure from a portion of his loss which might arise from certain perils of the sea or river to which the ship, merchandise, freight or interest insured might be exposed during a particular voyage or for a specified time.<sup>2</sup> Marine policies are contracts of indemnity and therefore the assured can only recover according to the damage he has sustained.<sup>3</sup> Marine insurance is but a wager between the parties to it, on the safety of the vessel.<sup>4</sup>

## III. Form, Requisites and Validity.

**A. Oral Contracts.**—See the title *INSURANCE*, vol 7, p. 94.

**B. Memoranda.**—A written memorandum upon a blank policy, made by an agent of an insurance company, to the effect that the owners of a vessel were insured in a specified sum, on the freight of such vessel, effects such insurance by a policy in blank according to the usage of the company.<sup>5</sup>

**C. Kinds of Policies**—1. **WAGER POLICIES.**—See the title *INSURANCE*, vol. 7, p. 106.

2. **OPEN OR RUNNING POLICIES.**—An open or running policy is one which enables the merchant to insure his goods shipped at a distant port when it is impossible for him to be advised of the particular ship upon which the goods are laden, and therefore cannot name it in the policy.<sup>6</sup>

3. **VALUED POLICIES.**—See post, "Valued Policy," IX, D, 1, a.

4. **TIME AND VOYAGE POLICIES.**—See post, "Retardation of Voyage," IX, E, 3, b, (2), (g).

**D. Requisites**—1. **WRITING.**—See the title *INSURANCE*, vol. 7, p. 94.<sup>7</sup>

2. **COMPETENT PARTIES.**—See post, "Insurable Interest," V.

3. **MEETING OF MINDS.**—To be binding, a contract of marine insurance must be assented to by both parties at one time.<sup>8</sup>

*Insurance Co. v. Dunham*, 11 Wall. 1, 32, 20 L. Ed. 90. See post, "Courts of Common Law," XVIII, B, 2.

2. **Nature and purpose of contract.**—*Insurance Co. v. Folsom*, 18 Wall. 237, 246, 21 L. Ed. 827; *Hobson v. Lord*, 92 U. S. 397, 409, 23 L. Ed. 613.

3. *Insurance Co. v. Bailey*, 13 Wall. 616, 618, 20 L. Ed. 501; *Insurance Co. v. Folsom*, 18 Wall. 237, 246, 21 L. Ed. 827; *Rhineland v. Insurance Co.*, 4 Cranch 29, 45, 2 L. Ed. 540. See post, "Insurable Interest," V.

4. *Ward v. Peck*, 18 How. 267, 268, 15 L. Ed. 383.

**Not an instrumentality of commerce.**—See the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 293.

5. **Memoranda.**—*Insurance Co. v. Mordecai*, 22 How. 111, 16 L. Ed. 329.

6. **Open or running policies.**—*Orient Mut. Ins. Co. v. Wright*, 23 How. 401, 405, 16 L. Ed. 524, reaffirmed in *Sun Mut. Ins. Co. v. Wright*, 23 How. 412, 16 L. Ed. 529.

"A relaxation in this respect has been permitted by the laws and practice of commercial countries; and the party effecting the insurance is allowed to insure the cargo 'on board ship or ships,' on condition of declaring the ship upon the policy and giving notice to the underwriter as soon as known, and if possible before the loss on board of which the goods have been laden." *Orient Mut.*

*Ins. Co. v. Wright*, 23 How. 401, 405, 16 L. Ed. 524, reaffirmed in *Sun Mut. Ins. Co. v. Wright*, 23 How. 412, 16 L. Ed. 529.

"But until the declaration is made by the assured, it is inchoate and incomplete; and, if not made at all, the risk is regarded as not having commenced, and the assured is entitled to a return of his premium." *Orient Mut. Ins. Co. v. Wright*, 23 How. 401, 406, 16 L. Ed. 524.

7. **Effect of reducing to writing.**—See post, "Parol Evidence," XVIII, G, 3. See the title *INSURANCE*, vol. 7, p. 95.

8. **Meeting of minds.**—*Insurance Co. v. Lyman*, 15 Wall. 664, 21 L. Ed. 246.

**Effect of subsequent memorandum requiring approval of agent.**—Where the agent of an insurance company was fully authorized to make insurance of vessels, and had, in fact, on a previous occasion, insured the same vessel for the same applicant, and in the instance under consideration actually delivered to him, on receipt of the premium note, a policy duly executed by the officers of the company, filled up and countersigned by himself under his general authority, and having every element of a perfect and valid contract, the fact that after the execution and delivery of the policy the party insured signed a memorandum thus, "The insurance on this application to take effect when approved by E. P. D., general agent," etc., does not make the previous transaction a nullity until approved.

4. **DELIVERY AND ACCEPTANCE.**—Manual delivery of a policy of marine insurance is not essential to its consummation.<sup>9</sup>

**E. Validity and Illegality.**—1. **GENERAL RULE.**—In the case of assurance on illegal voyages, even where the underwriters have contracted with their eyes open, they are notwithstanding permitted to avail themselves of the plea of illegality *ad libitum*. Nor is it to voyages illegal by statute alone, that this principal applies. Whenever an insurance is made on a voyage expressly prohibited by the common, statute or maritime law of the country, the policy is of no effect.<sup>10</sup>

2. **WHEN ILLEGALITY MUST EXIST.**—The illegality must exist during the course of the voyage covered by the insurance. An antecedent independent, illegal act will not avoid future contracts of insurance which are only remotely connected with it.<sup>11</sup>

3. **VIOLATION OF REGISTRY LAWS.**—A violation of the law relative to the registry and enrolling of vessels does not avoid a policy of insurance on the vessel.<sup>12</sup>

4. **SAILING TO A BLOCKADED PORT.**—See post, "Sailing to Blockaded Port," VIII, E, 2, h.

5. **EFFECT OF FRAUD.**—See post, "Representations," VIII, A; "Concealment," VIII, B. See the title **INSURANCE**, vol. 7, p. 110.

#### IV. Construction, Operation and Effect.

**A. Rules of Construction.**—Policies of marine insurance are generally the most informal instruments which are brought into courts of justice; and there are no instruments which are more liberally construed, in order to effect the real intention of the parties, if that intention can be clearly ascertained.<sup>13</sup> The sur-

Hence, though the general agent sent back the application directing the agent who had delivered the policy, to return to the party insured his premium note, and cancel the policy, the party insured was held entitled to recover for a loss, the agent having neither returned the note nor canceled the policy. *Insurance Co. v. Webster*, 6 Wall. 129, 18 L. Ed. 888. See, also, *Insurance Co. v. Higginbotham*, 95 U. S. 380, 388, 24 L. Ed. 499.

**Evidence insufficient.**—A., knowing that his vessel had been lost on the 8th of January, 1870, but concealing his knowledge of the fact, applied for, on the 15th following, and got a written policy of insurance dated on that day, on her, "lost or not lost," from the 1st of January, 1870, to the 1st of April following. The insurance company, discovering afterwards that when he applied for this policy he knew of the loss, refused to pay. He brought suit, setting out his written policy, but declaring on it in such a way as was meant to show that the execution of it was but "a compliance with and a formal statement" of an agreement to make the insurance, which he alleged had been entered into between himself and the insurers on the 31st of December, 1869, and before the loss. Held, that the fact that the plaintiff went to the insurance office about half-past three o'clock in the afternoon, saw a clerk or person (whom he was not able afterwards to identify) standing at the desk, to whom he applied to have the vessel

insured, who told him that "the secretary had gone home, and that there was no one in the office who could do it, but said he would speak to the secretary when he came in, in the morning, and have it attended to the first thing," is not sufficient evidence of a completed contract—an agreement assented to by both parties at any one time—to be submitted to a jury in a suit as on a verbal contract for insurance, and assuming that the case was one where no written contract had ever been executed. *Insurance Co. v. Lyman*, 15 Wall. 664, 21 L. Ed. 246.

9. **Delivery and acceptance.**—*Commercial Mut. Marine Ins. Co. v. Union Mut. Ins. Co.*, 19 How. 318, 15 L. Ed. 636. See the title **INSURANCE**, vol. 7, p. 99. See, also, ante, "Meeting of Minds," III, D, 3.

10. **Validity and illegality.**—*United States Bank v. Owens*, 2 Pet. 527, 540, 7 L. Ed. 508.

11. **When illegality must exist.**—*Ocean Ins. Co. v. Polleys*, 13 Pet. 157, 10 L. Ed. 105.

12. **Violation of registry law.**—*Ocean Ins. Co. v. Polleys*, 13 Pet. 157, 10 L. Ed. 105. See the title **ILLEGAL CONTRACTS**, vol. 6, p. 750.

13. **Intention of parties.**—*Yeaton v. Fry*, 5 Cranch 335, 342, 3 L. Ed. 117. See, also, *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 6 L. Ed. 664. See the title **INSURANCE**, vol. 7, p. 101.

**Rule applied to open policies.**—See *Orient Mut. Ins. Co. v. Wright*, 23 How.



rounding circumstances may be considered.<sup>14</sup>

**Written and Printed Clauses.**—If possible the written and printed parts of a policy of marine insurance must be construed so that both can stand but, where there is a conflict between them, the written part will prevail.<sup>15</sup>

**Usage of Merchants.**—Not only in the introduction of this branch of law into England, but in its progress since, both there and here, a constant reference has been had to the usage of merchants.<sup>16</sup> The contract is construed with reference to the general usages and customs of the trade insured, and the parties both insurer and insured are held to know such usages and customs.<sup>17</sup>

**But where the written contract is susceptible on its face of a construction that is "reasonable,"** resort cannot be had to evidence of custom or usage to explain its language,<sup>18</sup> or vary or contradict the agreement.<sup>19</sup>

**B. What Law Governs.**—In all foreign voyages, the underwriters, necessarily, have it in contemplation, that the vessel insured must, or at least may be, subjected to the operation of the laws of the foreign ports which are visited. Those very laws may in some cases impose burdens, and in some cases give benefits, different from the laws of the home port; and yet there are cases under policies of insurance, where it is admitted the foreign law will govern the rights of the parties, and not the domestic law; such is the known case of general average, settled in a foreign port, according to the local law, although it may differ from the law of the home port.<sup>20</sup>

**C. Description of Property and Interest Insured**—1. **IN GENERAL.**—In general a policy of marine insurance covers only the interest of the person named in it as the insured.<sup>21</sup>

401, 406, 16 L. Ed. 524, reaffirmed in *Sun Mut. Ins. Co. v. Wright*, 23 How. 412, 16 L. Ed. 529.

**14. Surrounding circumstances considered.**—*Reed v. Insurance Co.*, 95 U. S. 23, 24 L. Ed. 348.

**15. Written and printed clauses.**—*Hagan v. Scottish Ins. Co.*, 186 U. S. 423, 46 L. Ed. 1229. See, also, *Merchant's Ins. Co. v. Allen*, 121 U. S. 67, 30 L. Ed. 858. See the title **INSURANCE**, vol. 7, p. 103.

A marine policy was made out upon a blank policy providing by many of its terms for insurance on property or goods on land. The words "for account of whom it may concern" were written immediately after the name of the insured. A printed clause of the policy provided that it should be entirely void unless otherwise provided by agreement, if any transfer in interest, title or possession should be made. It was held that the interest of a subsequent vendee of the boat or an interest therein is protected by virtue of the words "for account of whom it may concern" notwithstanding the retention of the clause forbidding a transfer of title, etc. *Hagan v. Scottish Ins. Co.*, 186 U. S. 423, 46 L. Ed. 1229.

**16. Usage of merchants.**—*General Mut. Ins. Co. v. Sherwood*, 14 How. 351, 362, 14 L. Ed. 452.

**17. Hearne v. Marine Ins. Co.**, 20 Wall. 488, 22 L. Ed. 395. See post, "Knowledge and Presumption of Knowledge of Insurer," VIII, B, 2, g, (2).

**Settled construction, different from natural import of words sanctioned.**—See the title **INSURANCE**, vol. 7, p. 103.

**Local usage.**—A local usage of the place where an open policy of marine insurance is executed, but which is sent into another state to take effect there by the acceptance of risks under it by the agent of the underwriter, does not effect the policy. *North America Ins. Co. v. Hibernia Ins. Co.*, 140 U. S. 565, 35 L. Ed. 517; *Hazard v. New England Marine Ins. Co.*, 8 Pet. 557, 8 L. Ed. 1043. See the titles **CONFLICT OF LAWS**, vol. 3, p. 1056; **INSURANCE**, vol. 7, p. 202.

**Carrying papers necessary to voyage.**—See post, "Papers Required by Usage of Trade," VIII, B, 2, f, (2).

**18. Contract susceptible on its face of reasonable construction.**—*Insurance Companies v. Wright*, 1 Wall. 456, 17 L. Ed. 505.

**Open policy.**—And this general rule of evidence applies to an instrument so loose as an open or running policy of assurance, and even to one on which the phrases relating to the matter in contest are scattered about the document in a very disorderly way. *Insurance Companies v. Wright*, 1 Wall. 456, 17 L. Ed. 505.

**19. Hearne v. Marine Ins. Co.**, 20 Wall. 488, 22 L. Ed. 395; *Insurance Companies v. Wright*, 1 Wall. 456, 486, 17 L. Ed. 505. See, also, post, "Parol Evidence," XVIII, G, 3.

**20. What law governs.**—*Peters v. Warren Ins. Co.*, 14 Pet. 99, 10 L. Ed. 371. See the title **CONFLICT OF LAW**, vol. 3, pp. 1055, 1057.

**21. Description of property and interest insured.**—*Graves v. Boston Marine Ins. Co.*, 2 Cranch 419, 438, 2 L. Ed. 324.

2. "FOR OR ON ACCOUNT OF WHOM IT MAY CONCERN."—A policy of marine insurance in the name of a special party "for or on account of whom it may concern," will cover the interest of the person for whom it was intended by the party who ordered it, although the particular persons intended was not known.<sup>22</sup>

3. "AS PROPERTY MAY APPEAR."—A policy which insures the persons therein named, "as property may appear" covers each and every interest of such persons, in whatever capacity such interest may be; but these words restrict the general terms of the policy to the interests of the persons named in it as the assured.<sup>23</sup>

4. "LOST OR NOT LOST."—Where parties mean to insure a vessel "lost or not lost," the use of that phrase is not necessary to make the policy retroactive. It is sufficient if it appear by the description of the risk and the subject matter of the contract that the policy was intended to cover a previous loss.<sup>24</sup>

5. POLICY IN NAME OF JOINT OWNER.—See the title INSURANCE, vol. 7, p. 113.

6. CARGO—a. *In General*.—A policy on the cargo covers household furniture.<sup>25</sup>

b. *Trading Voyage*.—A policy on cargo on a trading voyage is an insurance upon every successive cargo which is taken on board in the course of the voyage out and home, and covers the risk of a return cargo, the proceeds of the sales of the outward cargo.<sup>26</sup>

c. *Successive or Substituted Cargo*.—See ante, "Trading Voyage," IV, C, 6, b; post, "Freight," IV, C, 7.

7. FREIGHT.—Where the insurance is upon the freight of every successive cargo taken on board in the course of the voyage out and home, it is to be applied to the freight at risk at any time, whether on the outward or homeward passage. In such case the policy is not regarded as for one entire voyage out, and home again, but as, in effect, covering freight upon separate voyages out and home to the amount of the valuation. The valuation of freight in such policy applies to the freight at risk at any time on each successive voyage.<sup>27</sup>

22. "For or on account of whom it may concern."—Hagan v. Scottish Ins. Co., 186 U. S. 423, 429, 46 L. Ed. 1229; Hooper v. Robinson, 98 U. S. 528, 25 L. Ed. 219. See the title INSURANCE, vol. 7, p. 132. See, also, post, "Neutral and Belligerent Property," IV, C, 8.

A policy upon a cargo.—Hooper v. Robinson, 98 U. S. 528, 25 L. Ed. 219; Hagan v. Scottish Ins. Co., 186 U. S. 423, 429, 46 L. Ed. 1229.

23. "As property may appear."—Graves v. Boston Marine Ins. Co., 2 Cranch 419, 439, 2 L. Ed. 324.

24. "Lost or not lost."—Insurance Co. v. Folsom, 18 Wall. 237, 21 L. Ed. 827.

25. Household furniture.—Vasse v. Ball, 2 Dall. 270, 276, 1 L. Ed. 377.

26. Trading voyage.—Columbian Ins. Co. v. Catlett, 12 Wheat. 383, 6 L. Ed. 664; Hugg v. Augusta Ins., etc., Co., 7 How. 595, 12 L. Ed. 834; Insurance Co. v. Mordecai, 22 How. 111, 117, 16 L. Ed. 329.

A policy for \$10,000 upon a voyage "at and from Alexandria to St. Thomas, and two other ports in the West Indies, and back to her port of discharge, in the United States, upon all lawful goods and merchandise, laden or to be laden on board the ship, etc., beginning the adventure upon the said goods and merchandise, from the lading at Alexandria, and continuing the same until the said goods

and merchandise shall be safely landed at St. Thomas, etc., and the United States, aforesaid"—is an insurance upon every successive cargo taken on board, in the course of the voyage out and home, so as to cover the risk of a return cargo, the proceeds of the sales of the outward cargo. Columbian Ins. Co. v. Catlett, 12 Wheat. 383, 6 L. Ed. 664.

Such a policy covers an insurance of \$10,000 during the whole voyage out and home, so long as the assured has that amount of property on board, without regard to the fact of a portion of the original cargo having been safely landed at an intermediate port, before the loss. Columbian Ins. Co. v. Catlett, 12 Wheat. 383, 6 L. Ed. 664.

27. Freight.—Hugg v. Augusta Ins., etc., Co., 7 How. 595, 610, 12 L. Ed. 834; Columbian Ins. Co. v. Catlett, 12 Wheat. 383, 6 L. Ed. 664; Insurance Co. v. Mordecai, 22 How. 111, 117, 16 L. Ed. 329.

Where there was insurance upon the freight of a vessel on a voyage from Charleston to Rio Janeiro, and from thence to a port of discharge in the United States, the insurance was upon the freight of each successive voyage, and is to be applied to the freight at risk at any time, whether on the outward or homeward voyage, to the amount of the valuation. Therefore, where the vessel



Where the voyage insured is one entire voyage out and back to the port of discharge the underwriters are entitled to a deduction of the freight earned on the outward voyage.<sup>28</sup>

8. **NEUTRAL AND BELLIGERENT PROPERTY.**—A general policy, insuring every person having an interest in the thing insured, and containing no warranty that the property is neutral, covers belligerent as well as neutral property.<sup>29</sup>

A policy "for whom it may concern," will, in ordinary cases, cover belligerent property.<sup>30</sup>

**D. Designation of Voyage and Adventure**—1. **IN GENERAL.**—Only the voyage described in the policy is covered by the insurance.<sup>31</sup>

2. **WATERS AND PORTS**—a. *Rule of Construction.*—The description of the waters and ports to or from which the vessel is confined or excluded, will be construed, if possible, so as to give effect to the intention of the parties.<sup>32</sup>

b. *Included and Excluded Waters.*—See ante, "Rule of Construction," IV, D, 2, a; post, "To," "at" and "from," IV, D, 3, b.

c. *Port.*—When a city is named in a policy of marine insurance, the port of

performed the outward voyage, and was condemned as unseaworthy, and the whole freight of the return voyage lost, the underwriters were not entitled to a deduction of the freight earned on the outward voyage, but the loss of the freight on the return voyage was a total loss, and the plaintiff was entitled to the whole amount underwritten. *Insurance Co. v. Mordecai*, 22 How. 111, 117, 16 L. Ed. 329.

A policy of insurance upon "freight of the bark Margaret Hugg, at and from Baltimore to Rio Janeiro and back to Havana or Matanzas, or a port in the United States, to the amount of \$5,000, upon all lawful goods, etc., beginning the adventure upon the said freight from and immediately following the lading thereof aforesaid at Baltimore, and continuing the same until the said goods, wares, and merchandise shall be safely landed at the port aforesaid," upon which a greater premium was paid than was usual for the outward voyage alone, must not be construed as a policy upon the round voyage. The insurers were, therefore, not entitled to a deduction for the outward freight. *Hugg v. Augusta Ins., etc., Co.*, 7 How. 595, 12 L. Ed. 834.

28. **Voyage entire.**—*Hugg v. Augusta Ins., etc., Co.*, 7 How. 595, 12 L. Ed. 834; *Insurance Co. v. Mordecai*, 22 How. 111, 117, 16 L. Ed. 329; *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 6 L. Ed. 664.

29. **Neutral and belligerent property.**—*Hodgson v. Marine Ins. Co.*, 5 Cranch 100, 3 L. Ed. 48.

**Belligerent property covered as neutral.**—Contracts made with underwriters in relation to property covered as neutral, when in truth it was belligerent, have always been enforced in the courts of a neutral country, where the true character of the property, and the means taken to protect it from capture have been fairly represented to the insurers; the same doctrine has always been held, where false papers have been used to cover the property, provided the underwriters knew, or were bound to know, that such stratagems

were always resorted to, by the persons engaged in that trade. If such means may be used to prevent capture, there can be no good reason for condemning with more severity, the continuation of the same disguise, after capture, in order to prevent the condemnation of the property, or to procure compensation for it, when it has been lost by reason of the capture. Courts of the capturing nation would never enforce contracts of that description; but they have always been regarded as lawful in the courts of a neutral country. *De Valengin v. Duffy*, 14 Pet. 282, 10 L. Ed. 457.

30. **Policy for whom it may concern.**—*Buck v. Chesapeake Ins. Co.*, 1 Pet. 151, 7 L. Ed. 90.

31. **Designation of voyage and adventure.**—*Filly v. Pope*, 115 U. S. 213, 221, 29 L. Ed. 372.

A policy of insurance upon goods for a voyage from Glasgow will not cover a S. 213, 221, 29 L. Ed. 372.

**Deviation.**—See post, "Deviation and Change of Risk," VIII, E.

**32. Rule of construction.**—*Merchants' Ins. Co. v. Allen*, 121 U. S. 67, 30 L. Ed. 858.

A policy of marine insurance upon a ship was taken out "to navigate the Atlantic Ocean between Europe and America and to be covered in port and at sea." When the policy was issued the ship was on a voyage from Liverpool to New Orleans, the latter being the home port of the ship. These facts were known to the company when it issued the policy. The policy contained the following printed clause: "Warranted by the assured not to use port or ports in Eastern Mexico, Texas nor Yucatan, nor anchorage thereof; during the continuance of this insurance, nor ports in the West India Islands between July 15, and October 15; nor ports on the northeastern coast of Great Britain beyond the Thames, nor ports on the continent of Europe north of Antwerp, between November 1st and March 1st." It was held



that city is ordinarily meant. Usage of the trade determines what is within the confines of a particular port.<sup>33</sup>

**Port of Loading and Discharge Different.**—See post, “‘To,’ ‘at’ and ‘from,’” IV, D, 3, b.

3. COMMENCEMENT, DURATION AND TERMINATION—*a. Open Policies.*—In the case of an insurance of goods shipped from and to port or ports designated, or on a voyage particularly specified, the ship to be afterwards declared, and the rate of premium to be paid is ascertained, and inserted in the body of the policy at its execution, the contract becomes complete, and the policy attaches upon the goods from the time they are laden on board the vessel, as soon as the ship is declared or reported, provided the shipment comes within the description in the policy. But until the declaration is made by the assured, it is inchoate and incomplete; and, if not made at all, the risk is regarded as not having commenced, and the assured is entitled to a return of his premium.<sup>34</sup>

b. “‘To,” “‘at’ and “‘from.”—An insurance to an island may terminate at the first port, and the expression may be adopted from the uncertainty at what port the vessel insured may first arrive.<sup>35</sup>

“‘At and from” an Island.—A policy of insurance on a vessel “at and from” an island, protects her in sailing from port to port of the island, to take in a cargo.<sup>36</sup>

“‘At and from a Port.”—A policy on a ship, “at and from a port,” will attach, although, the ship be, at the time, undergoing extensive repairs, in port; so as, in a general sense, for the purposes of the whole voyage, to be utterly unseaworthy.<sup>37</sup>

c. *Termination of Voyage.*—The voyage is understood to be terminated, when the vessel arrives at her port of destination, and has been moored there in safety

that the policy covers the ship while in the Gulf of Mexico except as to the excluded ports. *Merchants’ Ins. Co. v. Allen*, 121 U. S. 67, 30 L. Ed. 858.

33. **Port.**—*Gracie v. Marine Ins. Co.*, 8 Cranch 75, 3 L. Ed. 492.

34. **Open policies.**—*Orient Mut. Ins. Co. v. Wright*, 23 How. 401, 406, 16 L. Ed. 524, reaffirmed in *Sun Mut. Ins. Co. v. Wright*, 23 How. 412, 16 L. Ed. 529.

“In the case of policies on goods ‘in ship or ships,’ to be afterwards declared, and where the full premium is paid or secured at the execution, the policy, even in that case, is a mere outline of the contract, to be completed on making the declaration; but if not made within the terms of the policy, the contract is at an end as respects the particular shipment.” *Orient Mut. Ins. Co. v. Wright*, 23 How. 401, 410, 16 L. Ed. 524, reaffirmed in *Sun Mut. Ins. Co. v. Wright*, 23 How. 412, 16 L. Ed. 529.

35. “‘To,” “‘at’ and “‘from.”—*Dickey v. Baltimore Ins. Co.*, 7 Cranch 327, 329, 3 L. Ed. 360.

36. “‘At” and “‘from” an island.—*Dickey v. Baltimore Ins. Co.*, 7 Cranch 327, 3 L. Ed. 360; *Equitable Ins. Co. v. Hearne*, 20 Wall. 494, 497, 22 L. Ed. 398.

“The words, at and from an inland, and at and from a port, are not synonymous, and yet, in effect, the same meaning would often be given to them, if the privilege of sailing from one port to another, for the purpose of completing the cargo, should not be granted by the policy.” *Dickey v.*

*Baltimore Ins. Co.*, 7 Cranch 327, 329, 3 L. Ed. 360.

“Strictly speaking, a vessel is not at an island, while sailing from one port to another of the same island; yet it is difficult to resist the persuasion that something more is meant by an insurance at and from an island, than by an insurance at and from a port.” *Dickey v. Baltimore Ins. Co.*, 7 Cranch 327, 329, 3 L. Ed. 360.

“In *Dickey v. Baltimore Ins. Co.*, 7 Cranch 327, 3 L. Ed. 360, the policy insured the vessel upon a voyage ‘from New York to Barbadoes, and at and from thence to the Island of Trinidad, and at and from Trinidad back to New York.’ This court held that the words ‘at and from’ protected the vessel in sailing from one port to another in Trinidad to take in a part of her cargo.” *Equitable Ins. Co. v. Hearne*, 20 Wall. 494, 497, 22 L. Ed. 398.

**Port of loading different from port of discharge.**—Where a party proposed to insurers to insure his vessel on a “voyage from Liverpool to Cuba and to Europe via Falmouth,” at a rate named, and the company offered to insure at a somewhat higher rate, saying, “It is worth something, you know, to cover the risk at the port of loading in Cuba,” held that it was implied that “the port of loading” might be different from the port of discharge. *Equitable Ins. Co. v. Hearne*, 20 Wall. 494, 22 L. Ed. 398.

37. “‘At and from a port.”—*McLanahan v. Universal Ins. Co.*, 1 Pet. 170, 7 L. Ed. 98. See, also, preceding note.

for twenty-four hours.<sup>38</sup>

d. *Termination of Risk on Cargo and Freight.*—The termination of the voyage as to the ship, does not necessarily terminate the risk on the goods. This risk may continue, when the voyage as to the ship is ended. Its duration depends on the intention of the parties, and this intention must be found in their contract.<sup>39</sup>

**Freight.**—There can be no recovery against the insurers on the freight of a vessel which sails upon a lawful voyage, but on arrival at the port of destination finds it in possession of a foreign government which prohibited the landing of the cargo; for the freight is earned.<sup>40</sup>

e. *Suspension of Risk.*—A clause may be inserted in a policy suspending the risk while designated conditions exist. In construing such clause the surrounding circumstances in the case must be considered.<sup>41</sup>

**E. Double Insurance.**—A double insurance is, where the same man is to receive two sums instead of one, or the same sum twice over, for the same loss, by reason of his having made two insurances upon the same ship or goods. In such case the risk must be the same. In cases of double insurance, the assured may sue either set of underwriters, at his election, and recover full satisfaction or indemnity; and if the whole amount should be recovered from one, he is entitled to receive contribution from the other, ratably, in proportion to the amount insured.<sup>42</sup>

### V. Insurable Interest.

**A. Necessity.**—An insurable interest, by the person insured, in the property insured, is essential to the validity of a contract of marine insurance. The general rule is that only persons who have an insurable interest in the subject matter of a contract of marine insurance can be insured.<sup>43</sup>

**Wager Policies.**—See the title INSURANCE, vol. 7, p. 106.

**B. Requisites and Sufficiency.—In General.**—See the title INSURANCE, vol. 7, p. 108.

**Legal ownership** of the subject of insurance is not necessary to entitle a party otherwise connected without it to effect a valid insurance.<sup>44</sup>

**38. Termination of voyage.**—*Gracie v. Marine Ins. Co.*, 8 Cranch 75, 82, 3 L. Ed. 492.

**39. Termination of risk on cargo and freight.**—*Gracie v. Marine Ins. Co.*, 8 Cranch 75, 82, 3 L. Ed. 492.

**"Safely landed."**—Under a clause of a policy providing that the risk shall continue until the goods and merchandise shall be "safely landed at," etc., the risk is terminated by the safe landing of the goods at the port of delivery. *Gracie v. Marine Ins. Co.*, 8 Cranch 75, 82, 3 L. Ed. 492.

A policy on goods, to be safely landed at Leghorn, is discharged by landing them at the Lazaretto; that being the usage of the trade. *Gracie v. Marine Ins. Co.*, 8 Cranch 75, 3 L. Ed. 492.

**40. Freight.**—*Morgan v. Insurance Co.*, 4 Dall. 455, 1 L. Ed. 907.

**41. Suspending risk.**—*Reed v. Insurance Co.*, 95 U. S. 23, 24 L. Ed. 348.

A policy of insurance on a vessel at and from Honolulu, via Baker's Island, to a port of discharge in the United States, contained a clause, "the risk to be suspended while vessel is at Baker's Island loading." Held, in view of the circumstances which must be supposed to have appeared to the parties at the time of mak-

ing the contract, that the meaning of the clause is that the risk was to be suspended while the vessel was at Baker's Island for the purpose of loading, and not while it is actually engaged in the process of loading. *Reed v. Insurance Co.*, 95 U. S. 23, 24 L. Ed. 348.

A strictly literal construction would favor the latter meaning. In determining the meaning of the clause, the court may consider the circumstances surrounding the moving of the vessel at said island. *Reed v. Insurance Co.*, 95 U. S. 23, 30, 24 L. Ed. 348.

**42. Double insurance.**—*Thurston v. Koch*, 4 Dall. 348, 351, 1 L. Ed. 862. See the title INSURANCE, vol. 7, pp. 186, 196.

**43. Insurable interest—Necessity.**—*Insurance Co. v. Bailey*, 13 Wall. 616, 618, 20 L. Ed. 501; *Hooper v. Robinson*, 98 U. S. 528, 25 L. Ed. 219; *Insurance Co. v. Barling*, 20 Wall. 159, 22 L. Ed. 250.

**44. Legal ownership.**—*Buck v. Chesapeake Ins. Co.*, 1 Pet. 151, 162, 7 L. Ed. 90.

The legal and equitable owner of part of a cargo who is also the legal, though not equitable, owner of the residue, has an insurable interest in the whole cargo. *Buck v. Chesapeake Ins. Co.*, 1 Pet. 151, 162, 7 L. Ed. 90. See the title INSURANCE, vol. 7, p. 108.

The term "interest" as used in marine insurance does not necessarily imply property in the subject of insurance.<sup>45</sup>

**Contingent Interest.**—See post, "Lost Property," V, D, 11.

**C. Time When Interest Must Subsist.**—An insurable interest, subsisting during the risk and at the time of loss, is sufficient, and the assured need not also allege or prove that he was interested at the time of effecting the policy; indeed, it is every day's practice to effect insurance in which the allegation could not be made with any degree of truth; as, for instance, where goods are insured on a return voyage long before they are bought.<sup>46</sup>

**D. Interests Insurable**—1. **IN GENERAL.**—In the law of marine insurance, insurable interests are multiform and very numerous.<sup>47</sup> The agent,<sup>48</sup> factor,<sup>49</sup> bailor and bailee,<sup>50</sup> carrier,<sup>51</sup> trustee,<sup>52</sup> consignee,<sup>53</sup> mortgagee,<sup>54</sup> and every other lien holder<sup>55</sup> may insure to the extent of his own interest in that to which such interest relates; and by the clause, "on account of whom it may concern," for all others to the extent of their respective interests, where there is previous authority or subsequent ratification. Numerous as are the parties of the classes named, they are but a small portion of those who have the right to insure.<sup>56</sup>

2. **PART OWNERS.**—A part owner of a vessel or cargo may insure his own interest, but he has no insurable interest in the shares of the other joint owner.<sup>57</sup>

3. **PURCHASERS UNDER EXECUTORY CONTRACT.**—A purchaser under an executory contract of sale has an insurable interest in the goods in transit during the voyage, by reason of the title which would accrue to him under the contract, on arrival and delivery, and of the profits that he might make in case of a rise in the market.<sup>58</sup>

4. **LESSEE WITH OPTION TO PURCHASE.**—A lessee, the United States, has an insurable interest in a vessel hired at a fixed price per diem with option to purchase at an agreed price deducting therefrom any sum that has been paid as per diem hire.<sup>59</sup>

5. **LIEN HOLDERS**—a. *In General.*—In the law of marine insurance a holder of a lien upon a vessel or cargo has an insurable interest to the amount of his lien.<sup>60</sup>

b. *Lenders on Respondentia or Bottomry.*—A lender on respondentia or on

45. "Interest."—Buck v. Chesapeake Ins. Co., 1 Pet. 151, 7 L. Ed. 90. See the title INSURANCE, vol. 7, p. 108.

46. Time when interest must subsist.—Hooper v. Robinson, 98 U. S. 528, 537, 25 L. Ed. 219. And see North America Ins. Co. v. Hibernia Ins. Co., 140 U. S. 565, 35 L. Ed. 517; Hagan v. Scottish Ins. Co., 186 U. S. 423, 46 L. Ed. 1229.

47. Interest insurable.—Hooper v. Robinson, 98 U. S. 528, 538, 25 L. Ed. 219. See ante, "Requisites and Sufficiency," V, B.

48. Agent.—Hooper v. Robinson, 98 U. S. 528, 538, 25 L. Ed. 219.

49. Factor.—Hooper v. Robinson, 98 U. S. 528, 538, 25 L. Ed. 219.

50. Bailor and bailee.—Hooper v. Robinson, 98 U. S. 528, 538, 25 L. Ed. 219; Phoenix Ins. Co. v. Erie, etc., Transp. Co., 117 U. S. 312, 29 L. Ed. 873.

51. Carrier.—Hooper v. Robinson, 98 U. S. 528, 538, 25 L. Ed. 219; Phoenix Ins. Co. v. Erie, etc., Transp. Co., 117 U. S. 312, 29 L. Ed. 873.

52. Trustee.—Hooper v. Robinson, 98 U. S. 528, 538, 25 L. Ed. 219.

53. Consignee.—Hooper v. Robinson, 98 U. S. 528, 538, 25 L. Ed. 219. See, also, Buck v. Chesapeake Ins. Co., 1 Pet. 151, 7 L. Ed. 90.

54. Mortgagee.—Hooper v. Robinson, 98 U. S. 528, 538, 25 L. Ed. 219.

55. Lien holder.—Hooper v. Robinson, 98 U. S. 528, 538, 25 L. Ed. 219. See post, "Lien Holders," V, D, 5.

56. Hooper v. Robinson, 98 U. S. 528, 538, 25 L. Ed. 219.

57. Part owners.—Graves v. Boston Marine Ins. Co., 2 Cranch 419, 2 L. Ed. 324. See the title INSURANCE, vol. 7, p. 133.

58. Where goods to be shipped are bought "no arrival, no sale," the purchaser has an insurable interest. Harrison v. Fortlage, 161 U. S. 57, 64, 40 L. Ed. 616.

Purchaser under executory contract.—Filly v. Pope, 115 U. S. 213, 220, 29 L. Ed. 372; Insurance Co. v. Chase, 5 Wall. 509, 513, 18 L. Ed. 524; Harrison v. Fortlage, 161 U. S. 57, 65, 40 L. Ed. 616.

59. Lessee with option to purchase.—Propeller Co. v. United States, 14 Wall. 670, 20 L. Ed. 760.

60. Lien holder.—Hooper v. Robinson, 98 U. S. 528, 538, 25 L. Ed. 219; Insurance Co. v. Baring, 20 Wall. 159, 164, 22 L. Ed. 250; Russell v. Union Ins. Co., 4 Dall. 421, 1 L. Ed. 892. See, also, ante, "In General," V, D, 1.

Lien for advances.—See post, "Advances," V, D, 5, c.



bottomry has an insurable interest in the cargo or vessel to the amount of his loan.<sup>61</sup>

c. *Advances*.—Where advances made on the credit of a ship or upon an agreement that they shall be repaid from the cargo, constitute a lien upon the ship or the cargo, such a lien gives the lender an insurable interest in the ship or cargo for the amount of his advances which he may insure accordingly; but unless there is a lien the advance creates no insurable interest.<sup>62</sup>

d. *Mortgagee*.—See ante, "In General," V, D, 1.

6. *SURETIES*.—A surety for the payment of the value of a cargo, if it should be condemned by a foreign court, and who has possession of the same for his indemnity, has an insurable interest therein.<sup>63</sup>

7. *MASTER OF VESSEL*.—The master of a vessel to whom property shipped on board the vessel under his command is to be consigned, in the absence of proof that the owner of the property had not given authority to order insurance, has an insurable interest in the property on board his vessel; and this interest is sufficient to authorize the recovery of a loss, on the policy.<sup>64</sup>

8. *FREIGHT*.—Freight at sea is an insurable interest.<sup>65</sup>

9. *FREIGHT ADVANCED*.—A person who advanced a sum of money called "freight advanced" to the owner of a ship, in consideration of which he acquired a right to fill up a subsequent part of the tonnage of the ship for that voyage with goods either as his own or the property of others, has an interest which he may insure.<sup>66</sup>

10. *PROFITS*.—Profits are an insurable interest.<sup>67</sup>

11. *LOST PROPERTY*.—A policy "lost or not lost" is a valid stipulation for indemnity against past as well as future losses, and the law upholds it.<sup>68</sup> Contracts of the kind are as valid as those intended to cover a subsequent loss, if it appears that the insured as well as the underwriter was ignorant of the loss at the time the contract was made.<sup>69</sup>

**Knowledge of Agent Not Imputed to Insured.**—The knowledge of the master or agent of the insured that the vessel has been lost is not imputed to the owner, who acting in good faith, procures a policy of insurance after the loss occurred.<sup>70</sup>

**61. Lender on respondentia or bottomry.**—*Insurance Co. v. Baring*, 20 Wall. 159, 22 L. Ed. 250; *Hooper v. Robinson*, 98 U. S. 528, 25 L. Ed. 219.

**62. Advances.**—*Insurance Co. v. Baring*, 20 Wall. 159, 22 L. Ed. 250; *Hooper v. Robinson*, 98 U. S. 528, 25 L. Ed. 219.

"Where money is advanced, \* \* \* for repairs and supplies to enable a vessel to proceed on her voyage, the lender has a lien, not on the cargo, but upon the vessel, and the amount of the debt may be protected by insurance upon the latter. *Insurance Co. v. Baring*, 20 Wall. 159, 163, 22 L. Ed. 250, and the authorities there cited. If the owner of a vessel, being also the owner of the cargo, or the owner of the cargo, not being the owner of the vessel, procures a third person to make such advances upon an agreement that he shall be repaid from the cargo, and a bill of lading is furnished to him, he has a lien on the cargo for the amount of his advances, and may insure accordingly." *Hooper v. Robinson*, 98 U. S. 528, 538, 25 L. Ed. 219.

**63. Sureties.**—*Russell v. Union Ins. Co.*, 4 Dall. 421, 1 L. Ed. 892.

**64. Master of vessel.**—*Buck v. Chesapeake Ins. Co.*, 1 Pet. 151, 7 L. Ed. 90.

**65. Freight.**—*Insurance Companies v.*

*Thompson*, 95 U. S. 547, 550, 24 L. Ed. 487. See ante, "Freight," IV, C, 7.

**66. Freight advanced.**—*Sansom v. Ball*, 4 Dall. 459, 1 L. Ed. 908.

**67. Profits.**—*Canada Sugar Ref. Co. v. Insurance Co.*, 175 U. S. 609, 622, 44 L. Ed. 292. See the title *INSURANCE*, vol. 7, p. 114.

**68. Lost property.**—*Hooper v. Robinson*, 98 U. S. 528, 25 L. Ed. 219.

"Where the insurance is 'lost or not lost,' the thing insured may be irrecoverably lost when the contract is entered into, and yet the contract be valid." *Hooper v. Robinson*, 98 U. S. 528, 537, 25 L. Ed. 219.

**69. Knowledge of loss.**—*Insurance Co. v. Folsom*, 18 Wall. 237, 251, 21 L. Ed. 827.

A policy was executed January 5th. The assured claimed that it was really but the expression of a verbal contract, made the 31st day of December previous. The vessel was lost between those two dates and the fact of the loss, though known to the insured, was kept secret from the insurers. It was held that this concealment invalidated the contract. *Insurance Co. v. Lyman*, 15 Wall. 664, 669, 21 L. Ed. 246.

**70. Knowledge of agent not imputed to**

**A contingent interest** may be the subject of such a policy.<sup>71</sup>

**E. Effect of Sale**—1. **IN GENERAL**.—An absolute sale of the property insured, prior to the loss, is a good defense to an action on a policy of marine insurance.<sup>72</sup>

2. **VESSEL SOLD AND REPURCHASED BY ASSURED**.—Where a vessel insured for a stated time was sold and transferred, and was repurchased and transferred back within that time, it has been held that the insurance was suspended while the title was out of the assured, and was revived again on the reconveyance to the assured during the term specified in the policy.<sup>73</sup>

**F. Evidence**—1. **PRESUMPTIONS AND BURDEN OF PROOF**.—See post, "Presumptions and Burden of Proof," XVIII, G, 2.

2. **PROOF OF INTEREST OTHER THAN THAT ALLEGED**.—The interest of a partnership cannot be given in evidence, on an averment of individual interest, nor an averment of the interest of a company be supported, by a special contract relating to the interest of an individual.<sup>74</sup>

## VI. Premium.

**A. Amount**—1. **IN GENERAL**.—Ordinarily the amount of the premium is ascertained in advance and stated in the policy.<sup>75</sup>

2. **OPEN OR RUNNING POLICIES**.—The expression "rate," or "rating" of vessels, as used in policies of assurance, means relative state in regard to insurable qualities.<sup>76</sup>

**How Rating Determined**.—Where there is nothing in the language of the policy itself to indicate the source from which the rating of the vessel is to be determined, the reasonable inference would seem to be, that, like any other question of value, or quantity, or quality, left open in a written contract, it should be decided by a reference to all the sources of information which enable the jury to fix the rate correctly.<sup>77</sup>

**owner**.—General Interest Ins. Co. v. Ruggles, 12 Wheat. 408, 412, 6 L. Ed. 674.

The knowledge of the fact of loss, by the agent, or the principal, at the time the policy is procured, will not vacate it. Such knowledge must be brought home to some of the parties or agents connected with the business of procuring the insurance; and then the rule properly applies, which puts the principal in place of the agent, and makes him responsible for his acts; there is then the relation of principal and agent in the subject matter of the contract. General Interest Ins. Co. v. Ruggles, 12 Wheat. 408, 412, 6 L. Ed. 674.

**Fact of loss fraudulently concealed by master**.—Where an insurance was affected, after a loss had happened, though unknown to the assured, the master having omitted to communicate information to the owner, and having expressed his intention not to write to the owner, and taken measures to prevent the fact of the loss being known, for the avowed purpose of enabling the owner to effect insurance, in consequence of which, information of the loss had not reached the parties, at the time the policy was underwritten: held, that the owner having acted with good faith, was not precluded from a recovery upon the policy, on account of the fraudulent misconduct of the master. General Interest Ins. Co. v. Ruggles, 12 Wheat. 408, 6 L. Ed. 674.

**71. Contingent interest**.—Hooper v. Robinson, 98 U. S. 528, 25 L. Ed. 219.

**72. Effect of sale**.—Insurance Co. v. Bailey, 13 Wall. 616, 618, 20 L. Ed. 501. See the title INSURANCE, vol. 7, p. 117.

"Marine \* \* \* policies are contracts of indemnity, by which the claim of the insured is commensurate with the damages he sustained by the loss of, or injury to, the property insured. Such being the nature of the contract, it is clear that an absolute sale of the property insured, prior to the alleged disaster, is a good defense to an action on the policy, as the insured cannot justly claim indemnity for the loss of, or injury to, property in which he had no insurable interest at the time the loss or injury occurred." Insurance Co. v. Bailey, 13 Wall. 616, 618, 20 L. Ed. 501.

**73. Vessel sold and repurchased by assured**.—Hooper v. Robinson, 98 U. S. 528, 537, 25 L. Ed. 219.

**74. Graves v. Boston Marine Ins. Co.**, 2 Cranch 419, 2 L. Ed. 324.

**75. Premium**.—Orient Mut. Ins. Co. v. Wright, 23 How. 401, 16 L. Ed. 524, reaffirmed in Sun Mut. Ins. Co. v. Wright, 23 How. 412, 16 L. Ed. 529.

**76. "Rate" or "rating"**.—Insurance Companies v. Wright, 1 Wall. 456, 17 L. Ed. 503.

**77. How rating determined**.—Insurance Companies v. Wright, 1 Wall. 456, 472, 17 L. Ed. 503.

Where a policy requires that a vessel shall not be below a certain "rate," as, *Ex gr.*, "not below A 2;" this rate is not, in

Where the vessel to which the insurance relates is unknown, is not known to the underwriters a higher premium is demanded, as there is no opportunity to inquire into the character or capacity of the vessel for the voyage.<sup>78</sup> But the parties may stipulate that the additional premium shall be fixed when the risk is made known; and unless the assured paid or secured this additional premium fixed by the underwriter, the contract of insurance, in respect to the particular shipment, did not become complete or binding.<sup>79</sup> This is different from an ordinary running policy, in which the rate of premium to be paid is ascertained and inserted in the body of the policy at its execution, and in which species of policy the contract becomes complete, and the policy attaches upon the goods from the time they are laden on board the vessel, as soon

the absence of agreement to that effect, to be established by the rating register alone of the office making the insurance—certainly not unless the vessel was actually rated there—nor by a standard of rating anywhere in the port merely where that office is. There being, as yet, no “American Lloyds,” the party assured—if not actually rated on the books of the office insuring—may establish the rate by any kind of evidence which shows what the vessel’s condition really was; and that, had she been rated at all at the port where the office was, she would have rated in the way required. He may even show how she would have rated in her port of departure, or in one where the company insuring had an agency through which the insurance in question was effected; this being shown, of course, not as conclusive on the matter of rate, but as bearing upon it, and so fit for consideration by the jury. *Insurance Companies v. Wright*, 1 Wall. 456, 17 L. Ed. 505.

As the true object of inquiry is to fix the insurable character or status of the vessel, the jury should be at liberty to hear any testimony which would tend to show her capacity for resisting the perils insured against. Therefore, when the court instructed the jury to base their verdict on the fact to be ascertained by them, whether the *Mary W.* would or would not have rated below A 2 in New York, had she been there for examination, the rule was stated quite as favorably to plaintiffs in error as sound principle will justify. *Insurance Companies v. Wright*, 1 Wall. 456, 476, 17 L. Ed. 505.

Evidence is not admissible of a general usage and understanding among shippers and insurers of the port in which the insuring office is, that in open policies the expression used, as Ex gr., “not below A 2,” refers to the rate of vessels or the register of vessels making the insurance. *Insurance Companies v. Wright*, 1 Wall. 456, 17 L. Ed. 505.

**78. Vessel unknown.**—*Orient Mut. Ins. Co. v. Wright*, 23 How. 401, 16 L. Ed. 524, reaffirmed in *Sun Mut. Ins. Co. v. Wright*, 23 How. 412, 413, 16 L. Ed. 529.

The underwriter agrees that the policy shall attach, if the vessel be seaworthy, however low may be her relative capacity to perform the voyage; and for the addi-

tional risks he may thus incur, he finds his compensation in an increase of the premium. *Orient Mut. Ins. Co. v. Wright*, 23 How. 401, 405, 16 L. Ed. 524, reaffirmed in *Sun Mut. Ins. Co. v. Wright*, 23 How. 412, 16 L. Ed. 529.

“The ship, indeed, must be seaworthy, or the policy will not attach; but the degrees of seaworthiness or of the capacity of a ship to perform a given voyage are exceedingly various; and it is well known that the rates of premium are varied by the underwriters according to the different estimate they form of the character and qualities of the vessels to which they relate.” *Orient Mut. Ins. Co. v. Wright*, 23 How. 401, 405, 16 L. Ed. 524, reaffirmed in *Sun Mut. Ins. Co. v. Wright*, 23 How. 412, 16 L. Ed. 529. See post, “Seaworthiness,” VIII, C, 3.

Where the vessel is known, information as to its character or capacity for the voyage is readily accessible, by reference to the book of the register of vessels kept by the underwriters, in which the name, master, rate, and present condition, are entered. *Orient Mut. Ins. Co. v. Wright*, 23 How. 401, 407, 16 L. Ed. 524, reaffirmed in *Sun Mut. Ins. Co. v. Wright*, 23 How. 412, 16 L. Ed. 529.

**79. When additional premium fixed.**—*Orient Mut. Ins. Co. v. Wright*, 23 How. 401, 16 L. Ed. 524, reaffirmed in *Sun Mut. Ins. Co. v. Wright*, 23 How. 412, 16 L. Ed. 529.

An open or running policy of insurance upon “coffee laden or to be laden on board the good vessel or vessels from Rio Janeiro to any port in the United States, to add an additional premium if by vessels lower than A 2, or by foreign vessels,” contained also the following clause, viz: “Having been paid the consideration for this insurance by the assured or his assigns, at and after the rate of one and one-half per cent., the premiums on risks to be fixed at the time of endorsement, and such clauses to apply as the company may insert, as the risks are successively reported.” But in the policy in question there is something more to be done, in order to make the contract complete, than merely to declare the ship. The assured must pay or secure the additional premium, which the underwriter has reserved the right to fix at the time of the declaration of the risk



as the ship is declared or reported, provided the shipment comes within the description in the policy.<sup>80</sup>

**Mode Stated Must Be Followed.**—In an open cargo policy the mode of determining the amount of the premium stated in the policy must be followed.<sup>81</sup>

3. **RATING OF VESSEL.**—See ante, "Open or Running Policies," VI, A, 2.

**B. Time of Payment.**—See the title *INSURANCE*, vol. 7, pp. 119, 120. See also, ante, "Open or Running Policies," VI, A, 2.

**C. Effect of Failure to Pay.**—See ante, "Open or Running Policies," VI, A, 2. See the title *INSURANCE*, vol. 7, p. 122.

**Payment Enjoined.**—See the title *INSURANCE*, vol. 7, p. 122.

**D. Right to Return of Premium**—1. **VOYAGE ENTIRE.**—Where the voyage is entire, and the risk has once commenced, there is no return of premium.<sup>82</sup>

2. **APPORTIONMENT WHERE RISK DIVISIBLE.**—When by the course of trade, or the agreement of the parties, the voyage is divided into distinct parts; and on one of these parts no risk has been run, there should be an apportionment of the premium and part returned.<sup>83</sup> A voyage may be entire, though the ship is to go to a number of different places, and to take in different cargoes. But if, in the contract of insurance, there are certain contingencies introduced, which, at certain periods of the voyage, may operate so as to make the insurance void, it has been considered that in such cases the voyage may be supposed to have been divided, in the contemplation of the parties, into distinct parts.<sup>84</sup>

3. **DEVIATION.**—See post, "Operation and Effect," VIII, E, 4.

## VII. Risks and Causes of Loss.

**A. In General.**—To entitle the plaintiff to recover in an action on a policy of marine insurance, the loss must be occasioned by one of the perils insured against.<sup>85</sup>

in case the vessel rates lower than A 2. *Orient Mut. Ins. Co. v. Wright*, 23 How. 401, 16 L. Ed. 524, reaffirmed in *Sun Mut. Ins. Co. v. Wright*, 23 How. 412, 16 L. Ed. 529.

"The mere declaration of the ship on board of which the goods are laden is not sufficient to complete the contract. \* \* \* The premiums specified in the body of the policy are nominal; and the true premiums to be charged are fixed by increasing or reducing the nominal premiums when the risks are reported. This, it was proved, was the established custom of this company, and of which the assured is chargeable with notice." *Orient Mut. Ins. Co. v. Wright*, 23 How. 401, 406, 16 L. Ed. 524, reaffirmed in *Sun Mut. Ins. Co. v. Wright*, 23 How. 412, 16 L. Ed. 529.

In such case an instruction that the contract was complete and binding as soon as the vessel was reported; and that, if the parties could not agree as to the additional premium, the question was one for the courts to settle, is erroneous. *Orient Mut. Ins. Co. v. Wright*, 23 How. 401, 16 L. Ed. 524, reaffirmed in *Sun Mut. Ins. Co. v. Wright*, 23 How. 412, 16 L. Ed. 529.

In the correspondence which took place between the insurer and the insured, there was no waiver by the former of the right of fixing the premium, nor was it claimed or suggested in the communications between the parties at the time. *Sun Mut. Ins. Co. v. Wright*, 23 How. 412, 16 L. Ed. 529.

80. *Orient Mut. Ins. Co. v. Wright*, 23

How. 401, 16 L. Ed. 524, reaffirmed in *Sun Mut. Ins. Co. v. Wright*, 23 How. 412, 16 L. Ed. 529.

**81. Mode stated must be followed.**—Under a policy insuring "in port and at sea, and at all times and places" for a stipulated time, the cargo to be valued "as interest shall appear," the underwriters cannot recover a premium for more than the amount of their risk, and the premium varies with the changes in the value of the cargo from time to time during the term insured. *Pollock v. Donaldson*, 3 Dall. 510, 1 L. Ed. 699.

**82. Voyage entire.**—*Donath v. Insurance Co.*, 4 Dall. 463, 1 L. Ed. 910.

**83. Risk divisible.**—*Donath v. Insurance Co.*, 4 Dall. 463, 1 L. Ed. 910.

"The language of the policy is, that the underwriters insure \$10,000, at and from Alexandria, and two other ports in the West Indies, and back to the United States. The premium is apportioned accordingly, for a half per cent is to be returned 'for each port not used or attempted.'" Held the loss, must be apportioned between the parties, in the proportion which the sum insured bears to the amount of value on board at the time of the loss. *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 395, 6 L. Ed. 664.

**84.** *Donath v. Insurance Co.*, 4 Dall. 463, 471, 1 L. Ed. 910.

**85. Risks and causes of loss generally.**—*Swan v. Union Ins. Co.*, 3 Wheat. 168, 4 L. Ed. 361; *Hugg v. Augusta Ins.*, etc., Co., 7 How. 595, 12 L. Ed. 834.

**B. Proximate and Remote Cause.—In General.**—In the law of marine insurance, it is a settled rule that underwriters are liable only for losses arising from the proximate cause of the loss, and not for losses arising from a remote cause, not immediately connected with the peril. The maxim, *causa proxima non remota spectatur*, is applicable.<sup>86</sup> This maxim is not without limitations; and has been constantly qualified, and constantly applied only in a modified practical sense, to the perils insured against.<sup>87</sup>

**Incidental Expense, Contribution or Loss.**—Whenever the thing insured becomes by law directly chargeable with any expense, contribution or loss, in consequence of a particular peril, the law treats that peril, for all practical purposes, as the proximate cause of such expense, contribution or loss.<sup>88</sup>

**C. Independent Causes.**—When the causes of a marine loss succeed each other in order of time or are independent of each other, the law only regards

**Insurance on time.**—See post, "Retardation of Voyage," IX, E, 3, b, (2), (g).

**86. Proximate and remote cause.**—*Peters v. Warren Ins. Co.*, 14 Pet. 99, 109, 10 L. Ed. 371; *General Mut. Ins. Co. v. Sherwood*, 14 How. 351, 365, 14 L. Ed. 452; *Orient Ins. Co. v. Adams*, 123 U. S. 67, 31 L. Ed. 63; *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. 213, 9 L. Ed. 691; *The G. R. Booth*, 171 U. S. 450, 453, 43 L. Ed. 234. See the title *INSURANCE*, vol. 7, p. 134.

In *Richelieu, etc., Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 34 L. Ed. 398, the exception was of loss occasioned by want of ordinary care and skill in navigation or by unseaworthiness, and the loss was the result of stranding by reason of a defective compass and the running of the ship at full speed in a fog. It was held that if the peril was caused by negligence or unseaworthiness, notwithstanding it was the fog which prevented the seeing the island upon which the vessel stranded, the predominating and efficient cause was the negligence or unseaworthiness, and must be regarded as the proximate cause. See post, "Negligence and Misconduct," VII, E, 17.

**Fire resulting from collision.**—See post, "Fire," VII, E, 8.

**87.** *Peters v. Warren Ins. Co.*, 14 Pet. 99, 110, 10 L. Ed. 371.

The rule is correct, when it is understood and applied in its true sense. The question, in all cases of this sort, is, what, in a just sense, is the proximate cause of the loss? *Peters v. Warren Ins. Co.*, 14 Pet. 99, 108, 10 L. Ed. 371.

"In applying this maxim, in looking for the proximate cause of the loss, if it is found to be a peril of the sea, we inquire no further; we do not look for the cause of that peril. But if the peril of the sea, which operated in a given case, was not of itself sufficient to occasion, and did not in and by itself occasion the loss claimed, if it depended upon the cause of that peril whether the loss claimed would follow it, and therefore a particular cause of the peril is essential to be shown by the assured, then we must look beyond the peril to its cause, to ascertain the efficient cause of the loss." *General Mut. Ins. Co.*

*v. Sherwood*, 14 How. 351, 365, 14 L. Ed. 452.

**88. Incidental expense, contribution or loss.**—*Peters v. Warren Ins. Co.*, 14 Pet. 99, 112, 10 L. Ed. 371. See *General Mut. Ins. Co. v. Sherwood*, 14 How. 351, 365, 14 L. Ed. 452.

A ransom after capture is treated as a mutual consequence of the capture and a necessary means of deliverance from a peril insured against. *Peters v. Warren Ins. Co.*, 14 Pet. 99, 109, 10 L. Ed. 371.

**Jettison.**—In the case of a jettison at sea, to avoid a fire insured against that peril is deemed the proximate cause of the loss, and the underwriters are held liable for the loss thus sustained by the jettison, on a general average. *Peters v. Warren Ins. Co.*, 14 Pet. 99, 109, 10 L. Ed. 371; *Lawrence v. Minturn*, 17 How. 100, 111, 15 L. Ed. 58.

"But if a jettison of a cargo becomes necessary in consequence of any fault or breach of contract by the master or owners, the jettison is attributable to that fault or breach of contract, and not to sea peril, though that also may be present and enter into the case." *Lawrence v. Minturn*, 17 How. 100, 111, 15 L. Ed. 58, citing *General Mut. Ins. Co. v. Sherwood*, 14 How. 351, 365, 14 L. Ed. 452; *The Portsmouth*, 9 Wall. 682, 684, 19 L. Ed. 754. See post, "Jettison," VII, E, 11.

**General average**, as such, is not, eo nomine, insured against in our policies. It is only payable, when it is a consequence, or result, or incident (call it which we may) of some peril positively insured against; as, for example, of the perils of the sea. *Peters v. Warren Ins. Co.*, 14 Pet. 99, 109, 10 L. Ed. 371.

A salvage decreed by a court of admiralty for services rendered to a vessel in distress, although the vessel may have been long before dismasted or otherwise injured, or abandoned by her crew, in consequence of the perils of the winds and waves; is attributed to the original peril, as the direct and proximate cause; and the underwriters are held responsible therefor, although salvage is not specifically, and in terms, insured against. *Peters v. Warren Ins. Co.*, 14 Pet. 99, 110, 10 L. Ed. 371.



that peril which is nearest in point of time. When one of several successive causes is sufficient to produce the effect, the law will not regard an antecedent cause of that cause, or "causa causans." In such case the last cause is the proximate one within the meaning of the maxim "proxima causa, non remota spectatur."<sup>89</sup>

**D. Concurrent Causes**—1. IN GENERAL.—When there is no order of succession in time of the causes of a marine loss—when there are two concurrent causes of such loss—the predominating efficient one must be regarded as the proximate, when the damages done by each cannot be distinguished.<sup>90</sup>

2. DISCRIMINATION OF DAMAGES FROM CONCURRENT CAUSES.—See the title INSURANCE, vol. 7, p. 194.

**E. Perils Covered by Policy**—1. IN GENERAL.—There is nothing unreasonable, unjust or inconsistent with public policy, in allowing the assured to insure himself against all losses, from any perils not occasioned by his own personal fraud.<sup>91</sup>

2. PERILS OF THE SEA, NAVIGATION, RIVER, ETC.—In an enlarged sense, all losses which occur from maritime adventures may be said to arise from the perils of the sea; but the underwriters are not bound to this extent. They insure against losses from extraordinary occurrences only; such as stress of weather, winds and waves, lightning, tempests, rocks, etc. These are understood to be the "perils of the sea" referred to in the policy, and not those ordinary perils which every vessel must encounter.<sup>92</sup> The destruction of a vessel by worms at sea is not accounted a loss by the perils of the sea;<sup>93</sup> nor is a damage from bilging, arising in consequence of the insufficiency of tackle for getting her from the dock;<sup>94</sup> nor damage occasioned to a vessel by her props being carried away by the tide while she was undergoing repairs on the beach, excused, as falling within that exception.<sup>95</sup>

The term "perils of the river" include risks arising from natural accidents peculiar to the river, which do not happen by the intervention of man, nor are to be prevented by human prudence; and have been extended to comprehend losses arising from some irresistible force or overwhelming power which no ordinary skill could anticipate or evade.<sup>96</sup>

The terms "dangers of lake navigation" include all the ordinary perils

**89. Independent causes.**—Insurance Co. v. Transportation Co., 12 Wall. 194, 199, 20 L. Ed. 378. See, also, The G. R. Booth, 171 U. S. 450, 456, 43 L. Ed. 234.

**90. Concurrent causes.**—Insurance Co. v. Transportation Co., 12 Wall. 194, 20 L. Ed. 378; The G. R. Booth, 171 U. S. 450, 456, 43 L. Ed. 234.

**91. Perils covered by policy.**—Waters v. Merchants' Louisville Ins. Co., 11 Pet. 213, 221, 9 L. Ed. 691. See post, "Fraudulent Losses," VII, E, 18.

**92. Perils of the sea.**—Hazard v. New England Marine Ins. Co., 8 Pet. 557, 585, 8 L. Ed. 1043.

Generally speaking, the words "perils of the sea" have the same meaning in a bill of lading and in a policy of insurance. The G. R. Booth, 171 U. S. 450, 457, 43 L. Ed. 234. See Propeller Mohawk, 8 Wall. 153, 19 L. Ed. 406; The Portsmouth, 9 Wall. 682, 684, 19 L. Ed. 754; Phoenix Ins. Co. v. Erie, etc., Transp. Co., 117 U. S. 312, 322, 325, 29 L. Ed. 873; Liverpool, etc., Steam Co. v. Phenix Ins. Co., 129 U. S. 597, 438, 442, 32 L. Ed. 788; Compania La Flecha v. Brauer, 168 U. S. 104, 42 L. Ed. 398; General Mut. Ins. Co. v. Sherwood, 14 How. 351, 365, 14 L. Ed. 452; Propeller

Niagara v. Cordes, 21 How. 7, 29, 16 L. Ed. 41.

**Collision.**—See post, "Collision," VII, E, 6.

**93. Destruction by worms.**—Hazard v. New England Marine Ins. Co., 8 Pet. 557, 585, 8 L. Ed. 1043; Garrison v. Memphis Ins. Co., 19 How. 312, 314, 15 L. Ed. 656. See, also, General Mut. Ins. Co. v. Sherwood, 14 How. 351, 365, 14 L. Ed. 452.

The judge of the circuit court, on the trial of the case, charged the jury, that "if they should find that, in the Pacific Ocean, worms ordinarily assail and enter the bottom of vessels, then the loss of a vessel destroyed by worms would not be a loss within the policy." In the form in which this instruction was given, there was no error. Hazard v. New England Marine Ins. Co., 8 Pet. 557, 8 L. Ed. 1043.

**94. Bilging.**—Garrison v. Memphis Ins. Co., 19 How. 312, 314, 15 L. Ed. 656.

**95. Props carried away by tide.**—Garrison v. Memphis Ins. Co., 19 How. 312, 314, 15 L. Ed. 656.

**96. "Perils of the river."**—Garrison v. Memphis Ins. Co., 19 How. 312, 314, 15 L. Ed. 656.



which attend navigation on the lakes, and among others, that which arises from shallowness of the waters at the entrance of harbors formed from them.<sup>97</sup>

**Perils of the Lakes.**—See post, “Excluded Risks,” VII, F.

3. **ARRESTS, RESTRAINTS AND DETAINMENTS.**—Ordinarily policies of marine insurance cover “arrests, restraints and detainments of all kings, princes or people.”<sup>98</sup>

**What Constitutes.**—The restraints and detainments alluded to are the operations of the sovereign power by an exercise of the vis major, in its sovereign capacity, controlling or divesting, for the time, the dominion or authority of the owner over the ship; and not proceedings of a mere civil nature, to enforce private rights, claimed, under the owner, for services actually rendered in the preservation of his property.<sup>99</sup>

**“Restraint.”**—The word “restraint” does not necessarily imply possession of the thing by the restraining power.<sup>1</sup> The word restraint must be construed to comprehend the forcible confinement of a vessel in port, and the forcible prevention of her proceeding on her voyage.<sup>2</sup>

**“Arrest” and “Detainment.”**—The terms “an arrest” and “detainment” imply possession of the thing, by the power which arrests or detains.<sup>3</sup>

**“Unlawful Arrests,” etc.**—If a policy insures against “unlawful arrests, restraints and detainments of all kings, princes,” etc., the qualification, “unlawful,” extends in its operation as well to “restraints and detainments” as to “arrests;” and in such case, a detainment by a force lawfully blockading a port, is not a peril insured against, by a policy containing a warranty of neutrality.<sup>4</sup>

**Restraints Excepted from Policy.**—The party cannot, under the allega-

The words “perils of the river” do not include fire. *Garrison v. Memphis Ins. Co.*, 19 How. 312, 15 L. Ed. 656.

97. **“Dangers of lake navigation.”**—*Transportation Co. v. Downer*, 11 Wall. 129, 20 L. Ed. 160.

98. **Arrests, restraints and detainments.**—*Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 9 L. Ed. 1123.

99. **What constitutes.**—*Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 402, 9 L. Ed. 1123.

The detention of a ship, under admiralty proceedings, cannot be construed to be a substantive peril, within the clause of a policy respecting “restraints and detainments of all kings, princes or people;” for the detention by the admiralty process was a mere retardation of the voyage. The brig was delivered from that proceeding; the salvage was paid; and she not only was capable, but did, in fact, resume and complete her voyage. *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 402, 9 L. Ed. 1123.

1. **“Restraint.”**—*Olivera v. Union Ins. Co.*, 3 Wheat. 183, 194, 4 L. Ed. 365.

The term “restraint” does not imply that the limitation, restriction or confinement must be imposed by those who are in possession of the person or thing which is limited, restricted or confined; the term is satisfied by a restriction, created by the application of external force. *Olivera v. Union Ins. Co.*, 3 Wheat. 183, 189, 4 L. Ed. 365.

2. *Olivera v. Union Ins. Co.*, 3 Wheat. 183, 194, 4 L. Ed. 365. See the title **BLOCKADE**, vol. 3, p. 365.

**A blockade** of a vessel in a port is a

restraint, and a peril within the policy. *Olivera v. Union Ins. Co.*, 3 Wheat. 183, 194, 4 L. Ed. 365.

**“An embargo** is admitted to be a peril within the policy. \* \* \* the sovereign imposing the embargo is virtually in possession of the vessel, and may, therefore, be said to arrest and detain her. Yet, in fact, the vessel remains in the actual possession of the master or owner, and has the physical power to sail out and proceed on her voyage. The application of force is not more direct on a vessel stopped in port by an embargo, than on a vessel stopped in port by a blockading squadron.” *Olivera v. Union Ins. Co.*, 3 Wheat. 183, 193, 4 L. Ed. 365.

3. **“Arrest” and “detainment.”**—*Olivera v. Union Ins. Co.*, 3 Wheat. 183, 189, 4 L. Ed. 365.

**A blockade** certainly is not “an arrest,” nor is it “a detainment.” Each of these terms implies possession of the thing, by the power which arrests or detains; and in the case of a blockade, the vessel remains in the possession of the master. *Olivera v. Union Ins. Co.*, 3 Wheat. 183, 189, 4 L. Ed. 365.

4. **“Unlawful arrests,” etc.**—*McCall v. Marine Ins. Co.*, 8 Cranch 59, 3 L. Ed. 487.

**Construction.**—A clause (which insures “against all unlawful arrests, restraints and detainments,” etc.) does not require a concurrence of the three terms, in order to constitute the peril described. They are to be taken severally; and if a blockade be a “restraint,” the insured are protected against it, although it be neither an

tion of a restraint, recover a loss from which the underwriter is expressly exempted by an unambiguous exception in the policy.<sup>5</sup>

4. CAPTURE AND SEIZURE.—Every species of capture, whether lawful or unlawful, and whether by friends or enemies, is a loss within the policy.<sup>6</sup>

5. PIRATES AND THIEVES.—Seizure or capture by a de facto government is not a loss covered by an insurance against pirates.<sup>7</sup>

6. COLLISION.—Within the meaning of a policy of marine insurance the words "in collision" mean the striking together of two vessels.<sup>8</sup> A loss by col-

"arrest" nor detainment. *Olivera v. Union Ins. Co.*, 3 Wheat. 183, 189, 4 L. Ed. 365.

**When blockade an "unlawful restraint."**

—"A vessel within a port blockaded after the commencement of her voyage, and prevented from proceeding on it, sustains a loss by a peril within the policy; and if the vessel, so prevented be a neutral, having on board a neutral cargo, received before the institution of the blockade, the restraint is unlawful." *Olivera v. Union Ins. Co.*, 3 Wheat. 183, 195, 4 L. Ed. 365. See the title BLOCKADE, vol. 3, p. 375.

**5. Restraints excepted from policy.**—

*McCall v. Marine Ins. Co.*, 8 Cranch 59, 66, 3 L. Ed. 487.

**6. Capture and seizure.**—*Mauran v. Insurance Co.*, 6 Wall. 1, 11, 18 L. Ed. 836.

A capture may embrace the taking of a neutral ship and cargo by a belligerent jure belli; also, the taking forcibly by a friendly power, in time of peace, and even by the government itself to which the assured belongs." *Mauran v. Insurance Co.*, 6 Wall. 1, 10, 18 L. Ed. 836.

"The insurer is liable for a loss by capture, whether the property in the thing insured be changed by the capture or not. In every case of an illegal capture the property is not changed, yet as between the insurer and the insured, the effect is the same as in case of a capture by an enemy in open war." *Mauran v. Insurance Co.*, 6 Wall. 1, 11, 18 L. Ed. 836.

"In the case of a capture under a commission from an organized government, against an enemy, jure belli, to bring the capture within the policy, it is not necessary that the commission should issue from a perfectly lawful government any more than that the capture itself should be lawful." A capture under authority of a de facto government is a loss within the policy. *Mauran v. Insurance Co.*, 6 Wall. 1, 11, 18 L. Ed. 836.

**Capture by rebellious confederation.**—A taking of a vessel by the naval forces of a now extinct rebellious confederation, whose authority was unlawful and whose proceedings in overthrowing the former government were wholly illegal and void, and which confederation has never been recognized as one of the family of nations, is a "capture" within the meaning of a warranty on a policy of insurance having a marginal warranty "free from loss or expense by capture," if such rebellious confederation was at the time sufficiently in possession of the attributes of government to be regarded as in fact the ruling

or supreme power of the country over which its pretended jurisdiction extended. *Mauran v. Insurance Co.*, 6 Wall. 1, 18 L. Ed. 836.

Accordingly, a seizure by a vessel of the late so called Confederate States of America, for their benefit, was a capture within the terms of such a warranty. *Mauran v. Insurance Co.*, 6 Wall. 1, 18 L. Ed. 836.

**Warning of illegal capture disregarded.**

—Where a vessel, insured on a sealing voyage, was ordered by the government of Buenos Ayres not to catch seal off the Falkland Islands, and having contigued to take seal there, the vessel was seized and condemned, under the authority of the government of Buenos Ayres; the government of the United States not having acknowledged, but having denied, the right of Buenos Ayres to the Falkland Islands; the insurers are liable to pay for the loss of the vessel and cargo; the master, in refusing to obey the orders to leave the island, having acted under a belief that he was bound so to do, as a matter of duty to the owners, and all interested in the voyage, and in vindication of the right claimed by the American government. The master was not bound to abandon the voyage, under a threat of warning of such illegal capture. *Williams v. Suffolk Ins. Co.*, 13 Pet. 415, 10 L. Ed. 226.

**7. Pirates and thieves.**—*Mauran v. Insurance Co.*, 6 Wall. 1, 10, 18 L. Ed. 836.

**8. Collision.**—*London Assur. v. Companhia De Moagens*, 167 U. S. 149, 42 L. Ed. 113.

It is impossible to give a certain and definite meaning to the words "in collision," or to so limit their meaning as to plainly describe in advance that which shall and that which shall not amount to a collision within the meaning of a policy of marine insurance, but each case must be determined upon its own facts. *London Assur. v. Companhia De Moagens*, 167 U. S. 149, 42 L. Ed. 113.

**Vessel not in motion.**—It is not necessary that the vessel should itself be in motion at the time of the collision. If while anchored in the harbor a vessel is run into by another vessel, it would certainly be said that the two vessels had been in collision, although one was at anchor and the other was in motion. There is no distinction between a vessel at anchor and one at the wharf fully loaded and in entire readiness to proceed upon her voyage, and simply awaiting the



lision, without any fault on either side, is a loss by the perils of the sea, within the protection of a policy of marine insurance.<sup>9</sup>

**Where the insurance applies to all injuries caused to the insured vessel by collision**, whether the collision was the result of unavoidable accident, or of negligence on the part of the other vessel, or of negligence of the master and crew of the vessel insured, the insurers, within the limits of the policies, are responsible to the insured for the entire damage to his vessel and not merely for the moiety thereof, which, because of the fault on her part as well as on the part of the other vessel, was all he could recover against the latter.<sup>10</sup>

**Damage Done to Another Vessel.**—An ordinary policy against perils of

regulation of some insignificant matter about the machinery before moving out. If, while so stationary (at anchor or at wharf), the vessel is run into by another, she has been in collision. *London Assur. v. Companhia De Moagens*, 167 U. S. 149, 155, 42 L. Ed. 113.

**Seaworthiness not effected.**—A vessel is as a matter of fact, in collision, although the consequences of the collision were not serious enough to effect her seaworthiness, if within the ordinary use of language the circumstances could be fairly described as amounting to a collision. *London Assur. v. Companhia De Moagens*, 167 U. S. 149, 42 L. Ed. 113.

Where a vessel was run into by another vessel, as a result of which cracks were made from half an inch to an inch and three-quarters wide in the iron plating of her bulwarks (which were half an inch thick) for a distance of eleven feet, there can be no doubt that the vessel had been in collision, although her seaworthiness was not impaired in the slightest degree as a result thereof. This shows a somewhat serious impact—what would be called a collision; it shows that there was no mere “grazing,” where the injury to the hull of the steamship was sufficiently serious to cause the captain to have an examination of it made, resulting in the delay of the vessel in proceeding on her voyage for two days; and the payment of \$250 as damages occasioned by such collision. *London Assur. v. Companhia De Moagens*, 167 U. S. 149, 42 L. Ed. 113.

**9. A loss by perils of sea.**—*Peters v. Warren Ins. Co.*, 14 Pet. 99, 10 L. Ed. 371; *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 32 L. Ed. 788; *Richelieu, etc., Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 34 L. Ed. 398; *Insurance Co. v. Transportation Co.*, 12 Wall. 194, 20 L. Ed. 378; *General Mut. Ins. Co. v. Sherwood*, 14 How. 351, 361, 14 L. Ed. 452.

Insurance was made to the amount of \$8,000 on the ship *Paragon*, for one year; the policy containing the usual risks, and among others, that of the perils of the sea; the assured claimed for a loss by collision with another vessel, without any fault of the master or crew of the *Paragon*; and also insisted on a general average and contribution. The *Paragon* was

in part insured; and in November, 1836, in the year during which the policy was in operation, she sailed from Hamburg, in ballast, for Gottenburg, for a cargo of iron, for the United States; while proceeding down the Elbe, with a pilot on board, she came in contact with a galliot, and sunk her; she lost her bowsprit, jib-boom and anchor, and was otherwise damaged, and put into Cuxhaven, a port at the mouth of the Elbe, and in the jurisdiction of Hamburg. The master of the galliot libelled the *Paragon*, alleging that the loss of his vessel was caused by the carelessness or fault of those on board the *Paragon*; upon the hearing of the cause, the court decided, that the collision was not the result of the fault or carelessness of either side; and that, therefore, according to the marine law of Hamburg, the loss was a general average loss, and to be borne equally by both parties; that is, that the *Paragon* was to bear one-half of the expense of her own repairs, and to pay one-half of the value of the galliot; and that the galliot was to bear the loss of the half of her own value, and to pay one-half of the repairs of the *Paragon*; the result of this decree was, that the *Paragon* was to pay \$2600, being one-half of the value of the galliot (\$3,000), after deducting one-half of her own repairs, being \$400. The owners of the *Paragon*, having no funds in Hamburg, the master was obliged to raise the money on bottomry; there being no cargo on board the *Paragon*, and no freight earned, the *Paragon* was obliged to bear the whole loss. Held, that the assured were entitled to recover; so far as the injury and repairs done to the *Paragon* itself extended, the underwriters were liable for all damages. *Peters v. Warren Ins. Co.*, 14 Pet. 99, 10 L. Ed. 371.

“In this case the contributory amount paid by the *Paragon*, on account of the collision, was a direct, positive and proximate effect from the accident, in such sense as to render the defendants liable therefor upon this policy.” *Peters v. Warren Ins. Co.*, 14 Pet. 99, 10 L. Ed. 371.

**10. All injuries to vessel insured.**—*The Potomac*, 105 U. S. 630, 635, 26 L. Ed. 1194. See post, “Negligence and Misconduct,” VII, E, 17.



the sea does not cover damage done to another vessel by collision.<sup>11</sup>

7. **EXPLOSION.**—See post, "Fire," VII, E, 8.

8. **FIRE.**—Losses by fire are within a policy of marine insurance.<sup>12</sup>

**What Constitutes a "Burnt" Ship.**—As to a burnt vessel, it must be such a burning as will constitute the vessel a burnt vessel within the ordinary meaning of the English language. The language is used in regard to the vessel as a whole. It is not possible to lay down any hard and fast rule upon the subject.<sup>13</sup>

9. **STRANDING.**—Stranding is a peril of the seas; and a policy of insurance against perils of the seas covers a loss by stranding.<sup>14</sup>

10. **GENERAL AVERAGE EXPENSES, LOSSES AND CONTRIBUTIONS.**—See ante, "Proximate and Remote Cause," VII, B.

11. **JETTISON.**—There can be no doubt that a loss by a jettison, occasioned by a peril of the sea, is a loss by a peril of the sea.<sup>16</sup>

**11. Damage done to another vessel.**—The *Barnstable*, 181 U. S. 464, 469, 45 L. Ed. 954; *General Mut. Ins. Co. v. Sherwood*, 14 How. 351, 14 L. Ed. 452; *Peters v. Warren Ins. Co.*, 14 Pet. 99, 10 L. Ed. 371.

Under a policy insuring against the usual perils of the sea, including barratry, underwriters are not liable to repay to the insured damages paid by him to the owners of another vessel and cargo, suffered in a collision occasioned by the negligence of the master or mariners of the vessel insured. *General Mut. Ins. Co. v. Sherwood*, 14 How. 351, 14 L. Ed. 452. See the preceding note.

**Fire caused by collision.**—See post, "Fire," VII, E, 8.

**12. Fire.**—*Patapsco Ins. Co. v. Coulter*, 3 Pet. 222, 236, 7 L. Ed. 659.

"Losses by fire must happen either from the act of God, from design, or from accident. If from design, and by the master and crew, it is barratry; if by any other person, or by pure accident, it is clearly a risk by fire, but from the peculiar character of this risk, it is no easy matter to point out an accident that may not be resolved into negligence." *Patapsco Ins. Co. v. Coulter*, 3 Pet. 222, 236, 7 L. Ed. 659. See post, "Barratry," VII, E, 16; "Negligence and Misconduct," VII, E, 17.

**Fire caused by collisions.**—Underwriters against fire are responsible for a loss occasioned by the sinking of a vessel insured when caused by fire (though the fire itself be the result of a collision not insured against), if the effect of the collision without the fire would have been only to cause the vessel to settle to her upper deck, and that be a case in which she might have been saved. *Insurance Co. v. Transportation Co.*, 12 Wall. 194, 20 L. Ed. 378; *Western Mass. Ins. Co. v. Transportation Co.*, 12 Wall. 201, 20 L. Ed. 380; *The G. R. Booth*, 171 U. S. 450, 453, 455, 43 L. Ed. 234.

An insurance upon a steamer against fire, "except fire happening by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power," is an insurance against fire caused

by collisions. *Insurance Co. v. Transportation Co.*, 12 Wall. 194, 20 L. Ed. 378. See, also, ante, "Collision," VII, E, 6.

**Explosion caused by fire.**—Where an explosion on board a vessel was caused by fire, the fire was the proximate cause of the loss. *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. 213, 9 L. Ed. 691. See the title *INSURANCE*, vol. 7, p. 136.

**13. What constitutes a "burnt" ship.**—*London Assur. v. Companhia De Moagens*, 167 U. S. 149, 157, 42 L. Ed. 113.

A partial burning may, under some circumstances, constitute a "burnt" ship, and may not under other circumstances. The question is: "Has the fire been such as to bring the ship to such a condition that you consider her a 'burnt' ship within the ordinary meaning of the English language." *London Assur. v. Companhia De Moagens*, 167 U. S. 149, 157, 42 L. Ed. 113.

**14. Stranding.**—*Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 438, 32 L. Ed. 788; *Richelieu, etc., Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 421, 34 L. Ed. 398. See post, "Negligence and Misconduct," VII, E, 17.

**The word "stranded."**—In regard to the use of the word "stranded," in policies of marine insurance, it is said that if a ship "touches and goes" she is not stranded; but if she "touches and sticks" she is. That is, in places in which she, in the ordinary course of her navigation, is not suffered to touch. The distinction between what is regarded as a stranding and what is held not to be a stranding has been held to be a very narrow one. *London Assur. v. Companhia De Moagens*, 167 U. S. 149, 42 L. Ed. 113.

**16. Jettison.**—*Lawrence v. Minturn*, 17 How. 100, 111, 15 L. Ed. 58; *The Portsmouth*, 9 Wall. 682, 684, 19 L. Ed. 754; *The G. R. Booth*, 171 U. S. 450, 459, 43 L. Ed. 234.

But it is well settled that, if a jettison of a cargo, or a part of it, is rendered necessary by any fault or breach of contract of the master or owners of the vessel, the jettison must be attributed to that fault, or breach of contract, rather than to the sea peril, though that may also be

12. RANSOM.—See ante, "Proximate and Remote Cause," VII, B.

13. SALVAGE.—See ante, "Proximate and Remote Cause," VII, B.

14. UNDERWRITERS' FAILURE TO FURNISH FUNDS FOR REPAIR OF SHIP.—The underwriters are not bound to supply funds, in a foreign port, for the repair of any damage to the ship occasioned by a peril insured against; they undertake only to pay the amount, after due notice and proof of the loss, and within a prescribed time.<sup>17</sup>

15. BOTTOMRY.—See ante, "Lenders on Respondentia or Bottomry," V, D, 5, b; post, "Money Taken Up on Bottomry Bond," IX, C, 7.

16. BARRATRY.—The risk of barratry is not covered by a policy of marine insurance, unless it is enumerated, but when barratry is enumerated there may be a recovery for a loss, the efficient cause of which was the barratry of the master, or crew.<sup>18</sup>

17. NEGLIGENCE AND MISCONDUCT.—In marine policies, whether containing the risk of barratry or not, a loss, whose proximate cause was a peril insured against, is within the protection of the policy, notwithstanding it might have been occasioned, remotely, by the negligence of the master and mariners.<sup>19</sup>

present, and enter into the case. *Lawrence v. Minturn*, 17 How. 100, 15 L. Ed. 58. This is a principle alike applicable to exceptions in bills of lading and in policies of insurance. *General Mut. Ins. Co. v. Sherwood*, 14 How. 351, 365, 14 L. Ed. 452.

"Though the peril of the sea may be nearer in time to the disaster, the efficient cause, without which the peril would not have been incurred, is regarded as the proximate cause of the loss." *The Portsmouth*, 9 Wall. 682, 684, 19 L. Ed. 754; *The G. R. Booth*, 171 U. S. 450, 459, 43 L. Ed. 234. See ante, "Proximate and Remote Cause," VII, B.

17. *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 379, 9 L. Ed. 1123.

The underwriters engage to pay the amount of the expenditures and losses directly flowing from the perils insured against; but not any remote or contingent losses to the owner, from their neglect to pay the same. *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 404, 9 L. Ed. 1123.

The assured has demanded payment of a total loss which the defendants refused to pay; but there was no evidence of an actual abandonment, nor offer to abandon to the underwriters, before the suit was instituted; and the proof was of a loss in its nature total. It was held that a previous abandonment, or offer to abandon, was not necessary to enable the plaintiff to recover. *Watson v. Insurance Co.*, 4 Dall. 283, 1 L. Ed. 835.

18. Barratry.—*Patapsco Ins. Co. v. Coulter*, 3 Pet. 222, 238, 7 L. Ed. 659; *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. 213, 9 L. Ed. 691; *The G. R. Booth*, 171 U. S. 450, 454, 43 L. Ed. 234; *Marcadier v. Chesapeake Ins. Co.*, 8 Cranch 39, 3 L. Ed. 481. See the title BARRATRY, vol. 3, p. 201.

The insured cannot recover for a loss by barratry, unless the barratry produced the loss; but it is immaterial whether the loss so produced occurred during the con-

tinuance of the barratry or afterwards. *Swan v. Union Ins. Co.*, 3 Wheat. 168, 4 L. Ed. 361.

A loss by fire caused by the barratry of the master or crew is not within the policy unless enumerated. *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. 213, 219, 220, 9 L. Ed. 691; *The G. R. Booth*, 171 U. S. 450, 453, 43 L. Ed. 234.

The captain's failure to exert himself properly to extinguish any fire amounts to barratry. *Patapsco Ins. Co. v. Coulter*, 3 Pet. 222, 228, 234, 7 L. Ed. 659; *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. 213, 9 L. Ed. 691; *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507, 9 L. Ed. 512. And if the property be insured against barratry, the owners may then recover. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 347, 426, 12 L. Ed. 465. See the title BARRATRY, vol. 3, p. 202.

Barratrous sale after stranding.—Where the underwriter insures against the barratry of the master as well as the perils of the sea, the barratry of the master is no defense to an action on the policy for a loss from stranding by a peril of the seas and a subsequent barratrous sale. If the sale was barratrously made, i. e., was an act of barratry, the underwriter must make good the loss. *New Orleans Ins. Co. v. Albro Co.*, 112 U. S. 506, 509, 28 L. Ed. 809.

19. Negligence and misconduct.—*Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. 213, 9 L. Ed. 691; *General Mut. Ins. Co. v. Sherwood*, 14 How. 351, 366, 14 L. Ed. 452; *Phenix Ins. Co. v. Erie*, etc., *Transp. Co.*, 117 U. S. 312, 323, 29 L. Ed. 873; *Orient Ins. Co. v. Adams*, 123 U. S. 67, 72, 31 L. Ed. 63; *Richelieu*, etc., *Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 34 L. Ed. 398; *Patapsco Ins. Co. v. Coulter*, 3 Pet. 222, 7 L. Ed. 659. See, also, *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507, 9 L. Ed. 512; *Hazard v. New England Marine Ins. Co.*, 8 Pet. 557, 585, 8 L. Ed. 1043; *The G. R. Booth*, 171 U.

### Loss occasioned by willful misconduct of the owner or his agents is not

S. 450, 459, 43 L. Ed. 234; *The Potomac*, 105 U. S. 630, 635, 26 L. Ed. 1194. See post, "Negligence," VII, F, 3, a.

A loss by a peril insured against, and occasioned by negligence, is a loss within a marine policy; unless there be some other language in it, which excepts it. "Such a loss is within the words, and it is incumbent upon those who seek to make any exception from the words, to show that it is not within the intent of the policy." *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. 213, 221, 9 L. Ed. 691.

An insurer against "perils of the sea," is liable, when the negligence of the master or crew contribute to the loss, because the assured does not warrant that his servants shall use due care to avoid them. *The G. R. Booth*, 171 U. S. 450, 459, 43 L. Ed. 234.

A policy cannot be so construed as to insure against all losses directly referable to the negligence of the master and mariners. But if the loss is caused by a peril of the sea, the underwriter is responsible, although the master did not use due care to avoid the peril. *General Mut. Ins. Co. v. Sherwood*, 14 How. 351, 14 L. Ed. 452. See, also, *Hazard v. New England Marine Ins. Co.*, 8 Pet. 557, 585, 8 L. Ed. 1043.

Where the efficient and, therefore, proximate cause of the loss was a peril of the river, the company cannot escape liability by showing that the loss was remotely caused by mere negligence in not ascertaining, before giving the signal to let the vessel go, that she had steam enough for her proper management. *Orient Ins. Co. v. Adams*, 123 U. S. 67, 72, 31 L. Ed. 63.

"When a peril of the sea is the proximate cause of a loss, the negligence which caused that peril is not inquired into; not because the underwriter has taken upon himself all risks arising from negligence, but because he has assumed to indemnify the insured against losses from particular perils, and the assured has not warranted that his servants will use due care to avoid them." *General Mut. Ins. Co. v. Sherwood*, 14 How. 351, 365, 14 L. Ed. 452.

This is upon the general ground, that *causa proxima non remota spectatur*; and therefore, that a loss, whose proximate cause is one of the enumerated risks in the policy, is chargeable to the underwriters; although the remote cause may be traced to the negligence of the master and mariners. *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507, 517, 9 L. Ed. 512, approving *Patapsco Ins. Co. v. Coulter*, 3 Pet. 222, 7 L. Ed. 659.

"If we look to the question, upon mere principle, without reference to authority, it is difficult to escape from the con-

clusion, that a loss by a peril insured against, and occasioned by negligence, is a loss within a marine policy; unless there be some other language in it which repels that conclusion. Such a loss is within the words, and it is incumbent upon those who seek to make any exception from the words, to show that it is not within the intent of the policy." *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. 213, 221, 9 L. Ed. 691.

Insurance on profits, on board the ship *Mary*, "at and from Philadelphia to Gibraltar, and a port in the Mediterranean, not higher up than Marseilles, and from thence to Sonsonate, in Guatemala, Pacific Ocean, with liberty of Guayaquil; the insurance to begin from the loading of the goods at Philadelphia, and to continue until the goods were safely landed at the said ports; the insurance, \$5,000, declared to be on profits, warranted to be American property, to be proved at Philadelphia only, valued at \$20,000." The vessel proceeded, with a cargo of flour, to Gibraltar, where the same was to be sold, and the proceeds invested at Marseilles, in dry-goods, to be sent from thence to Sonsonate or Guayaquil. While the vessel lay at Gibraltar, before the discharge of her cargo, she and her cargo were totally lost by fire; the evidence on the trial went to show, that with proper diligence on the part of the master and crew, the fire might have been extinguished, and the vessel and cargo saved; soon after the fire commenced, the master called upon the crew to leave the ship, under an apprehension from a small quantity of gunpowder on board; and after they left her, she was boarded by other persons, who endeavored, without success, to extinguish the flames, having, as was alleged, arrived too late; evidence was given, tending to show that the fire originated from the carelessness of the master. The circuit court refused to instruct the jury, that if the fire proceeded from the carelessness or negligence of the master, the assured could not recover; that court also refused to instruct the jury, that if the fire originated from accident, or without any want of due care on the part of the master and crew, and if the jury should find, that by reasonable and proper exertions, the vessel and cargo might have been preserved by them, which they omitted, the assured could not recover; that court also refused to instruct the jury, that the assured, having offered no evidence that the sales of the flour at Gibraltar would have yielded a profit, they were not entitled to recover. Held, that there was no error in these instructions. *Patapsco Ins. Co. v. Coulter*, 3 Pet. 222, 7 L. Ed. 659.

**Collision or stranding.**—"In Liverpool, etc., *Steam Co. v. Phenix Ins. Co.*, 129 U.



covered by the policy.<sup>20</sup> The misconduct of the master, unless affected by fraud or design, will not defeat a recovery on the policy.<sup>21</sup>

18. **FRAUDULENT LOSSES.**—A loss occasioned by the personal fraud of the assured is not covered by a policy of marine insurance.<sup>22</sup>

19. **VIOLATION OF EMBARGO AND NONINTERCOURSE LAWS.**—See the title *EMBARGO AND NONINTERCOURSE LAWS*, vol. 5, p. 736.

**F. Excluded Risks**—1. **IN GENERAL.**—Whenever the risk commences, the exception commences also, for it is apparent that the underwriters meant to take upon themselves no portion of that hazard.<sup>23</sup>

2. **APPLICATION OF RULES AS TO PROXIMATE CAUSE.**—The rules as to proximate cause apply in determining whether a loss is within an excepted peril.<sup>24</sup>

3. **PARTICULAR EXCEPTIONS**—a. *Negligence.*—Where a policy of marine insurance excepts losses occasioned by want of ordinary care and skill in navigation, the underwriter is not liable for losses occasioned by running the vessel at full speed in a fog or by failure to properly station lookouts.<sup>25</sup>

**When a vessel has committed a positive breach of statute**, and a loss ensues, the assured, in an action on a marine policy, must show not only that probably her fault did not contribute to the disaster but that it could not have done so.<sup>26</sup>

S. 397, 438, 32 L. Ed. 788, it is said: 'Collision or stranding is, doubtless, a peril of the seas; and a policy of insurance against perils of the seas covers a loss by stranding or collision, although arising from the negligence of the master or crew, because the insurer assumes to indemnify the assured against losses from particular perils, and the assured does not warrant that his servants shall use due care to avoid them.' *Richelieu, etc., Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 421, 34 L. Ed. 398. See ante, "Collision," VII, E, 6; "Stranding," VII, E, 9.

**20. Loss occasioned by willful misconduct.**—*Union Ins. Co. v. Smith*, 124 U. S. 405, 427, 31 L. Ed. 497.

"Where the loss is not proximately caused by the perils of the sea, but is directly referable to the negligence or misconduct of the master or other agents of the assured, not amounting to barratry, there seems little doubt that the underwriters would be thereby discharged." *General Mut. Ins. Co. v. Sherwood*, 14 How. 351, 365, 14 L. Ed. 452.

"To this rule must be referred that class of cases, in which the misconduct of the master or mariners has either aggravated the consequences of a peril insured against, or been of itself the efficient cause of the whole loss. Thus, if damage be done by a peril insured against, and the master neglects to repair that damage, and in consequence of the want of such repairs, the vessel is lost, the neglect to make repairs, and not the sea damage, has been treated as the proximate cause of the loss." *General Mut. Ins. Co. v. Sherwood*, 14 How. 351, 365, 14 L. Ed. 452.

21. *Orient Ins. Co. v. Adams*, 123 U. S. 67, 73, 31 L. Ed. 63.

22. **Fraudulent losses.**—*Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. 213, 221, 9 L. Ed. 691; *Patapsco Ins. Co. v. Coulter*, 3 Pet. 222, 7 L. Ed. 659.

**23. Excluded risks.**—*Church v. Hubbard*, 2 Cranch 187, 232, 2 L. Ed. 249.

**24. Rules as to proximate cause apply.**—*Orient Ins. Co. v. Adams*, 123 U. S. 67, 31 L. Ed. 63; *Union Ins. Co. v. Smith*, 124 U. S. 405, 426, 31 L. Ed. 497. See ante, "Proximate and Remote Cause," VII, B.

Where by the terms of the policy, the vessel was insured against all perils of the lakes which should damage her, excepting perils and losses consequent upon and arising from, or caused by, the incompetency of the master or want of ordinary skill and care in navigating the vessel, and unseaworthiness; the company is not released from liability by reason of the existence of any of the excluded conditions but is released from such losses as are consequent upon and arise from or are caused by any of the specified excluded causes. If, therefore, the vessel was subjected to the perils of the lakes and sustained loss which did not arise from, or was not caused by some one of the excluded causes, the insurer was not released from liability. *Union Ins. Co. v. Smith*, 124 U. S. 405, 426, 31 L. Ed. 497.

An exception that the underwriter shall be free of all claims for loss or damage occasioned by "the derangement or breaking of the engine or machinery, or any consequence therefrom," does not include a loss which was a remote consequence of the derangement of the mud valves of a vessel when such derangement was not the proximate cause of the loss. *Orient Ins. Co. v. Adams*, 123 U. S. 67, 31 L. Ed. 63.

25. *Negligence.*—*Richelieu, etc., Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 34 L. Ed. 398. See ante, "Negligence and Misconduct," VII, E, 17.

**26. Breach of statute.**—*Richelieu, etc., Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 422, 34 L. Ed. 398; *Belden v. Chase*, 150 U. S. 674, 699, 37 L. Ed. 1218;

b. *Seizure for Illicit Trade*.—If the underwriters be exempted from the risk of a justifiable seizure for illicit trade, they are not accountable for losses consequent thereon, whether arising from a sentence of condemnation or otherwise.<sup>27</sup>

**Seizure Must Be for Justifiable Cause.**—A seizure and detention, to come within the exception of a policy relating to contraband and illicit trade, must be for a legal and justifiable cause. The question is not, whether there must be a legal or justifiable cause for condemnation, but whether there must not be such cause for the seizure and detention.<sup>28</sup>

c. *Blockaded Ports*.—The exception of blockaded ports is not a warranty. The words are the words of the insurer, not of the insured; and they take a particular risk out of the policy which, but for the exception, would be comprehended in the contract. The dangers of the blockade were the particular dangers which induced the exception, and it ought not to be extended beyond

The *Martello*, 153 U. S. 64, 74, 38 L. Ed. 637; The *Pennsylvania*, 19 Wall. 125, 136, 22 L. Ed. 148. See post, "What Constitutes Seaworthiness and Compliance with Warranty," VIII, C, 3, b.

Where a policy of marine insurance excepted all perils, losses or expenses arising from or caused by want of ordinary care and skill in navigation, or want of seaworthiness, and where a law of the country to which the insured vessel belongs provides that all vessels shall run in a fog at a moderate rate of speed, and the insured vessel being equipped with a compass known to be defective, is driven into a dense fog with unabated speed, and stranded upon an island off her usual track, and a loss ensues; the assured must show affirmatively that neither the speed of the steamer nor the defects of the compass could have caused or have contributed to cause the stranding of the steamer. The burden of proving a loss of this kind is upon the assured; and there is no presumption that the loss was occasioned by the perils insured against. *Richelieu*, etc., Nav. Co. v. *Boston Marine Ins. Co.*, 136 U. S. 408, 423, 34 L. Ed. 398.

27. **Seizure for illicit trade.**—*Carrington v. Merchants' Ins. Co.*, 8 Pet. 495, 516, 8 L. Ed. 1021; *Church v. Hubbard*, 2 Cranch 187, 2 L. Ed. 249.

If it be inserted in a policy that "the insurers are not liable for seizure by the Portuguese for illicit trade," and the vessel be seized and condemned for an attempt to trade illicitly, the underwriters are not liable for the loss. *Church v. Hubbard*, 2 Cranch 187, 2 L. Ed. 249; *Carrington v. Merchants' Ins. Co.*, 8 Pet. 495, 517, 8 L. Ed. 1021.

28. **Seizure must be for justifiable cause**—*Carrington v. Merchants' Ins. Co.*, 8 Pet. 495, 515, 8 L. Ed. 1021.

A memorandum, stipulating in a policy of insurance, "that the assurers shall not be liable for any charge, damage or loss which may arise in consequence of seizure or detention for or on account of illicit trade, or trade in articles contraband of war," is not to be construed, that there must be a legal or justifiable cause

of condemnation, but that there must be such a cause for seizure or detention. *Carrington v. Merchants' Ins. Co.*, 8 Pet. 495, 8 L. Ed. 1021.

The ship insured, when seized, had not unloaded all her outward cargo, but was still in the progress of the outward voyage, originally designated by the owners; she sailed on that voyage from Providence, Rhode Island, with contraband articles on board, belonging, with the other parts of the cargo, to the owners of the ship, with a false destination and false papers, which yet accompanied the vessel; the contraband articles had been landed, before the policy, which was a policy on time, designating no particular voyage, had attached; the underwriters, though taking no risks within the exception, were not ignorant of the nature and objects of the voyage; and the alleged cause of the seizure and detention was the trade in articles contraband of war by the landing of powder and muskets, which formed a part of the outward cargo. By the principles of the law of nations, there existed, under these circumstances, a right to seize and detain the ship and her remaining cargo, and to subject them to adjudication for a supposed forfeiture, notwithstanding the prior deposit of the contraband goods; there was a legal and justifiable cause of seizure. *Carrington v. Merchants' Ins. Co.*, 8 Pet. 495, 8 L. Ed. 1021.

When there has been a bona fide seizure and detention for and on account of illicit or contraband trade, and by a clause in the policy of insurance it was agreed that "the assurers should not be liable for any charge, damage or loss, which may arise in consequence of seizure or detention for or on account of illicit trade or trade in articles contraband of war," a sentence of condemnation or acquittal, or other regular proceeding to adjudication, is not necessary to discharge the underwriters. If the seizure or detention be lawfully made, for or on account of illicit or contraband trade, all charges, damages and losses consequent thereon, are within the scope of the exception; they are properly attributable to such seizure and

them.<sup>29</sup> The exception is not of the port, but of the risk of capture, for breaking the blockade.<sup>30</sup>

4. **EVIDENCE.**—It is necessary that it should appear from the whole proof that the loss was not within exceptions contained in the policy, against which the assured was not insured.<sup>31</sup>

### VIII. Forfeiture and Avoidance.

**A. Representations.**—See the title *INSURANCE*, vol. 7, p. 153, et seq. A material false representation vitiates a contract of marine insurance.<sup>32</sup>

**An immaterial misrepresentation** has no effect upon the validity of the policy unless made with a fraudulent intent.<sup>33</sup>

**Materiality.**—It is upon the representations that the underwriters are enabled to calculate the risk and fix the amount of the premium; and if any fact material to the risk be misrepresented, either through fraud, mistake or negligence, the policy is avoided.<sup>34</sup>

**Intent to Deceive.**—Any representation, whether material or not, if made with intent to deceive avoids the policy.<sup>35</sup>

detention as the primary cause, and relate back thereto. If the underwriters be discharged from the primary hostile act, they are discharged from the consequence of it. *Carrington v. Merchants' Ins. Co.*, 8 Pet. 495, 496, 8 L. Ed. 1021.

29. **Blockaded ports.**—*Yeaton v. Fry*, 5 Cranch 335, 341, 3 L. Ed. 117.

30. *Yeaton v. Fry*, 5 Cranch 335, 3 L. Ed. 117.

If the insurance be "against all risks, blockaded ports and Hispaniola excepted," a vessel sailing ignorantly for a blockaded port is covered by the policy. *Yeaton v. Fry*, 5 Cranch 335, 3 L. Ed. 117.

31. **Evidence.**—*Richelieu, etc., Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 423, 34 L. Ed. 398; *Union Ins. Co. v. Smith*, 124 U. S. 405, 31 L. Ed. 497.

**Where vessel has committed a breach of statute.**—See ante, "Negligence," VII, F, 3, a.

32. *Hodgson v. Marine Ins. Co.*, 5 Cranch 100, 113, 3 L. Ed. 48; *Hazard v. New England Marine Ins. Co.*, 8 Pet. 557, 8 L. Ed. 1043.

"It is not on the doctrine of seaworthiness that a misrepresentation is held to vitiate the policy, because the insured is always held to guaranty the sufficiency of his vessel to perform the voyage insured. Nor is it an evident and necessary increase of the risk; but it is presenting such false lights to the insurer, as induce him to enter into a contract materially different from that which he supposes he is entering into. It is a rule of law, introduced to protect underwriters from those innumerable frauds which are practised upon them, in a contract which must, of necessity, be regulated almost wholly by the information derived from the assured." *Hodgson v. Marine Ins. Co.*, 5 Cranch 100, 113, 3 L. Ed. 48. See post, "Seaworthiness," VIII, C, 3.

**Ownership.**—A letter written by the owner of a ship, merely directing his agent to procure insurance for him, on the cargo, such letter being laid before the

underwriter, is not such a representation as to the ownership of the cargo, as will vitiate a policy "for whom it may concern." *Buck v. Chesapeake Ins. Co.*, 1 Pet. 151, 7 L. Ed. 90.

**Seaworthiness.**—See post, "Seaworthiness," VIII, C, 3.

33. *Hodgson v. Marine Ins. Co.*, 5 Cranch 100, 3 L. Ed. 48; *Hazard v. New England Marine Ins. Co.*, 8 Pet. 557, 8 L. Ed. 1043.

34. *Hazard v. New England Marine Ins. Co.*, 8 Pet. 557, 8 L. Ed. 1043.

A misrepresentation, not averred to be material, is no bar to an action on a policy. A misrepresentation, to have that effect, must be material to the risk of the voyage. *Hodgson v. Marine Ins. Co.*, 5 Cranch 100, 3 L. Ed. 48.

**Overvaluation** of a vessel does not necessarily vitiate a contract of marine insurance. *Hodgson v. Marine Ins. Co.*, 5 Cranch 100, 110, 3 L. Ed. 48.

"It will hardly, however, be insisted, that every overvaluation, however considerable, or however innocently produced, will annul a contract of this nature. It would seem more reasonable, to let mistakes of this kind (if they are to have any operation at all) regulate the extent of recovery, and not deprive the party of his whole indemnity; for if an extravagant valuation be made, an underwriter cannot reasonably ask to be relieved beyond the excess complained of." *Hodgson v. Marine Ins. Co.*, 5 Cranch 100, 110, 3 L. Ed. 48.

Upon an action on a valuation policy, if a misrepresentation of the age and tonnage of the vessel, whereby the underwriters were induced to agree to a high valuation, be a defense, it is at law, and not in equity. *Marine Ins. Co. v. Hodgson*, 7 Cranch 332, 3 L. Ed. 362.

**Age and tonnage.**—See preceding note.

**Test of materiality.**—See the title *INSURANCE*, vol. 7, p. 154.

35. *Hazard v. New England Marine Ins. Co.*, 8 Pet. 557, 8 L. Ed. 1043; *Hodg-*



**Substantial compliance** with the representation is all that is required.<sup>36</sup>

**It is immaterial, in what way the loss may arise**, where there has been such a misrepresentation as to avoid the policy.<sup>37</sup>

**Presumed Knowledge of Underwriters.**—The underwriters are presumed to know, on a representation, the usage at the place where the vessel lies, and where she is described.<sup>38</sup>

**B. Concealment.**—See the title *INSURANCE*, vol. 7, p. 153.

1. **IN GENERAL.**—The contract of insurance is one of mutual good faith, and the principles which govern it are those of an enlightened moral policy; the underwriters must be presumed to act upon the belief, that the party procuring insurance, is not, at the time, in possession of any fact material to the risk, which he does not disclose; and that no known loss had occurred, which, by reasonable diligence, might have been communicated to him. This is the rule whether the insurance is procured by the owner or through a broker or agent.<sup>39</sup>

2. **MATERIALITY**—a. *In General.*—The operation of a concealment, on the policy, depends upon its materiality to the risk; and this materiality is a subject for the consideration of a jury.<sup>40</sup>

b. *Information Withheld from Agent Procuring Insurance*—(1) *In General.*—If a party, knowing that his agent is about to procure insurance for him, withholds information, for the purposes of misleading the underwriter, it is a fraud, and vitiates the insurance.<sup>41</sup>

(2) *Information Received While Negotiations Pending.*—Where a party orders insurance, and afterwards receives intelligence material to the risk, or has knowledge of a loss, he ought to communicate it to the agent, by due and reasonable diligence, to be judged under all the circumstances of each particular case, if it can be communicated; for the purpose of countermanding the order, or laying the circumstances before the underwriter.<sup>42</sup>

c. *Title or Interest.*—**Special Interests.**—The assured should communicate to the underwriters the nature of the interest in the subject insured, though it need not be specified in the policy; and on this ground a question of fact for the jury arises. If the insurance of the special interest and not the principal ownership, made a material difference in the risk, or would have altered the amount of the premium, and the fact was not sufficiently disclosed to the underwriters, the omission would vacate the policy.<sup>43</sup>

**In policies for whom it may concern** there can be undue concealment as to the parties interested in the property to be insured.<sup>44</sup> If the underwriters

son v. Marine Ins. Co., 5 Cranch 100, 3 L. Ed. 48.

36. Hughes v. Union Ins. Co., 8 Wheat. 294, 5 L. Ed. 520.

**A representation of property, being covered as American**, is substantially complied with, if the property be actually American; and where the presence and agency of a person had the cloaking of the property as their sole object, his presence is dispensed with, when the cargo became actually American. Hughes v. Union Ins. Co., 8 Wheat. 294, 307, 5 L. Ed. 520.

37. Hazard v. New England Marine Ins. Co., 8 Pet. 557, 583, 8 L. Ed. 1043.

"If the coppering of the ship, as stated in the letter on which the insurance was made, was substantially untrue and incorrect, in a point material to the risk, such a misrepresentation would discharge the underwriters, although the ship was partially coppered, and although the loss did not arise from any deficiency in the coppering." Hazard v. New England Ma-

rine Ins. Co., 8 Pet. 557, 583, 8 L. Ed. 1043.

38. Hazard v. New England Marine Ins. Co., 8 Pet. 557, 582, 8 L. Ed. 1043.

39. McLanahan v. Universal Ins. Co., 1 Pet. 170, 7 L. Ed. 98.

40. Maryland Ins. Co. v. Ruden, 6 Cranch 338, 3 L. Ed. 242; Livingston v. Maryland Ins. Co., 6 Cranch 274, 3 L. Ed. 222.

41. McLanahan v. Universal Ins. Co., 1 Pet. 170, 7 L. Ed. 98.

42. McLanahan v. Universal Ins. Co., 1 Pet. 170, 7 L. Ed. 98; Insurance Co. v. Lyman, 15 Wall. 664, 21 L. Ed. 246.

What constitutes due and reasonable diligence, is a question of fact for the jury. McLanahan v. Universal Ins. Co., 1 Pet. 170, 7 L. Ed. 98.

43. Russell v. Union Ins. Co., 4 Dall. 421, 1 L. Ed. 892.

44. **Title or interest.**—Buck v. Chesapeake Ins. Co., 1 Pet. 151, 7 L. Ed. 90.

To affirm that "in policies for whom it may concern," there can be no undue con-

make no inquiries as to the real character of the cargo the law imputes to them the use of the phrase, "for whom it may concern," in its ordinary effect and signification.<sup>45</sup>

d. *Time of Sailing*.—The accidental concealment of the time of the sailing of a vessel would not prejudice the insurance, unless material to the risk; if fraudulently intended, it might not mislead; and whether fraudulent or not, is matter of fact for the jury.<sup>46</sup>

e. *Name of Master*.—Ordinarily the name of the master is not material and need not be disclosed.<sup>47</sup>

f. *Concealment of Papers*.—(1) *National Character*.—In general, concealment of papers amounts to a breach of warranty.<sup>48</sup>

(2) *Papers Required by Usage of Trade*.—If, by the usage of the trade insured, it be necessary that certain papers should be on board, the concealment of those papers cannot affect the plaintiff's right to recover upon the policy.<sup>49</sup>

g. *Matters within Knowledge of Underwriter*.—(1) *In General*.—Matters within, or presumed by law to be within, the knowledge of the underwriter need not be communicated to him.<sup>50</sup>

cealment as to the parties interested in the property to be insured, is obviously going much too far; since the underwriter has an unquestionable right to be informed, if he makes the inquiry. The assured may be silent, it is true, if he will; and let the premium be charged accordingly; but if the inquiry, when made, should be responded to by information, contrary to the verity of the case, this obviously gives a conventional signification to the terms of the policy, which may differ from the known and received signification in ordinary cases. *Buck v. Chesapeake Ins. Co.*, 1 Pet. 151, 7 L. Ed. 90.

"He, for instance, who should insure 'for whom it may concern,' under an express assurance that there is no belligerent interest in the cargo, could not, upon any principle, be held to have made assurance upon belligerent interest." *Buck v. Chesapeake Ins. Co.*, 1 Pet. 151, 160, 7 L. Ed. 90.

45. *Buck v. Chesapeake Ins. Co.*, 1 Pet. 151, 161, 7 L. Ed. 90.

46. *McLanahan v. Universal Ins. Co.*, 1 Pet. 170, 171, 7 L. Ed. 98.

The question of materiality of the time of the sailing of the ship to the risk is one for the jury, under the direction of the court, as in other cases. The court may aid their judgment by an exposition of the nature, bearing and pressure of the facts; but it has no right to supersede the exercise of that judgment, and to direct an absolute verdict as upon contested matter of fact, resolving itself into a mere point of law. *McLanahan v. Universal Ins. Co.*, 1 Pet. 170, 171, 7 L. Ed. 98.

The material ingredients of a question of the importance of concealing the time of a vessel's sailing, are mixed up of nautical skill, information and experience; and are, in no sense, judicially cognizable, as matters of law. It seems that this question does not cease to be a question of fact, when the vessel is to sail from a port abroad. *McLanahan v.*

*Universal Ins. Co.*, 1 Pet. 170, 171, 7 L. Ed. 98.

47. *Insurance Co. v. Folsom*, 18 Wall. 237, 21 L. Ed. 827.

48. *Livingston v. Maryland Ins. Co.*, 7 Cranch 506, 3 L. Ed. 421.

If a vessel take on board papers which increase the risk of capture, and if it be not the regular usage of the trade insured to take such papers, the nondisclosure of the fact that they would be on board, will vacate the policy. *Livingston v. Maryland Ins. Co.*, 6 Cranch 274, 3 L. Ed. 222.

"In estimating the materiality of the papers to the risk, their effect, taken together, should be considered; not the effect of any one of them, taken by itself." *Livingston v. Maryland Ins. Co.*, 7 Cranch 506, 538, 3 L. Ed. 421.

49. *Livingston v. Maryland Ins. Co.*, 7 Cranch 506, 3 L. Ed. 421.

"But when the underwriters know, or, by the usage and course of the trade insured ought to know, that certain papers ought to be on board, for the purpose of protection in one event, which, in another, might endanger the property, they tacitly consent that the papers shall be so used as to protect the property." *Livingston v. Maryland Ins. Co.*, 7 Cranch 506, 536, 3 L. Ed. 421.

**Letter referring to previous letter giving information that vessel traded to Spanish colonies.**—If a letter submitted to underwriters, ordering insurance, refer to another letter, previously laid before them, which letter contained information that the vessel had permission to trade to the Spanish colonies, the underwriters are bound to notice that fact, and to know that the vessel would take all the papers necessary to make the voyage legal. *Livingston v. Maryland Ins. Co.*, 7 Cranch 506, 3 L. Ed. 421.

50. *Buck v. Chesapeake Ins. Co.*, 1 Pet. 151, 7 L. Ed. 90; *Vasse v. Ball*, 2 Dall. 270, 1 L. Ed. 377.

(2) *Knowledge and Presumption of Knowledge of Underwriter.*—A knowledge of the state of the world, of the allegiance of particular countries, of the risks and embarrassments affecting their commerce,<sup>51</sup> their laws and customs,<sup>52</sup> and of the established import of the terms used in their contracts, must necessarily be imputed to underwriters.<sup>53</sup>

**Usage or Cause of Trade.**—Every underwriter is presumed to know the ordinary course and incident of the trade on which he insures, and to regulate his proceedings accordingly,<sup>54</sup> and if he does not know it, he ought to inform himself.<sup>55</sup>

**What Constitutes Seaworthiness.**—See post, "What Constitutes Seaworthiness and Compliance with Warranty," VIII, C, 3, b.

(3) *Effect.*—A material concealment avoids the policy, whether it is the result of inadvertence or is intentional. A fraudulent intent is not necessary.<sup>56</sup>

(4) *Evidence.*—The burden of proof to establish the defense of concealment is upon the party pleading it.<sup>57</sup>

**Admissibility—Application.**—Where the application for insurance contains no statement in respect to any one of the matters which it is alleged was concealed by the assured its terms are exactly the same as those of the policy, its contents are immaterial to the issue, as they can have no tendency to show that the assured, when he made the application, did not communicate to the defendants all the material facts and circumstances within his knowledge, and answer truly all questions put to him in regard to those several matters.<sup>58</sup>

51. *Buck v. Chesapeake Ins. Co.*, 1 Pet. 151, 159, 7 L. Ed. 90.

Underwriters are presumed to know the political condition of foreign nations. *Hazard v. New England Marine Ins. Co.*, 8 Pet. 557, 587, 8 L. Ed. 1043.

52. **Laws and customs.**—*Morean v. United States Ins. Co.*, 1 Wheat. 219, 231, 4 L. Ed. 75.

In *Morean v. United States Ins. Co.*, 1 Wheat. 219, 231, 4 L. Ed. 75, the court said: "In the present case, the corn never was out of the possession of the agents of the assured, who exercised every act of ownership over it, subject, nevertheless, to the laws and customs of the country to which it was sent, with which the insurer and assured are supposed to have been acquainted at the time they entered into this contract, and to which they impliedly agreed to submit."

53. *Buck v. Chesapeake Ins. Co.*, 1 Pet. 151, 7 L. Ed. 90.

54. *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 388, 6 L. Ed. 664; *Hearne v. Marine Ins. Co.*, 20 Wall. 488, 492, 22 L. Ed. 395; *Buck v. Chesapeake Ins. Co.*, 1 Pet. 151, 7 L. Ed. 90.

"It is not necessary that the usage relied upon \* \* \* should have been communicated or known to the assurers." *Hearne v. Marine Ins. Co.*, 20 Wall. 488, 492, 22 L. Ed. 395.

The underwriters are presumed to know the usages of foreign ports to which insured vessels are destined; also the usages of trade; men who engage in this business are seldom ignorant of the risks they incur; and it is their interest to make themselves acquainted with usages of the different ports of their own country, and also those of foreign countries; this

knowledge is essentially connected with their ordinary business; and by acting on the presumption that they possess it, no violence or injustice is done to their interests. *Hazard v. New England Marine Ins. Co.*, 8 Pet. 557, 8 L. Ed. 1043.

Where, by the terms of a policy, a vessel is insured "to a port in Cuba, and at and thence to port of advice and discharge in Europe," and the vessel is lost in going from the port of discharge in Cuba, to another port in the same island for reloading, held on a suit on the policy for a loss that evidence by the assured was inadmissible to show a usage that vessels going to Cuba might visit at two ports, one for discharge and another for loading. (In the present case the court held that the evidence offered did not show such a usage.) *Hearne v. Marine Ins. Co.*, 20 Wall. 488, 22 L. Ed. 395.

"The true meaning of the policy is to be sought in an exposition of the words, with reference to this known course and usage of the West India trade. The parties must be supposed to contract with a tacit adoption of it as the basis of their engagements." *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 387, 6 L. Ed. 664.

**As to papers.**—See ante, "Concealment of Papers," VIII, B, 2, f.

**Letter referring to previous letter giving information as to voyage.**—See ante, "Papers Required by Usage of Trade," VIII, B, 2, f, (2).

55. *Hearne v. Marine Ins. Co.*, 20 Wall. 488, 492, 22 L. Ed. 395.

56. *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485, 27 L. Ed. 337.

57. **Burdens of proof.**—*Insurance Co. v. Folsom*, 18 Wall. 237, 252, 21 L. Ed. 827.

58. **Admissibility—Application.**—*Insur-*



**C. Warranties**—1. *IN GENERAL*.—Generally, as to definition, nature and compliance with warranties, see the title *INSURANCE*, vol. 7, pp. 151, 171.

2. *PROMISSORY WARRANTIES*.—See the title *INSURANCE*, vol. 7, p. 171.

**Form and Construction**.—Promissory warrants in policies of marine insurance are generally expressed in a few words, but where they are plain and clear it would be a dangerous consequence to introduce a loose construction into them.<sup>59</sup>

**Must Be Strictly Complied with**.—Promissory warranties in policies of marine insurance are required by law, and by the constant use of merchants to be strictly complied with.<sup>60</sup>

3. *SEAWORTHINESS*—a. *In General*.—In every policy, there is an implied warranty of seaworthiness, and this is a condition precedent on the part of the insured.<sup>61</sup>

**Whether Fact of Unseaworthiness Known or Unknown**.—The exception of losses occasioned by unseaworthiness is in effect a warranty that a loss shall not be so occasioned, and whether the fact of unseaworthiness were known or unknown is immaterial.<sup>62</sup>

**Claims Not Connected with Unseaworthiness**.—The warranty that the ship is seaworthy applies to every insurance for a voyage including insurance on cargo, notwithstanding the owner of the cargo has no power to make the ship seaworthy. The warranty is absolute, and the breach of this implied condition makes the policy wholly void, so that it is immaterial whether the loss

ance Co. v. Folsom, 18 Wall. 237, 252, 21 L. Ed. 827.

Where a policy of insurance, following the exact language of the application, insured on the 1st of March, 1869, a vessel then at-sea, "at and from the 1st day of January, 1869, at noon, until the 1st day of January, 1870, at noon," nothing being said in either policy or application as to "lost or not lost," nor about who was the master of the vessel, nor as to what voyage she was on; held, on a suit on the policy—and the company not having shown that the name of the master or the precise destination were material facts—that the application had no tendency to show that the assured when he made the application did not communicate to the defendants all the material facts and circumstances within his knowledge, and answer truly all questions put to him in regard to those several matters. *Insurance Co. v. Folsom*, 18 Wall. 237, 21 L. Ed. 827.

59. **Form and construction of promissory warranties**.—*Ogden v. Ash*, 1 Dall. 162, 1 L. Ed. 82.

60. *Ogden v. Ash*, 1 Dall. 162, 1 L. Ed. 82.

A warranty in a policy of marine insurance that "orders will be given that the ship shall not cruise," is not complied with unless express orders be given to that effect. That such direction may be implied from the instructions to the master, or the mere absence of authority to cruise, does not satisfy the warranty. *Ogden v. Ash*, 1 Dall. 162, 1 L. Ed. 82.

61. *Hazard v. New England Marine Ins. Co.*, 8 Pet. 557, 581, 8 L. Ed. 1043; *Hodgson v. Marine Ins. Co.*, 5 Cranch 100, 113, 3 L. Ed. 48.

**Open or running policies**.—So held as

to an open or running policy. *Orient Mut. Ins. Co. v. Wright*, 23 How. 401, 16 L. Ed. 524.

**Time policies**.—So held as to time policies. *Hazard v. New England Marine Ins. Co.*, 8 Pet. 557, 581, 8 L. Ed. 1043.

"A representation might embrace all the facts of an implied warranty of seaworthiness; but this is wholly unnecessary, and is seldom if ever done. The representation is designed to state the quality and condition of the ship, if that be the object of insurance, so as to induce the underwriters to insure on reasonable terms; and it is not limited to the facts necessary to constitute seaworthiness." *Hazard v. New England Marine Ins. Co.*, 8 Pet. 557, 581, 8 L. Ed. 1043.

"But the facts stated in a representation may go beyond those usages; and the insured is bound to the extent of his communication, whether verbal or written. In the one case, the law implies a definite and fixed responsibility; in the other, the liability depends upon the express declarations of the insured. If the representation in this case fall below the implied warranty of seaworthiness, it does not, in any degree, affect such warranty; it cannot, therefore, be considered as a substitute for the implied seaworthiness of the ship, but as a representation which entered into the consideration of the underwriters, when they fixed the premium of insurance." *Hazard v. New England Marine Ins. Co.*, 8 Pet. 557, 581, 8 L. Ed. 1043.

62. *Richelieu, etc., Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 429, 34 L. Ed. 398; *Work v. Leathers*, 97 U. S. 379, 24 L. Ed. 1012; *Union Ins. Co. v. Smith*, 124 U. S. 405, 31 L. Ed. 497.

claimed was in any way connected with the unseaworthiness or totally independent of it.<sup>63</sup>

b. *What Constitutes Seaworthiness and Compliance with Warranty.*—The policy does not attach, unless the vessel be properly manned, equipped and provided with all necessary stores, and in all respects fit for the intended voyage.<sup>64</sup> The equipment of the vessel must depend upon the nature of the voyage; as a ship might be seaworthy for a voyage across the Atlantic, and not for a whaling voyage in the Pacific.<sup>65</sup> A question of seaworthiness is determined by the usages of the port where the vessel is fitted out, in reference to the destined voyage.<sup>66</sup>

**Negligence.**—Negligent acts, which violate implied duties incident to navigating the vessel and produce a positive and definitive increase of risk, discharge the underwriters.<sup>67</sup>

**Time Policies.**—In the insurance of a vessel by a time policy, the warranty of seaworthiness is complied with if the vessel be seaworthy at the commencement of the risk, and the fact that she subsequently sustains damage, and is not properly refitted at an intermediate port, does not discharge the insurer from subsequent risk or loss, provided such loss be not the consequence of the collision.<sup>68</sup>

c. *Evidence.*—In the abstract, a certificate of survey is not legal evidence; because the examination of the surveyors themselves would be better. But parties may by compact adopt that or any other, as the criterion for deciding on their relative rights; and the rights of the parties are made to depend upon

63. *London Assur. v. Companhia De Moagens*, 167 U. S. 149, 167, 42 L. Ed. 113.

64. *Hazard v. New England Marine Ins. Co.*, 8 Pet. 557, 581, 8 L. Ed. 1043.

**Master and crew.**—Every ship must, at the commencement of the voyage insured, possess all the qualities of seaworthiness, and be navigated by a competent master and crew. *McLanahan v. Universal Ins. Co.*, 1 Pet. 170, 7 L. Ed. 98.

What is a competent crew for the voyage? at what time such crew should be on board? what is proper pilot ground? what is the course and usage of trade, in relation to the master and crew being on board, when a ship breaks ground for the voyage? are questions of fact dependent upon nautical testimony, and exclusively within province of the jury. *McLanahan v. Universal Ins. Co.*, 1 Pet. 170, 7 L. Ed. 98.

**Defects in the compass.**—If there were any defects in the compass, known or unknown, rendering it unsafe or unsuitable for use, in lake navigation, and the stranding of the vessel was caused by, consequent upon, or arose from such defects in the compass, the vessel was not seaworthy. *Richelieu, etc., Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 429, 34 L. Ed. 398.

65. *Hazard v. New England Marine Ins. Co.*, 8 Pet. 557, 587, 8 L. Ed. 1043.

Seaworthiness in port, or lying in the offing, may be one thing; and seaworthiness for a whole voyage, quite another. *McLanahan v. Universal Ins. Co.*, 1 Pet. 170, 7 L. Ed. 98.

66. *Hazard v. New England Marine Ins. Co.*, 8 Pet. 557, 581, 8 L. Ed. 1043.

**Knowledge of underwriters.**—"The underwriters are presumed to know what constitutes seaworthiness in a foreign port, and to act under this knowledge." *Hazard v. New England Marine Ins. Co.*, 8 Pet. 557, 582, 8 L. Ed. 1043.

67. *Patapsco Ins. Co. v. Coutler*, 3 Pet. 222, 235, 7 L. Ed. 659. See ante, "Negligence," VII, F, 3, a.

"For a vessel to leave her register behind, in time of war, affected her seaworthiness as much as leaving her compass, or quadrant, or anchors, at home, at any time. So, neglecting to take a pilot, neglecting to pay port duties, neglecting to obtain a clearance, neglecting to comply with the laws of any port which the vessel has leave to enter; all these, although nonfeasances, involve misfeasances, which discharge the underwriters, because they violate implied duties incident to navigating the vessel, and produce a positive and definite increase of risk." *Patapsco Ins. Co. v. Coulter*, 3 Pet. 222, 235, 7 L. Ed. 659.

68. *Union Ins. Co. v. Smith*, 124 U. S. 405, 427, 31 L. Ed. 497.

**A defect of seaworthiness, arising after the commencement of the risk,** and permitted to continue from bad faith or want of ordinary prudence or diligence on the part of the insured or his agents, discharges the insurer from liability for any loss which is the consequence of such bad faith, or want of prudence or diligence; but does not affect the contract of insurance as to any other risk or loss covered by the policy and not caused or increased by such particular defect. *Union Ins. Co. v. Smith*, 124 U. S. 405, 427, 31 L. Ed. 497.

the fact of the survey rather than on the truth of it.<sup>69</sup>

**A regular survey** must, in every instance, be such as is known to the laws and customs of the port in which a vessel happens to be.<sup>70</sup>

69. *Dorr v. Pacific Ins. Co.*, 7 Wheat. 581, 611, 5 L. Ed. 528.

Under a policy containing the following clause: "And lastly, it is agreed, that if the above vessel, upon a regular survey, should be thereby declared unseaworthy, by reason of her being unsound or rotten, then the assurers shall not be bound to pay their subscription on this policy," and it was found by the jury, that the vessel was seaworthy, at the time of the commencement of the risk, and when she sailed on the voyage insured; held, that proof, by a regular survey, of unsoundness, at any subsequent period of the voyage, discharged the underwriters. *Dorr v. Pacific Ins. Co.*, 7 Wheat. 581, 5 L. Ed. 528.

An exemplification of a condemnation of the vessel, in a foreign court of vice admiralty, reciting the certificate of surveyors, that the vessel was unworthy of being repaired, and unsafe and unfit ever to go to sea again, and produced in evidence by the assured, to prove the loss, is "a regular survey," in the language of the above clause. The exemplification of the proceedings of that court is not only admissible evidence, but perhaps, the only evidence that could be received of the survey. *Dorr v. Pacific Ins. Co.*, 7 Wheat. 581, 5 L. Ed. 528. See, also, *Janney v. Columbian Ins. Co.*, 10 Wheat. 411, 6 L. Ed. 354.

The survey was a part of the *res gestæ*, and the plaintiff could not possibly have made out the loss, without introducing the survey which led to it. The survey was, therefore, properly in evidence, and that it was "a regular survey," in the language of the covenant, is to be deduced from two considerations. First, if there was any irregularity in the survey, it is attributable to the plaintiff's own agents. But, secondly, the survey bears every evidence of regularity or authenticity that can reasonably be required. *Dorr v. Pacific Ins. Co.*, 7 Wheat. 581, 611, 5 L. Ed. 528.

Under a policy containing the following clause: "It is declared and understood, that if the above-mentioned brig, after a regular survey, should be condemned for being unsound or rotten, the insurers shall not be bound to pay the sum hereby insured, nor any part thereof," a survey by the master and wardens of the port of New Orleans, which was obtained at the instance of the master, who was also a part owner, and was transmitted by him to the other part owner, and by the latter laid before the underwriters, as proof of the loss, stated that the wardens, "ordered one streak of plank, fore and aft, to be taken out, about three feet below the bends on

the starboard side; and found the timber and bottom plank so much decayed, that we were unanimously of opinion, her repairs would cost more than she would be worth afterwards, and that it would be for the interest of all concerned she should be condemned as unworthy of repair, on that ground; we did, therefore, condemn her as not seaworthy, and as unworthy of repair; and therefore, according to the powers vested by law in the master and wardens of this port, we do hereby order and direct the aforesaid damaged brig to be sold at public auction, for the account of the insurers thereof or whomsoever the same may concern." It was held, that the survey was conclusive evidence, under the clause, to discharge the insurers from their liability for the loss. *Janney v. Columbian Ins. Co.*, 10 Wheat. 411, 6 L. Ed. 354.

However this may be, the above condemnation not being specially authorized by any law of the state of Louisiana, it would not have been considered as conclusive evidence within the clause, had not the condemnation been obtained by the master, as the agent of the owners, and afterwards adopted by them, as proof of the facts stated therein. *Janney v. Columbian Ins. Co.*, 10 Wheat. 411, 6 L. Ed. 354.

The distinction between the case of *Janney v. Columbian Ins. Co.*, 10 Wheat. 411, 416, 6 L. Ed. 354, and the case of *Dorr v. Pacific Ins. Co.*, 7 Wheat. 581, 582, 5 L. Ed. 528, is this: In the latter case although a condemnation in the vice admiralty court of the Bahamas was produced in evidence the court made no other use of it, than as the means of authenticating the survey upon which the decree was made, while by the terms of the stipulation in the former both a regular survey and a condemnation are in contemplation of the parties.

70. **A regular survey.**—*Dorr v. Pacific Ins. Co.*, 7 Wheat. 581, 611, 5 L. Ed. 528.

On the subject of the regularity and authenticity of surveys, "the nature of the contract of insurance casts the parties on the municipal regulations of all the world. Every commercial country has its own regulations on the subject of surveys. It is properly a subject of admiralty jurisdiction; since mariners and freighters have to claim the aid of the admiralty to release them from their contract, in cases of a defect of seaworthiness. \* \* \* In this instance, both from the jurisdiction assumed by the court, and the known habits of British jurisprudence, the mode of passing a survey through a court to give it authenticity may well be adjudged a regular survey according to the laws of the port into which this vessel was



**Survey Must Correspond with Contract.**—The survey must correspond with the contract.<sup>71</sup>

4. **NEUTRALITY**—a. *Warranty as to Vessel.*—The vessel is impliedly warranted to be neutral.<sup>72</sup>

**Anti-neutral conduct** forfeits the warranty that the vessel is neutral.<sup>73</sup>

**Concealing Papers.**—See ante, "National Character," VIII, B, 2, f, (1).

b. *Warranty as to Cargo.*—The assured are not understood to warrant that the whole cargo is neutral, but that the interest insured is neutral.<sup>74</sup>

c. *Evidence of Breach.*—In an action upon a policy on property warranted neutral, "proof of which to be required in the United States only," a sentence of condemnation in a foreign court of admiralty, upon the ground of breach of blockade, is not conclusive evidence of a violation of the warranty.<sup>75</sup>

5. **LOADING.**—When the assured warrants "not to load more than the ship's registered tonnage," ballast and dunnage are not included in the warranty.<sup>76</sup> But such a warranty will be broken by carrying more cargo in weight than such tonnage, though the excess be used as dunnage; whilst, if such excess had been mere dunnage, and not cargo, the warranty would not have been broken.<sup>77</sup>

forced." *Dorr v. Pacific Ins. Co.*, 7 Wheat. 581, 611, 5 L. Ed. 528.

**71. Survey must correspond with contract.**—*Dorr v. Pacific Ins. Co.*, 7 Wheat. 581, 5 L. Ed. 528.

Under a stipulation that if the vessel, upon a regular survey, should be thereby declared unseaworthy, by reason of her being unsound or rotten, the survey must correspond with the contract, and if the vessel be declared unseaworthy, for any additional cause, besides being "unsound or rotten," is not conclusive evidence of unseaworthiness. *Dorr v. Pacific Ins. Co.*, 7 Wheat. 581, 5 L. Ed. 528.

If a policy upon a vessel have a clause "that if the vessel, after a regular survey, should be condemned as unsound or rotten, the underwriters should not be bound to pay," a report of surveyors that she was unsound and rotten, but not referring to the commencement of the voyage, is not sufficient to discharge the underwriters. *Marine Ins. Co. v. Wilson*, 3 Cranch 187, 2 L. Ed. 406.

Quære, whether such report, even if it related to the commencement of the voyage, would be conclusive evidence? *Marine Ins. Co. v. Wilson*, 3 Cranch 187, 2 L. Ed. 406.

**72. Maryland Ins. Co. v. Woods**, 6 Cranch 29, 3 L. Ed. 143.

Quære, whether breach of blockade, by a vessel not warranted neutral, would discharge the underwriters? *Maryland Ins. Co. v. Woods*, 6 Cranch 29, 3 L. Ed. 143.

**73. Maryland Ins. Co. v. Woods**, 6 Cranch 29, 46, 3 L. Ed. 143.

**Conduct of vessel.**—"The breach of the warranty of neutrality, which, though in terms extended only to the property, has been carried, by construction, to the conduct of the vessel." *Maryland Ins. Co. v. Woods*, 6 Cranch 29, 46, 3 L. Ed. 143.

**Attempt to enter blockaded port.**—A ship warranted to be American is im-

pliedly warranted to conduct herself, during the voyage, as an American, and an attempt to enter a blockaded port, knowing it to be blockaded, forfeits that character. *Fitzsimmons v. Newport Ins. Co.*, 4 Cranch 185, 198, 2 L. Ed. 591.

**Persisting in an intention to enter a blockaded port**, after warning, is not attempting to enter it within the prohibition of a policy of marine insurance. *Fitzsimmons v. Newport Ins. Co.*, 4 Cranch 185, 2 L. Ed. 591.

**The fact of clearing out for a blockaded port** is in itself innocent, unless it be accompanied with knowledge of the blockade. The clearance, therefore, is not considered as the offense. *Fitzsimmons v. Newport Ins. Co.*, 4 Cranch 185, 198, 2 L. Ed. 591.

A vessel might lawfully sail for a port in the West Indies, known to be blockaded, until she was warned off, according to the British orders of April, 1804. She was not bound to make inquiry elsewhere than of the blockading force. *Maryland Ins. Co. v. Woods*, 6 Cranch 29, 3 L. Ed. 143.

**74. Livingston v. Maryland Ins. Co.**, 6 Cranch 274, 3 L. Ed. 222. And see *Buck v. Chesapeake Ins. Co.*, 1 Pet. 151, 7 L. Ed. 90; *Hodgson v. Marine Ins. Co.*, 5 Cranch 100, 3 L. Ed. 48.

If the interest of one joint owner of a cargo be insured, and if that interest be neutral, it is no breach of the warranty of neutrality, if the other joint owner, whose interest is not insured, be a belligerent. *Livingston v. Maryland Ins. Co.*, 6 Cranch 274, 3 L. Ed. 222.

**75. Maryland Ins. Co. v. Woods**, 6 Cranch 29, 3 L. Ed. 143.

**76. Insurance Co. v. Thwing**, 13 Wall. 672, 674, 20 L. Ed. 607. See, also, *Maryland Ins. Co. v. LeRoy*, 7 Cranch 26, 3 L. Ed. 257.

**77. Insurance Co. v. Thwing**, 13 Wall. 672, 20 L. Ed. 607.

Merchandise, carried under bill of

**Not to Take Additional Cargo.**—See post, "Taking on Cargo Not within Permission of Policy," VIII, E, 2, d.

6. **OVER INSURANCE.**—An over insurance of the cargo, or on freight is not a breach of a warranty by the owner of the vessel not to insure his interest in the vessel beyond a certain amount.<sup>78</sup>

7. **AS TO CRUISING.**—See ante, "Promissory Warranties," VIII, C, 2.

**D. Negligence.**—See ante, "Negligence and Misconduct," VII, E. 17; "What Constitutes Seaworthiness and Compliance with Warranty," VIII, C, 3, b.

**E. Deviation and Change of Risk**—1. **DEFINITION.**—A deviation is defined to be "a voluntary departure, without necessity, or any reasonable cause, from the regular and usual course" of the voyage, in reference to the terms of a policy of marine insurance.<sup>79</sup> It is no deviation, in respect to such a voyage, to touch and stay at a port out of its course, if such departure is within the usage of the trade.<sup>80</sup>

2. **ACTS WHICH CONSTITUTE**—a. *Delay in Progress of Voyage.*—Any un-

lading and paying freight, is cargo and not dunnage, although stowed as dunnage would be stowed for the purpose of protecting the rest of the cargo from wet, and put on board by the shipper with knowledge that it would be so stowed. *Insurance Co. v. Thwing*, 13 Wall. 672, 20 L. Ed. 607.

78. *Merchants' Ins. Co. v. Allen*, 121 U. S. 67, 73, 30 L. Ed. 858; *Merchants' Ins. Co. v. Allen*, 122 U. S. 376, 30 L. Ed. 1209.

The warranty in a policy of insurance on a one-fourth interest in a vessel was in these words: "Warranted by the assured that no more than \$5,000 insurance, including this policy, now exists, nor shall hereafter be effected on said interest, either by the assured or others, to cover this or any other insurable interest in said interest during the continuance of this policy." Insurance on the freight and earnings in excess of \$5,000 was effected by the acceptors of drafts drawn by the master and a like insurance on freight and earnings in excess was effected on account of other owners. It was held that there was no breach of the covenant of warranty and that an insurance on cargo is not a breach of the warranty in the policy sued on. *Merchants' Ins. Co. v. Allen*, 122 U. S. 376, 30 L. Ed. 1209, denying rehearing of *Merchants' Ins. Co. v. Allen*, 121 U. S. 67, 30 L. Ed. 858.

79. *Hostetter v. Park*, 137 U. S. 30, 40, 34 L. Ed. 568; *Constable v. National Steamship Co.*, 154 U. S. 51, 66, 38 L. Ed. 903. To the same effect, *Oliver v. Maryland Ins. Co.*, 7 Cranch 487, 491, 3 L. Ed. 414; *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 387, 6 L. Ed. 664; *Gracie v. Marine Ins. Co.*, 8 Cranch 75, 83, 3 L. Ed. 492.

"The ordinary rule for ascertaining the identity of a voyage insured is by averting to the termini. A rule which is certainly correct, so far as it extends, but in the rigid application of which, it is

easy to conceive that cases may occur in which it would bear injuriously upon the insurer. If it has any defect, it is in not extending far enough the claim to indemnity, as the terminus ad quem may, in many instances, be relinquished, without any possible increase of risk, or even without varying the risk, except only as to lessening its duration." *Marine Ins. Co. v. Tucker*, 3 Cranch 357, 385, 2 L. Ed. 466.

80. *Hostetter v. Park*, 137 U. S. 30, 40, 34 L. Ed. 568.

"If such deviation be a customary incident of the voyage, and according to the known usage of trade, it neither avoids a policy of insurance, nor subjects the carrier to the responsibility of an insurer. *Oliver v. Maryland Ins. Co.*, 7 Cranch 487, 3 L. Ed. 414; *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 6 L. Ed. 664." *Constable v. National Steamship Co.*, 154 U. S. 51, 66, 38 L. Ed. 903.

In *Hostetter v. Park*, 137 U. S. 30, 40, 34 L. Ed. 568, "it was held to be no deviation in the Pittsburgh and New Orleans barge trade, to land and tie up a tow of barges, and detach from the tow such barge or barges as were designated to take on cargo en route, and to tow the same to the several points where the cargo might be stored, it having been shown that such delays were within the general and established usage of the trade." *Constable v. National Steamship Co.*, 154 U. S. 51, 66, 38 L. Ed. 903.

"So in *Gracie v. Marine Ins. Co.*, 8 Cranch 75, 3 L. Ed. 492, it was held to be no deviation to land goods at a lazaretto or quarantine station, if the usage of the trade permitted it, though by the bill of lading goods were 'to be safely landed at Leghorn.'" *Constable v. National Steamship Co.*, 154 U. S. 51, 61, 38 L. Ed. 903.

Touching at a port out of the regular course to receive part of a cargo is not a deviation when within the known usage of trade. *Oliver v. Maryland Ins. Co.*, 7 Cranch 487, 3 L. Ed. 414.

reasonable delay in the ordinary progress of the voyage constitutes a deviation.<sup>81</sup>

"An idle waste of time, after a vessel has completed the purposes for which she entered a port, is a deviation."<sup>82</sup> But what delay will constitute such a deviation depends upon the nature of the voyage and the usage of the trade.<sup>83</sup> That delay which is necessary to accomplish the object of the voyage, according to the course of the trade, if bona fide made, does not constitute a deviation.<sup>84</sup>

**Selling Price Limited.**—Where different ports are to be visited for the purpose of selling the cargo, the owner has a right to limit the price at which the master may sell, to a reasonable extent; and a delay at a particular port, if bona fide made for that purpose, does not constitute a deviation, though occasioned by this restriction.<sup>85</sup>

b. *Delay to Take in Cargo.*—The length of time a vessel may wait to take in her cargo, without discharging the underwriters, does not depend on the usage and courses of the trade.<sup>86</sup>

**81. In progress of voyage.**—*Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 388, 6 L. Ed. 664; *Oliver v. Maryland Ins. Co.*, 7 Cranch 487, 3 L. Ed. 414; *Maryland Ins. Co. v. LeRoy*, 7 Cranch 26, 3 L. Ed. 257; *Constable v. National Steamship Co.*, 154 U. S. 51, 66, 38 L. Ed. 903.

Delay by a vessel after her release at a port to which she was carried by her captors, longer than was necessary to prepare for her voyage, and for the purpose of trading, is a deviation. *Kingston v. Girard*, 4 Dall. 274, 1 L. Ed. 831.

**82.** *Oliver v. Maryland Ins. Co.*, 7 Cranch 487, 490, 3 L. Ed. 414.

**Time for visiting several ports exhausted at first port.**—If, according to the usage of the trade, a vessel be permitted to go from one port to another, to collect her cargo, and she unnecessarily exhausts, at one port, the whole time allowed, according to the usage of the trade, to complete her cargo, she cannot go to the other port, without being guilty of such a deviation as will avoid the policy. *Oliver v. Maryland Ins. Co.*, 7 Cranch 487, 3 L. Ed. 414.

**83.** *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 388, 6 L. Ed. 664; *Oliver v. Maryland Ins. Co.*, 7 Cranch 487, 3 L. Ed. 414.

Whether a delay at a particular port constitutes a deviation, depends upon the usage of trade, with reference to the object of selling the cargo. *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 389, 6 L. Ed. 664.

**84.** *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 388, 6 L. Ed. 664.

The parties, in entering into the contract of insurance, are always supposed to be governed in the premium, by the ordinary length of the voyage, and the course of the trade. That delay, therefore, which is necessary to accomplish the objects of the voyage, according to the course of the trade, if bona fide made, cannot be admitted to avoid the insur-

ance. *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 388, 6 L. Ed. 664.

It may be a very justifiable delay to wait in port, and sell by retail, if that be the course of business, when such delay would be inexcusable, in a voyage requiring or authorizing no such delay. *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 388, 6 L. Ed. 664.

**Delay for seventy days** held not so unreasonable as to constitute a deviation, in a case where it was "a fair deduction from testimony, that considerable delays in a port in the West India trade are not uncommon, for the purpose of taking the advantages of the market, and that sales by retail are within the usage. There are no facts from which this court can infer that the delay in the present case was unreasonable or unusual; and, consequently, we cannot admit that the delay amounted to a deviation." *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 389, 6 L. Ed. 664.

**85.** *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 6 L. Ed. 664.

**86.** *Oliver v. Maryland Ins. Co.*, 7 Cranch 487, 3 L. Ed. 414.

In *Oliver v. Maryland Ins. Co.*, 7 Cranch 487, 3 L. Ed. 414, one question was, "whether the delay at Barcelona, for the purpose of taking in a return cargo, was a deviation. The court below instructed the jury, that it was not, if the vessel did not remain longer in that port than the usage and custom of trade at that place rendered necessary to complete her cargo. This court was of opinion, that the instruction was, in substance, correct. The only difficulty which arose was, from the terms of the instruction, which seemed to limit the right, not to the time necessary to take in the cargo, but to a particular period, regulated by the usage of trade. The chief justice there said, 'There is some doubt spread over the opinion in this case, in consequence of the terms in which it is expressed. The vessel might certainly



c. *Touching at Unauthorized Ports.*—Touching at an unauthorized port constitutes a deviation.<sup>87</sup>

d. *Taking on Cargo Not within Permission of Policy.*—Taking on board an additional cargo, not authorized by the policy, constitutes a deviation.<sup>88</sup>

remain as long as was necessary to complete her cargo, but it is scarcely to be supposed, this was regulated by usage and custom. The usages and customs of a port, or of a trade, are peculiar to a port or trade. But the necessity of waiting, where a cargo is to be taken on board, until it can be obtained, is common to all ports and all trades. The length of time frequently employed in selling one cargo and procuring another, may assist in proving, that a particular vessel has, or has not, practised unnecessary delays in port, but can establish no usage by which the time of remaining in port is fixed. The substantial part of the opinion, however, appears to have been and seems so to have been understood, that the plaintiff could not recover, unless the jury should be of opinion, that the vessel did not remain longer at Barcelona than was necessary to complete her cargo, of which necessity the time usually employed for that purpose might be evidence.' This case, therefore, recognizes the right to wait in port for the purpose of selling one cargo and procuring another; and the reasoning is employed solely to avoid a criticism founded upon some ambiguity of phrase peculiar to that case." *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 390, 6 L. Ed. 664.

A policy of marine insurance which insured against a voyage, to wit, "from Teneriffe to Havana \* \* \* and from Havana to New York" is not avoided by taking in a cargo at Havana. *Hughes v. Union Ins. Co.*, 8 Wheat. 294, 305, 5 L. Ed. 620.

87. *Maryland Ins. Co. v. Woods*, 6 Cranch 29, 50, 3 L. Ed. 143.

If a port is not a neighboring port within the policy, a voyage from a port within the policy to that place was not insured. *Maryland Ins. Co. v. Woods*, 6 Cranch 29, 50, 3 L. Ed. 143.

If a port is a neighboring port, so that a voyage to it is within the policy, going out of the way to see whether another port is blockaded is a deviation. *Maryland Ins. Co. v. Woods*, 6 Cranch 29, 50, 3 L. Ed. 143.

Where a policy of marine insurance authorized a voyage to Laquara "with liberty of one other neighboring port," the port of Amsterdam in Curacoa was held to be a neighboring port within the policy. *Maryland Ins. Co. v. Woods*, 6 Cranch 29, 47, 3 L. Ed. 143.

88. *Maryland Ins. Co. v. LeRoy*, 7 Cranch 26, 3 L. Ed. 257.

"In case of the *Maryland Ins. Co. v.*

*LeRoy*, 7 Cranch 26, 3 L. Ed. 257, \* \* \* a liberty was reversed in the policy, 'to touch at the Cape de Verd Islands, for the purchase of stock, such as hogs, goats and poultry, and taking in water.' The vessel stopped at Fago, one of the Cape de Verd Islands, and took in four bullocks and four jackasses, besides water and other provisions, unstowed the dry-goods, and broke open two bales, and took forty pieces out of each, for trade. The vessel remained at the island, from the 7th to the 24th of May, although the usual delay at those islands for taking in stock and water, when the weather is good, is from two to three days. The weather was good during this delay; and the bullocks and jackasses encumbered the deck of the vessel more than small stock would have done. The court left it to the jury to determine whether the risk was increased by taking the jackasses on board, and directed them to find for the plaintiffs, unless the risk was thereby increased. The jury found for the plaintiffs; and this court reversed the judgment rendered on that verdict, because the taking in the jackasses was not within the permission of the policy. It is perfectly clear, that the case of the *Maryland Insurance Company v. LeRoy* and others differs materially from this. In that case, articles were taken on board which encumbered the deck of the vessel, and which were not within the liberty reserved in the policy. In that case, too, the assured traded, and the delay was considerable and unnecessary; the risk, if not increased, might be, and certainly was, varied. The judge, therefore, ought not to have left it to the jury, on the single point of increase of risk by taking in the jackasses. Although the risk might not be thereby increased, the unauthorized delay and unauthorized trading, during that delay, connected with taking on board unauthorized articles, discharged the underwriters, according to the settled principles of law; and the court does not say, in that case, that these circumstances were immaterial or without influence." *Hughes v. Union Ins. Co.*, 3 Wheat. 159, 165, 4 L. Ed. 357.

If taking gunpowder on board a vessel insured against fire, was not justified by the usage of the trade, and therefore, was not contemplated as a risk, by the policy, there might be great reason to contend, that, if it increased the risk, the loss was not covered by the policy. *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. 213, 9 L. Ed. 691.

*e. Trading, Unlading Cargo, etc.*—Trading, unlading the cargo,<sup>89</sup> taking on provision,<sup>90</sup> and doing other similar acts at a port at which the vessel is permitted to touch, do not necessarily constitute a deviation.

*f. Detention to Save Vessel in Distress.*—A detention at sea, to save a vessel in distress, is such a deviation as discharges the underwriters, and the owner stands his own insurer.<sup>91</sup>

*g. Increasing Risk of Capture and Detention.*—Such acts or omissions of the assured as would induce a capture and detention, according to the common practice of the belligerents, may vitiate the policy and are proper for the consideration of the jury in estimating the risk. Nor is it necessary that the increased risk be the risk of rightful capture, according to the law of nations, or capture for a cause which would justify condemnation, according to the law of nations, as construed in the United States. But capture will always be made on suspicion of what the belligerent construes to be cause of forfeiture, and capture authorizes abandonment.<sup>92</sup>

*h. Sailing to Blockaded Port.*—A vessel may lawfully sail for a port known to be blockaded, not to violate the blockade, but to inquire whether it continues, without forfeiting the insurance.<sup>93</sup>

**3. CAUSES SANCTIONING OR EXCUSING DEVIATION**—*a. In General.*—**Necessity.**—Necessity alone can sanction a deviation, in any case; and that deviation must be strictly commensurate with the vis major producing it.<sup>94</sup>

*b. Avoiding Danger.*—(1) *In General.*—Departure or delay in order to avoid danger is justified.<sup>95</sup>

**Reasonable Apprehension of Danger.**—The danger which will justify a vessel in remaining in port a long time, without discharging the underwriters, must be obvious, immediate, directly applied to the interruption of the voyage, and imminent, not distant, contingent and indefinite.<sup>96</sup>

<sup>89</sup>. *Hughes v. Union Ins. Co.*, 3 Wheat. 159, 4 L. Ed. 357; *Maryland Ins. Co. v. LeRoy*, 7 Cranch 26, 3 L. Ed. 257.

Insurance on a vessel and freight, "at and from Teneriffe to the Havana, and at and from thence to New York, with liberty to stop at Matanzas," with a representation, that the vessel was "to stop at Matanzas, to know if there were any men of war off the Havana;" the vessel sailed on the voyage insured, and put into Matanzas, to avoid British cruisers, who were then off the Havana, and were in the practice of capturing neutral vessels trading from one Spanish port to another; while at Matanzas, she unladed her cargo, under an order from the Spanish authorities; and afterwards, proceeded to Havana, whence she sailed on her voyage for New York, and was afterwards lost, by the perils of the seas. It was proved that the stopping and delay at the Havana was necessary to avoid capture, that no delay was occasioned by discharging the cargo, and that the risk was not increased, but diminished. Held, that the order of the Spanish government was obtained under such circumstances as took from it the character of a vis major imposed upon the master, and was, therefore, no excuse for discharging the cargo; but that the stopping and delay at Matanzas were permitted by the policy, and that the unlading the cargo was not a deviation. *Hughes v. Union Ins. Co.*, 3 Wheat. 159,

4 L. Ed. 357, distinguishing *Maryland Ins. Co. v. LeRoy*, 7 Cranch 26, 3 L. Ed. 257.

Unlading and selling part of her cargo, by a captured vessel, during her detention, does not avoid the policy. *Kingston v. Girard*, 4 Dall. 274, 1 L. Ed. 831; *Hughes v. Union Ins. Co.*, 3 Wheat. 159, 4 L. Ed. 357.

<sup>90</sup>. *Maryland Ins. Co. v. LeRoy*, 7 Cranch 26, 3 L. Ed. 257.

<sup>91</sup>. *The Blaireau*, 2 Cranch 240, 2 L. Ed. 266.

<sup>92</sup>. *Livingston v. Maryland Ins. Co.*, 7 Cranch 506, 3 L. Ed. 421.

<sup>93</sup>. *Maryland Ins. Co. v. Woods*, 6 Cranch 29, 3 L. Ed. 143.

<sup>94</sup>. *Maryland Ins. Co. v. LeRoy*, 7 Cranch 26, 3 L. Ed. 257.

*In Constable v. National Steamship Co.*, 154 U. S. 51, 66, 38 L. Ed. 903, the berthing a ship at a pier other than her own was held not to be a deviation, the facts exhibiting a necessity for a discharge elsewhere than at her own pier.

<sup>95</sup>. *Oliver v. Maryland Ins. Co.*, 7 Cranch 487, 3 L. Ed. 414.

<sup>96</sup>. **Reasonable apprehension of danger.**—*Oliver v. Maryland Ins. Co.*, 7 Cranch 487, 3 L. Ed. 414.

"But in each case, the danger must not be a mere general danger, indefinite in its application and locality. If it were so, in time of war, any delay, however long, in a port, would become excusable, for there would always be danger of capture from the enemy's cruisers. Nor

**What is a reasonable apprehension of danger, is a question of law, to be decided by the court.**<sup>97</sup>

**What Will Excuse a Delay a Question of Law.**—What will excuse a delay, apparently unreasonable, so as to repel the charge of a deviation on that account, must ever be, and ought to be, a question of law, to be decided by a court, under all the circumstances of the particular case. In this way only can anything like certainty be attained.<sup>98</sup>

(2) *Avoiding Capture, Confiscation, etc.*—No acts, justifiable by the usage of the trade, and done by the plaintiffs to avoid confiscation under the laws of Spain, can avoid the policy.<sup>99</sup>

**The stopping and delay at a port, expressly allowed by the policy, to avoid capture, and unlading the cargo, is not a deviation where it produced no delay, no increase of risk, and did not alter the voyage, but the vessel pursued precisely the course marked out for her in the policy.**<sup>1</sup>

4. **OPERATION AND EFFECT.**—Any deviation or change of risk discharges the underwriter from all liability for losses arising thereafter.<sup>2</sup> Where there has been a deviation, the law annuls the contract as to the future, forfeits the premium to the underwriter, and no fact thereof need be returned unless the risk is divisible. Here equity must follow the law.<sup>3</sup> The discharge of underwriters from the liability depends, not upon any supposed increase or diminution of risk, but wholly on the departure of the insured from the contract of insurance.<sup>4</sup> The consequences of such a violation of the contract are immaterial to its legal effect, as it is, per se, a discharge of the underwriters; and the law attaches no importance to the degree, in cases of voluntary deviation.<sup>5</sup>

5. **INTENDED DEVIATION.**—An intended deviation will not vitiate a policy. The vessel or cargo remains covered by the insurance, until she reaches the point of divergence, and actually turns off from the due course of the voyage insured.<sup>6</sup>

is it sufficient that the danger should be extraordinary, for then any considerable increase of the general risk would authorize a similar delay." *Oliver v. Maryland Ins. Co.*, 7 Cranch 487, 493, 3 L. Ed. 414.

97. *Oliver v. Maryland Ins. Co.*, 7 Cranch 487, 3 L. Ed. 414.

98. *Oliver v. Maryland Ins. Co.*, 7 Cranch 487, 493, 3 L. Ed. 414.

"But if it be left to a jury not only to find the facts, which is exclusively within their province, but also to pronounce what is the law resulting from them, it will be next to impossible to form a system of rules by which a merchant may safely regulate his conduct. Nor will it help the matter, to consider it as a mixed question of law and fact, because that gives to the jury a right to disregard the opinion of the court, which they will have no right to do, in case it be considered exclusively as a question of law on which the court alone has a right to decide." *Oliver v. Maryland Ins. Co.*, 7 Cranch 487, 493, 3 L. Ed. 414.

99. *Livingston v. Maryland Ins. Co.*, 7 Cranch 506, 3 L. Ed. 421.

1. *Hughes v. Union Ins. Co.*, 3 Wheat. 159, 164, 4 L. Ed. 357.

2. *Maryland Ins. Co. v. LeRoy*, 7 Cranch 26, 3 L. Ed. 257; *Hughes v. Union Ins. Co.*, 3 Wheat. 159, 165, 4 L. Ed. 357; *Hearne v. Marine Ins. Co.*,

20 Wall. 488, 22 L. Ed. 395; *Kingston v. Girard*, 4 Dall. 274, 1 L. Ed. 831; *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 6 L. Ed. 664; *Oliver v. Maryland Ins. Co.*, 7 Cranch 487, 3 L. Ed. 414; *Maryland Ins. Co. v. Woods*, 6 Cranch 29, 50, 3 L. Ed. 143.

3. *Hearne v. Marine Ins. Co.*, 20 Wall. 488, 493, 22 L. Ed. 395.

Where reformation to include a port not insured in the policy is asked on the ground of usage, but denied and the case treated as one of mere deviation, the court will not decree a return of the premium. *Hearne v. Marine Ins. Co.*, 20 Wall. 488, 22 L. Ed. 395.

4. *Maryland Ins. Co. v. LeRoy*, 7 Cranch 26, 3 L. Ed. 257; *Hughes v. Union Ins. Co.*, 3 Wheat. 159, 165, 4 L. Ed. 357.

5. *Maryland Ins. Co. v. LeRoy*, 7 Cranch 26, 3 L. Ed. 257; *Hughes v. Union Ins. Co.*, 3 Wheat. 159, 165, 4 L. Ed. 357.

6. **Intended deviation.**—*Marine Ins. Co. v. Tucker*, 3 Cranch 357, 2 L. Ed. 466; *Maryland Ins. Co. v. Woods*, 6 Cranch 29, 47, 3 L. Ed. 143.

If a vessel be insured "at and from Kingston, in Jamaica, to Alexandria," and take in a cargo at Kingston, for Baltimore and Alexandria, and sail with intent to go first to Baltimore, and from thence to Alexandria, and before she arrives at the dividing point, is captured;



**F. Voluntary Surrender of Contract by Shipper or Composition.**—A composition by which shippers purchase a release from their obligation to find a cargo from an intermediate port to the port of destination does not operate as a receipt in full to the underwriters for all freight that might by possibility be engaged on the remaining voyage.<sup>7</sup>

### IX. Extent of Loss and Liability Therefor.

**A. In General.**—The amount stated in the policy limits the amount for which the underwriters are liable.<sup>8</sup>

**B. General Average Losses.**—See the title *GENERAL AVERAGE*, vol. 6, p. 549. And see, also, post, "Actual Total Loss," IX, E, 2; "Memorandum Articles," IX, E, 3, b, (2), (k).

**C. Partial or Particular Average Losses**—1. *IN GENERAL.*—A particular average loss is a partial loss as distinguished from a total loss.<sup>9</sup> When a partial loss is sustained by one of the perils insured against, the owner recovers for his partial loss only.<sup>10</sup>

it is a case of intended deviation only, and of noninception of the voyage insured. *Marine Ins. Co. v. Tucker*, 3 Cranch 357, 2 L. Ed. 466.

If a vessel sail to a port within the policy, with intent to go to a port not within the policy, in case the former should be blockaded, this is not a deviation. *Maryland Ins. Co. v. Woods*, 6 Cranch 29, 3 L. Ed. 143.

**7.** *Hughes v. Union Ins. Co.*, 8 Wheat. 294, 308, 5 L. Ed. 520.

Insurance for \$18,000 on vessel, valued at that sum, and \$2,000 on freight, valued at \$12,000, on the ship *Henry*, "at and from Teneriffe, and at and from thence to New York, with liberty to stop at Matanzas; the property warranted American;" the policy was executed in 1807; and in the same year, another policy was made, by the same underwriters, on freight for the same voyage to the amount of \$10,000, and the property was also warranted American, but there was no liberty to stop at Matanzas. The following representation was made to the underwriters, on the part of the plaintiff, who was both owner and master of the ship: "We are to clear out for New Orleans, the property will be under cover of Mr. John Paul, of Baltimore, who goes supercargo on board, yet Mr. Paul will only have part of the cargo to his consignment; there will be three other persons on board that will have the remainder of the cargo in their care; we are to stop at the Matanzas, to know if there are any men-of-war off the Havana." The vessel sailed from Teneriffe, on the 17th of April, 1807, with a cargo belonging to Spanish subjects, but appearing to be the property of John Paul Dumeste, a citizen of the United States, and the same person called John Paul, in the representation; the cargo was shipped under a charter party, executed by the plaintiff and Dumeste, representing New Orleans as the place of destination. The ship arrived at the Havana, on the 7th of July, having put

into Matanzas to avoid British cruisers, and unloaded the cargo, which was there received by the Spanish owners, and the freight, amounting to \$7,000, paid to the plaintiff, who received it, "in full of all demands, for freight or otherwise, under or by virtue of the aforesaid charter party and cargo." At the Havana, the ship took in a new cargo, belonging to merchants in New York, and was lost, with the greater part of the cargo, on the voyage from Havana to New York. An action of debt was brought on the first policy, for the value of the ship and freight; the sum demanded in the writ was \$20,000, but the plaintiff limited his demand at the trial, to \$18,000 on the ship, and \$420 for the freight actually earned on the voyage from Havana to New York. Held, that he was entitled to recover. *Hughes v. Union Ins. Co.*, 8 Wheat. 294, 5 L. Ed. 520.

The voluntary surrender of that contract at the Matanzas did not put an end to the voyage, or to the adventure insured. The receipt of a compensation, by way of compromise, for the \$7,000 freight, stipulated for on the voyage from Havana to New York, was not in fact the receipt of the whole freight on that voyage. And, taking in a cargo at the Havana, not in contemplation under the charter party or representation, did not put an end to the insurance on the vessel, and discharge the underwriters altogether. *Hughes v. Union Ins. Co.*, 8 Wheat. 294, 306, 5 L. Ed. 520.

**8. Extent of liability generally.**—The *Potomac*, 105 U. S. 630, 636, 26 L. Ed. 1194.

**9. Partial or particular average losses.**—*Insurance Co. v. Fogarty*, 19 Wall. 640, 22 L. Ed. 216. See post, "Memorandum Articles," IX, E, 3, b, (2), (k).

**10.** *Marshall v. Delaware Ins. Co.*, 4 Cranch 202, 207, 2 L. Ed. 596.

"The real object of the policy is not to effect a change in property, but to indemnify the insured. Whenever, therefore, only a partial loss is sustained by

2. **TOTAL LOSS OF PART OF CARGO.**—When only a part of the cargo, consisting all of the same kind of articles, is lost, in any way whatever, and the residue arrives in safety at its port of destination, the loss cannot but be partial.<sup>11</sup>

3. **FREIGHT.**—If damage happens either to the ship or cargo, and the voyage is broken up so that no freight can be earned, the owner is entitled to recover for a partial loss where he has earned freight *pro rata itineris*.<sup>12</sup>

**Freight pro rata itineris** is not due, unless the owner of the cargo voluntarily agree to receive it, at a place short of its ultimate destination.<sup>13</sup>

**The expenses incurred for seaman's wages, provisions and extra pilotage**, during an embargo on a vessel, are recoverable, as a partial loss, from the underwriter on freight.<sup>14</sup>

4. **PROFITS.**—The insured cannot recover for the loss of probable profits at the port of destination.<sup>15</sup> The loss of the cargo carries with it the loss of the profits; proof that profits would have arisen on the voyage, in order to recover on a policy on profits, is not required, if the cargo has been lost.<sup>16</sup>

5. **SALVAGE LOSSES.**—If a ship at an intermediate port sells a part of her cargo which has been so injured by perils insured against as that it is unfit to be carried farther, it may be sold at that port and the loss to be adjusted as a salvage loss; that is, the value of the goods stated in the policy is to be paid after deducting the amount realized on the sale of the damaged goods.<sup>17</sup>

6. **REPAIR OF SHIP.**—See ante, "Underwriters' Failure to Furnish Funds for Repair of Ship," VII, E, 14.

7. **MONEY TAKEN UP ON BOTTOMRY BOND.**—In the case of a partial loss, where money is taken up on bottomry bond, to defray the expenditures for repairs, the underwriters have nothing to do with the bottomry bond; but are

one of the perils insured against, the original owner of the property retains it, prosecutes his voyage, and recovers for his partial loss." *Marshall v. Delaware Ins. Co.*, 4 Cranch 202, 207, 2 L. Ed. 596.

11. **Total loss of part of cargo.**—*Biays v. Chesapeake Ins. Co.*, 7 Cranch 415, 418, 3 L. Ed. 389.

**Loss after part of cargo landed.**—A loss of the balance of a cargo after the landing of a part at the port of destination, from a risk insured against, is a partial loss and affected by the warranty against particular average. *Gracie v. Maryland Ins. Co.*, 8 Cranch 75, 84, 3 L. Ed. 492.

12. **Freight.**—*Hugg v. Augusta Ins., etc., Co.*, 7 How. 595, 604, 12 L. Ed. 834. See post, "Freight," IX, E, 3, b, (2), (i).

13. *Caze v. Baltimore Ins. Co.*, 7 Cranch 358, 3 L. Ed. 370.

The underwriters upon a cargo are not liable for freight *pro rata itineris*, to the owner of the vessel, who is also owner of the cargo insured, in a case where the vessel and cargo were captured, the cargo abandoned to the underwriters as a total loss, and by them accepted, the loss paid, the cargo condemned, restored upon appeal, and the proceeds of the cargo paid over to the underwriters. *Caze v. Baltimore Ins. Co.*, 7 Cranch 358, 3 L. Ed. 370.

14. **Freight.**—*Jones v. Insurance Co.*, 4 Dall. 246, 1 L. Ed. 819.

15. **Profits.**—*Smith v. Condry*, 1 How. 28, 35, 11 L. Ed. 35.

16. *Patapsco Ins. Co. v. Coulter*, 3 Pet. 222, 7 L. Ed. 659; *Canada Sugar Ref.*

*Co. v. Insurance Co.*, 175 U. S. 609, 621, 44 L. Ed. 292.

17. **Salvage losses.**—*London Assur. v. Companhia De Moagens*, 167 U. S. 149, 172, 42 L. Ed. 113.

"Mr. Parsons (2 Marine Insurance, 411) says that if a ship at an intermediate port finds a part of its cargo so injured by sea damage that it is unfit to be carried on, it may be sold at that port, and the loss adjusted as a salvage loss. Mr. Phillips (2 Insurance, § 1480) says, speaking of an adjustment as upon a salvage loss: 'The underwriter is liable for such an adjustment of a particular average only in cases where the sale at an intermediate port is obviously expedient, and made on account of damage by the perils insured against; where, if the subject were forwarded to port of destination, it would be greatly diminished in value or be of no value, on arriving there.'" *London Assur. v. Companhia De Moagens*, 167 U. S. 149, 174, 42 L. Ed. 113.

The whole cargo was sold by the assured, the cargo owner, in an intermediate port where the voyage was broken up by common consent, and where the sale was for the benefit and with the consent of all concerned, and for the purpose of preventing greater loss. It was held that under such circumstances the rule of adjustment is the same as where a part of the cargo has been damaged and necessarily sold at an intermediate port. Such port cannot and ought not to be regarded as the port of destination for any purpose. It was a



simply bound to pay the partial loss, including their share of the extra expenses of obtaining the money in that mode, as a part of the loss.<sup>18</sup>

**D. Determination of Amount for Which Insurer Liable**—1. **VALUATION OF PROPERTY INSURED**—a. *Valued Policy*.—**Valuation of Insurance**.—An agreed valuation of a vessel in a policy of marine insurance, will in the absence of fraud, or mistake, be the measure of recovery in case of a loss,<sup>19</sup> and such valuation will not be set aside for overvaluation.<sup>20</sup>

b. *Open or Running Policies*—(1) *In General*.—Under open or running policies the assured is entitled to prove and recover the actual value at the time of the commencement of the risk. And although evidence of the cost price is admissible, to show the real value, it is not conclusive against the insured.<sup>21</sup>

(2) *Ship and Cargo*.—In an action on an open policy on a ship or cargo, the insured is entitled to prove and recover the actual value of the vessel or cargo at the time of the commencement of the risk and is not limited to the cost price.<sup>22</sup>

(3) *Freight*.—See ante, "Freight," IV, C, 7.

2. **MEASURE AND COMPUTATION OF DAMAGES**—a. *Damage on Vessel*—(1) *In General*.—The damages which the owner of the insured vessel is entitled to re-

port of refuge, where the whole cargo was sold instead of but a part, and it was sold in order to make the loss as small as possible. *London Assur. v. Companhia De Moagens*, 167 U. S. 149, 173, 42 L. Ed. 113.

The voyage of a ship carrying a cargo of wheat, was not broken up or the cargo delivered to its owners for their sole benefit but a sale was in fact made at an intermediate port for the mutual benefit of all. The peculiar law of the port of destination in relation to the importation of damaged wheat rendered it clear that to carry it through would result in a greater loss to the insurers than to sell the wheat in the intermediate port, and that to terminate the voyage was to the interest of the insurers as well as the owners. The whole cargo was sold. It was held that a loss under such facts should be adjusted as a salvage loss. *London Assur. v. Companhia De Moagens*, 167 U. S. 149, 173, 42 L. Ed. 113.

18. **Money taken up on bottomry bond**.—*Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 379, 9 L. Ed. 1123.

There is no principle of law which makes the underwriters liable, in the case of a merely partial loss of the ship, if money is taken up on bottomry for the necessary repairs and expenditures, and which makes it the duty of the underwriters to deliver the ship from the bottomry bond, to the extent of their liability for the expenditures; and that if they do not, and if the vessel is sold under the bottomry bond, they are liable, not only for the partial loss, but for all other losses to the owner, for their neglect. *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 379, 9 L. Ed. 1123.

If, to meet the expenditures for repairs, the master is compelled to take up money on bottomry, and thereby an additional premium becomes payable, that constitutes a part of the loss, for which the underwriters are liable; but in cases of

partial loss, the money is not taken up on account of the underwriters, but of the owner; and they become liable for the loss, whether the bottomry bond ever becomes due and payable, or not. *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 379, 9 L. Ed. 1123.

19. **Valued policy**.—*Hodgson v. Marine Ins. Co.*, 5 Cranch 100, 110, 3 L. Ed. 48.

**Where there are both valued and open policies**.—When a cargo is insured by diverse policies, in some of which the rate of exchange is fixed, there being a prior open policy on the cargo at which the prime cost of the cargo shall be valued; in ascertaining the amount of the interest of the assured, upon settlement of those policies in which the rate of exchange is fixed, the whole cargo is to be valued at that rate of exchange, without regard to the rate of exchange by which the value may have been ascertained in the other policies. *Pleasants v. Maryland Ins. Co.*, 8 Cranch 55, 3 L. Ed. 486.

20. **Overvaluation**.—*Hodgson v. Marine Ins. Co.*, 5 Cranch 100, 110, 3 L. Ed. 48.

**Overvaluation no ground for mitigation of damages**.—Overvaluation in a valued policy of the vessel insured is no ground for mitigation of damages in an action on the policy. In the absence of fraud or misrepresentation as to the value of the vessel, the policy is conclusive although the value of the vessel is less than that stated in the policy. *Marine Ins. Co. v. Hodgson*, 6 Cranch 206, 217, 3 L. Ed. 200.

**Parol evidence**.—In an action upon a valued policy, it is not competent for the underwriters to give parol evidence that the real value of the subject insured is different from that stated in the policy. *Marine Ins. Co. v. Hodgson*, 6 Cranch 206, 3 L. Ed. 200.

21. **Open or running policies**.—*Snell v. Delaware Ins. Co.*, 4 Dall. 430, 1 L. Ed. 896.

22. **Ship and cargo**.—*Snell v. Delaware Ins. Co.*, 4 Dall. 430, 1 L. Ed. 896.



cover are estimated in the same manner as in other suits of like nature for injuries to personal property, and the owner, as the suffering party, is not limited to compensation for the immediate effects of the injury inflicted, but the claim for compensation may extend to loss of freight, necessary expense incurred in making repairs, and unavowed detention.<sup>23</sup>

**Time and Place Where Value Ascertained.**—The rule laid down in the books is general, that the value of the vessel, at the time of the accident, is the true basis of calculation; and if so, it necessarily follows, that it must be the value at the place where the accident occurs. The sale is not conclusive with respect to such value; the question is open for other evidence, if any suspicion of fraud or misconduct rest upon the transaction.<sup>24</sup>

(2) *Deduction of New for Old.*—In cases of a partial loss, a deduction of "one-third new for old," from the repairs, is allowed.<sup>25</sup>

b. *Damage on Goods*—(1) *In General.*—The value of the goods at the place of shipment is the measure of compensation. It is the actual damage sustained by the party at the time and place of the injury that is the measure of damage.<sup>26</sup>

(2) *Partial Loss.*—The rule for computing a technical particular average loss of goods is that the damaged goods upon reaching their destination must be at once sold for the best price that can be had. It is then to be determined what the goods would have been worth in the same market had they been sound, and the difference between the sound value and the proceeds of the sale of the damaged articles gives the ratio of deterioration, and the underwriter is to pay this ratio or per cent of loss on the policy value.<sup>27</sup>

**E. Total Loss**—1. *CLASSIFICATION.*—A total loss may be real or legal where the loss is real; a controversy can only respect the fact.<sup>28</sup>

2. *ACTUAL TOTAL LOSS*—a. *What Constitutes.*—It is not necessary to a total loss that there should be an absolute extinction or destruction of the thing insured, so that nothing of it can be delivered at the point of destination.<sup>29</sup> A destruction in specie, so that while some of its component elements or parts may remain, while the thing which was insured, in the character or description by which it was insured, is destroyed, is a total loss.<sup>30</sup>

**Memorandum Articles.**—See post, "Protection from Partial Loss and Liability for Total Loss," IX, F, 3.

**23. Damage on vessel.**—The *Baltimore*, 8 Wall. 377, 385, 19 L. Ed. 463; The *Ann Caroline*, 2 Wall. 538, 17 L. Ed. 833.

**24. Time and place where value ascertained.**—*Patapsco Ins. Co. v. Southgate*, 5 Pet. 604, 8 L. Ed. 243.

"Strictly speaking the rule is the value of the ship antecedent to the injuries received, but as that requirement can seldom be met, the usual resort is her value at the port of departure, making such deduction for deterioration as appears to be just and reasonable." *Star of Hope*, 9 Wall. 203, 235, 19 L. Ed. 638; *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604, 8 L. Ed. 243.

**25. Deduction off new for old.**—*Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 398, 9 L. Ed. 1123; *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604, 8 L. Ed. 243. See, also, *The Atlas*, 93 U. S. 302, 310, 23 L. Ed. 863.

"Repairs, in consequence of a collision, may enhance the value of the vessel and render her worth more than she was prior to the accident, and in that state of the case the rule in insurance cases is that one-third of the value of the new

material is deducted, because the new material is more valuable than the old, but the rule is not so where the repairs are required in consequence of a culpable collision." *The Baltimore*, 8 Wall. 377, 386, 19 L. Ed. 463.

**26. Damage on goods.**—*Smith v. Condry*, 1 How. 28, 35, 11 L. Ed. 35.

**27. Partial loss.**—*London Assur. v. Companhia De Moagens*, 167 U. S. 149, 171, 42 L. Ed. 113.

**28. Classification.**—*Rhineland v. Insurance Co.*, 4 Cranch 29, 2 L. Ed. 540.

**29. Actual total loss.**—*Insurance Co. v. Fogarty*, 19 Wall. 640, 22 L. Ed. 216.

"Utterly lost."—The expression "utterly lost" is commented upon in *Insurance Co. v. Gossler*, 96 U. S. 645, 656, 24 L. Ed. 863.

**30. Insurance Co. v. Fogarty**, 19 Wall. 640, 22 L. Ed. 216.

Hence, where machinery was insured, to wit, the parts of a sugar-packing machine, and no part of the same was delivered in a condition capable of use, it is a total loss, though more than half the pieces in number and value may be delivered, and would have some value as old iron. In-

b. *Freight*.—Where the cargo never arrives at the port of destination, there is an actually total loss of freight.<sup>31</sup>

c. *Profits*.—There is a total loss of profits, where there is an actual total loss of the cargo or an abandonment of the same to the underwriters as upon a total loss.<sup>32</sup>

3. **TECHNICAL OR CONSTRUCTIVE TOTAL LOSS**—a. *Definition and Nature*.—A technical or constructive total loss arises in cases where the loss, though not actually total, is of such character that the insured is entitled to treat it as total and abandon to the underwriter.<sup>33</sup>

b. *Right to Abandon*—(1) *In General*.—Where there is a technical or legal total loss, the assured may abandon to the underwriter.<sup>34</sup>

(2) *When Assured May Treat Loss as Total and Abandon*—(a) *American Rule*—aa. *Statement of Rule*.—Under the American rule the insured may treat a loss of the ship or cargo as total, where either is damaged during the course of the voyage by any of the perils insured against, to an amount exceeding fifty per cent of their value.<sup>35</sup>

bb. *Peril Insured against*.—To constitute a right to abandon, there must have existed a (technical) total loss, occasioned by one of the perils insured

insurance Co. v. Fogarty, 19 Wall. 640, 22 L. Ed. 216; Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co., 179 U. S. 1, 14, 45 L. Ed. 49.

31. **Freight**.—Caze v. Baltimore Ins. Co., 7 Cranch 358, 362, 3 L. Ed. 370. See post, "Freight," IX, E, 3, b, (2), (i).

32. **Profits**.—Canada Sugar Ref. Co. v. Insurance Co., 175 U. S. 609, 625, 44 L. Ed. 292.

Where none of the cargo insured ever came to the assured, the consignee, in the ordinary course of the voyage, or through any delivery to him as consignee by the carrier, but only through a delivery by the insurer of the cargo, after a practical abandonment to the latter, and through a settlement by the insurer as upon a total loss, in which a part of the cargo received by the assured upon an equitable basis in part payment, and as the equivalent of the value in cash, as any other property might have been received; the assured is entitled to recover the amount of the profits as valued in the policy, although the insurer of profits took no part in the settlement between the cargo insurers and the assured. The insurer of profits sought to invoke the doctrine of *res inter alios*, and the court said: "They had knowledge of the prior insurance, and were bound to know that, in case of disaster, there was the right to abandon. There is evidence that they were informed of what was going on between the other parties concerned. They do not impugn, by allegation or evidence, the fairness and good faith of that transaction, nor do they claim that it was conducted with a view to prejudice them. They plant their defense solely on the proposition of fact that a sound portion of the cargo reached the port of destination in due course, and was there delivered" to the assured as consignee—a proposition of fact, not sustained but refuted by the evidence. Canada Sugar

Ref. Co. v. Insurance Co., 175 U. S. 609, 625, 44 L. Ed. 292.

33. **Definition and nature**.—Ward v. Peck, 18 How. 267, 268, 15 L. Ed. 383.

34. **Right to abandon**.—Rhineland v. Insurance Co., 4 Cranch 29, 45, 2 L. Ed. 540; Ward v. Peck, 18 How. 267, 268, 15 L. E. 383.

"The right to abandon is founded on an actual or legal total loss." Marshall v. Delaware Ins. Co., 4 Cranch 202, 2 L. Ed. 596.

If full compensation could only be demanded, where there was an actual total loss, an abandonment could only take place where there was nothing to abandon. Rhineland v. Insurance Co., 4 Cranch 29, 45, 2 L. Ed. 540.

35. **American rule**.—Patapsco Ins. Co. v. Southgate, 5 Pet. 604, 8 L. Ed. 243; Bradlie v. Maryland Ins. Co., 12 Pet. 378, 9 L. Ed. 1123; Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co., 179 U. S. 1, 45 L. Ed. 49; Ward v. Peck, 18 How. 267, 268, 15 L. Ed. 383; Orient Ins. Co. v. Adams, 123 U. S. 67, 31 L. Ed. 63; Marcadier v. Chesapeake Ins. Co., 8 Cranch 39, 3 L. Ed. 481.

Damages to a vessel, by any of the perils of the sea, on the voyage insured, which could not be repaired at the port to which such vessel proceeded after the injury, without an expenditure of money to an amount exceeding half the value of the vessel at that port, after such repairs, constitute a total loss. Patapsco Ins. Co. v. Southgate, 5 Pet. 604, 8 L. Ed. 243.

**Cargo**.—A damage of ordinary goods exceeding half their value entitles the insured to recover for a constructive total loss. But this rule does not extend to a cargo of memorandum articles in respect to which the exception of particular average excludes a constructive total loss. Marcadier v. Chesapeake Ins. Co., 8 Cranch 39, 3 L. Ed. 481; Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co., 179

against;<sup>36</sup> and it is not sufficient, that the voyage be abandoned for fear of the operation of the peril.<sup>37</sup>

cc. *Removal of Peril before Loss*.—If any peril acts upon the subject, yet if it be removed, before any loss takes place, and the voyage be not thereby broken up, but is, or may be resumed, the assured cannot abandon for a total loss.<sup>38</sup>

dd. *Certainty or High Probability of Loss*.—The right of abandonment does not depend upon the certainty, but upon the high probability of a total loss, either of the property, or of the voyage, or both. The insured is to act, not upon certainties, but upon probabilities; and if the facts present a case of extreme hazard, and of probable expense, exceeding half the value of the ship, the insured may abandon; though it should happen, that she was afterwards recovered at a less expense.<sup>39</sup>

ee. *Mode of Ascertaining Extent of Loss*.—In respect to the mode of ascertaining the value of the ship, and, of course, whether she is injured to the amount of half her value; the true basis of the valuation is the value of the ship, at the time of the disaster;<sup>40</sup> if, after the damage is or might be repaired, the ship is not, or would not, be worth, at the place of the repairs, double the cost of the repairs, it is to be treated as a technical total loss.<sup>41</sup>

The estimated cost of repairs, and not what the actual cost may subsequently prove to be, determines the right to abandon.<sup>42</sup>

U. S. 1, 11, 45 L. Ed. 49. See post, "Memorandum Articles," IX, E, 3, b, (2), (k).

36. *Peril insured against*.—*Rhineland v. Insurance Co.*, 4 Cranch 29, 42, 2 L. Ed. 540.

"If the loss was the result of a peril not insured against, there was no right to abandon." *Richelieu, etc., Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 431, 34 L. Ed. 398.

"Where a technical total loss is asserted as a ground of recovery, it is not sufficient that the voyage has been entirely frustrated and lost; but the loss must be occasioned by some peril actually insured against. The peril must act directly, and not circuitously, upon the subject of the insurance. It must be an immediate peril, and the loss the proper consequence of it." *Smith v. Universal Ins. Co.*, 6 Wheat. 176, 185, 5 L. Ed. 235.

37. *Smith v. Universal Ins. Co.*, 6 Wheat. 176, 5 L. Ed. 235.

38. *Removal of peril before loss*.—*Smith v. Universal Ins. Co.*, 6 Wheat. 176, 185, 5 L. Ed. 235.

39. *Certainty or high probability of loss*.—*Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 397, 9 L. Ed. 1123; *Orient Ins. Co. v. Adams*, 123 U. S. 67, 76, 31 L. Ed. 63.

"A technical total loss originates in the danger of a real total loss." *Marshall v. Delaware Ins. Co.*, 4 Cranch 202, 208, 2 L. Ed. 596.

40. *Mode of ascertaining extent of loss*.—*Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 9 L. Ed. 1123; *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604, 8 L. Ed. 243.

"It follows, from this doctrine, that the valuation of the vessel in the policy, or the value at the home port, or in the general market of other ports, constitutes no ingredient in ascertaining whether the

injury by the disaster is more than one-half the value of the vessel, or not." *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 398, 9 L. Ed. 1123.

"The purpose for which the value is to be ascertained is to determine the right to abandon." *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604, 620, 8 L. Ed. 243.

"The value at the time the injury happens must necessarily be the rule by which" the right to abandon is to be decided. *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604, 620, 8 L. Ed. 243.

*Salvage*.—In determining whether or not a vessel has been impaired to more than 50 per cent of her value, the actual amount of salvage decreed may be considered. *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 9 L. Ed. 1123.

*One-third new for old*.—The ordinary deduction, in cases of a partial loss, of one-third new for old from the repairs, is inapplicable to cases of a technical total loss, by an injury exceeding one-half on the value of the vessel. That rule supposes the vessel to be repaired and returned to the owner, who receives a correspondent benefit from the repairs, beyond his loss, to the amount of the one-third. But in the case of a total loss, the owner receives no such benefit; the vessel never returns to him, but is transferred to the underwriters. If the actual cost of the repairs exceeds one-half of her value, after the repairs are made. *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 398, 9 L. Ed. 1123. See *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604, 8 L. Ed. 243.

41. *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 398, 9 L. Ed. 1123; *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604, 8 L. Ed. 243.

42. *Estimated cost*.—*Orient Ins. Co. v. Adams*, 123 U. S. 67, 74, 31 L. Ed. 63;



(b) *English Rule*.—There is a material difference between the English and American rule to which some of the cases allude.<sup>43</sup>

(c) *Loss or Breaking Up of Voyage*.—If the voyage is wholly and justifiably lost or broken up, the insured may abandon.<sup>44</sup> The loss of the voyage is no ground of abandonment, where the ship is not damaged to an extent which permanently disables her to perform it.<sup>45</sup> Upon an insurance on a ship for a voyage, a total loss of the cargo for the voyage, is not a total loss of the ship for the voyage.<sup>46</sup>

**Termination through Fear**.—If, from fear, founded on misrepresentation, the voyage be broken up, the insurers on freight are not liable.<sup>47</sup>

**Question of Law**.—The questions whether the voyage be broken up, and whether the master was justified in returning, are questions of law, and the finding thereupon by a jury, is not to be regarded by the court.<sup>48</sup>

**Loss of Possession by Lienor**.—An assured who has a mere lien upon a cargo may abandon for a total loss upon losing his possession of the property.<sup>49</sup>

(d) *Grounding, Stranding, Wreck, etc.*—Grounding or stranding gives the insured a right to abandon where the recovery and repairs of the vessel were impracticable at the time of the abandonment, or where the expenditures which must be incurred to save and restore the vessel, amount to a constructive total loss.<sup>50</sup>

*Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 397, 9 L. Ed. 1123. See post, "Right as Depending upon Existing Facts," IX, H, 2, b.

**43. English rule**.—See Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co., 179 U. S. 1, 16, 45 L. Ed. 49; *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 6 L. Ed. 664.

**44. Loss or breaking up of voyage**.—*Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 6 L. Ed. 664; *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 9 L. Ed. 1123; *Symonds v. Union Ins. Co.*, 4 Dall. 417, 1 L. Ed. 890.

"The loss of the voyage by capture, shipwreck or otherwise, may be treated as a total loss." *Morean v. United States Ins. Co.*, 1 Wheat. 219, 225, 4 L. Ed. 75. See ante, "Blockade, Capture, Embargo, etc.," X, E, 3, b, (2), (c), bb.

Although the cargo insured be not damaged to one-half its value, the assured may abandon, and claim for a total loss, when the voyage is lost or broken up. *Fuller v. McCall*, 2 Dall. 219, 1 L. Ed. 356.

Where the cargo, in the course of the outward voyage, and before its termination, was permanently separated from the ship, by the total wreck of the latter, and the cargo being perishable in its nature, though not injured to one-half its value, it became necessary to sell it, the further prosecution of the voyage with the same ship or cargo became impracticable; held, that this was a technical total loss, on account of the breaking up of the voyage. *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 6 L. Ed. 664.

**45.** *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 109, 9 L. Ed. 1123; *Smith v. Universal Ins. Co.*, 6 Wheat. 176, 5 L. Ed. 235; *Alexander v. Baltimore Ins. Co.*, 4 Cranch 370, 2 L. Ed. 650.

The insurers do not undertake that the voyage shall be performed, without de-

lay, or that the perils insured against shall not occur. They undertake only for losses sustained by those perils; and if any peril does act upon the subject, yet, if it be removed, before any loss takes place, and the voyage be not thereby broken up, but is, or may be, resumed, the assured cannot abandon for a total loss. *Smith v. Universal Ins. Co.*, 6 Wheat. 176, 5 L. Ed. 235; *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 402, 9 L. Ed. 1123.

In *Alexander v. Baltimore Ins. Co.*, 4 Cranch 370, 2 L. Ed. 650, it was decided that an insurance on a ship for a voyage was not to be treated as an insurance on the ship and the voyage, or as an undertaking that she shall actually perform the voyage; but only, that notwithstanding any of the perils insured against, she shall be of ability to perform the voyage; and that the underwriters will pay any damage sustained by her, from those perils, during the voyage." *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 400, 9 L. Ed. 1123.

"The underwriter does not warrant that the vessel shall have a right to trade at the port of destination; but only that notwithstanding the perils insured against, the vessel shall proceed to such port." *Smith v. Universal Ins. Co.*, 6 Wheat. 176, 186, 5 L. Ed. 235.

**46.** *Alexander v. Baltimore Ins. Co.*, 4 Cranch 370, 2 L. Ed. 650; *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 400, 9 L. Ed. 1123.

**47. Termination through fear**.—*King v. Delaware Ins. Co.*, 6 Cranch 71, 3 L. Ed. 155.

**48. Question of law**.—*King v. Delaware Ins. Co.*, 6 Cranch 71, 3 L. Ed. 155.

**49. Loss of possession by lienor**.—*Russell v. Union Ins. Co.*, 4 Dall. 421, 1 L. Ed. 892.

**50. Grounding, stranding, wreck, etc.**—*Orient Ins. Co. v. Adams*, 123 U. S. 67,

(e) *Deprivation of Right to Conduct Voyage*—aa. *In General*.—There are situations in which the delay of the voyage, the deprivation of the right to conduct it, produce inconveniences to the assured, for the calculation of which the law affords, and can afford, no standard. In such cases, there is for the time a total loss; and in this state of things, the assured may abandon to the underwriter.<sup>51</sup>

bb. *Blockade, Capture, Embargo, etc.*—**Blockade**.—Where a vessel is prevented, by a blockade from entering any of the enumerated ports, the voyage is broken up and the assured may abandon and claim as for a total loss.<sup>52</sup> An embargo, or detention by a foreign friendly power, constitutes a total loss, and warrants as immediate abandonment.<sup>53</sup>

**Capture or seizure** authorizes abandonment,<sup>54</sup> but fears of loss by reason

75, 31 L. Ed. 63; *Bradley v. Maryland Ins. Co.*, 12 Pet. 378, 398, 9 L. Ed. 1123.

In determining whether the injuries to a stranded vessel (from the perils of the river) were to the extent of 50 per cent. of her agreed value, the jury should take into consideration the place where the vessel lay and the uncertainty as to when (if at all) a rise would come to float her off, and all the other circumstances in the case. *Orient Ins. Co. v. Adams*, 123 U. S. 67, 74, 31 L. Ed. 63.

A policy of insurance provided that there shall be "no abandonment as for a total loss," unless the injuries sustained be equivalent to 50 per cent. of the agreed value in the policy. An abandonment of the vessel as for a total loss was made in good faith at a time when it was impracticable to recover and repair the vessel, and when the damage was equivalent to 50 per cent. of the agreed value when the attendant circumstances were taken into consideration. By a subsequent change of circumstances it became practicable to float the vessel and the loss was reduced below 50 per cent. of the agreed value. It was held that the abandonment was a valid abandonment within the terms of the policy. *Orient Ins. Co. v. Adams*, 123 U. S. 67, 74, 31 L. Ed. 63.

**51. Deprivation of right to conduct voyage.**—*Rhineland v. Insurance Co.*, 4 Cranch 29, 45, 2 L. Ed. 540.

**52. Blockade.**—*Symonds v. Union Ins. Co.*, 4 Dall. 417, 1 L. Ed. 890.

The assured effected the insurance on a voyage "at and from New York to Cape Francois, with liberty to proceed to another port should Cape Francois be blockaded." The vessel sailed from New York with instructions "to proceed to Cape Francois; and if she could not enter from blockade or other cause, to steer towards the Bite of Leogane, and enter either into Port-au-Prince or some other port in the Bite." The vessel was prevented from entering that port, or any other port designated in the instructions given to the master by a blockading squadron. The master was forced to go to another place where he sold the goods and invested in another cargo with which the ship returned to New York. It was held that the insured was entitled to abandon and

recover as for a total loss. *Symonds v. Union Ins. Co.*, 4 Dall. 417, 1 L. Ed. 890.

**53. Embargo.**—*Marshall v. Delaware Ins. Co.*, 4 Cranch 202, 207, 2 L. Ed. 596; *Rhineland v. Insurance Co.*, 4 Cranch 29, 42, 2 L. Ed. 540.

**54. Livingston v. Maryland Ins. Co.**, 7 Cranch 506, 540, 3 L. Ed. 421; *Story v. Strettel*, 1 Dall. 10, 1 L. Ed. 15.

A capture, by one belligerent from another, constitutes, in the technical sense of the word, a total loss, and gives an immediate right to the assured to abandon to the insurers, although the vessel may afterwards be recaptured and restored. *Rhineland v. Insurance Co.*, 4 Cranch 29, 42, 2 L. Ed. 540; *Marshall v. Delaware Ins. Co.*, 4 Cranch 202, 2 L. Ed. 596.

A capture of a neutral or prize, by a belligerent, is a total loss, and entitles the insured to abandon. *Rhineland v. Insurance Co.*, 4 Cranch 29, 2 L. Ed. 540; *Marshall v. Delaware Ins. Co.*, 4 Cranch 202, 2 L. Ed. 596; *Dutilh v. Gatliff*, 4 Dall. 446, 1 L. Ed. 903.

In the case of *Rhineland v. Insurance Co.*, 4 Cranch 29, 2 L. Ed. 540, it was said, that "Where a belligerent has taken full possession of a vessel as prize, and continues that possession, to the time of the abandonment, there exists, in point of law, a total loss." The court, in delivering this opinion, understood itself to require, that the continuance of the possession up to the time of the abandonment, or a technical total loss incurred, notwithstanding the restoration, was necessary to justify a recovery as for a total loss." *Marshall v. Delaware Ins. Co.*, 4 Cranch 202, 206, 2 L. Ed. 596.

A neutral vessel captured and libelled as a prize of war may be abandoned as for a total loss, although regularly acquitted subsequent to the abandonment. *Dutilh v. Gatliff*, 4 Dall. 446, 1 L. Ed. 903.

Where a vessel having been captured is abandoned to the underwriters, the assured can recover as for a total loss, although she is subsequently released and arrives in port before commencement of the suit. *Dutilh v. Gatliff*, 4 Dall. 446, 1 L. Ed. 903.

A neutral vessel was captured and libelled as a prize. A decree of restitution was afterwards entered, but before actual

of capture or seizure and confiscation of the property is not ground for abandonment.<sup>55</sup>

**Vessel Captured and Recaptured.**—It depends upon the particular circumstances of the case, whether, if the vessel be captured and recaptured, the loss shall be determined total or partial.<sup>56</sup>

**Effect of Decree of Restitution.**—The technical total loss arising from capture, ceases with a final decree of restitution, although that decree may not have been executed, at the time of the offer to abandon.<sup>57</sup>

(f) *Sale by Master.*—A sale of the insured property by the master, bona fide, for the benefit of all concerned, is a constructive total loss, where there was extreme necessity for making the sale.<sup>58</sup>

restitution, and without knowledge of the decree the vessel was abandoned to the underwriters. The insurance was effected and the abandonment made by the agent of the owners, one of whom was with her when the decree of restitution was made. It was held that the assured could recover as for a total loss. *Dutilh v. Gatliff*, 4 Dall. 446, 1 L. Ed. 903.

**55. Fears of capture.**—*Smith v. Universal Ins. Co.*, 6 Wheat. 176, 185, 5 L. Ed. 235. See, also, *King v. Delaware Ins. Co.*, 6 Cranch 71, 3 L. Ed. 155.

The fact that the voyage was abandoned by the master quia timebat, and not because there was any actual direct restraint, which prevented the vessel from proceeding to the port of destination, does not operate to the total destruction of the thing insured. *Smith v. Universal Ins. Co.*, 6 Wheat. 176, 185, 5 L. Ed. 235.

Insurance on munitions of war, laden on board a neutral vessel, on a voyage from New York, to and at a port or ports, place or places in the gulf of Mexico, from the Balize to Campeachy, both inclusive, and from either, back to New York, etc., with a memorandum, that the insurers should be free from any loss arising from illicit or prohibited trade: the goods insured were prohibited from being imported into the ports of New Spain, in possession of the royalists, by the laws of Old Spain, but were permitted to be introduced into such ports as were in possession of the insurgents: the vessel and cargo arrived off a place, in possession of the patriot general Mina, and the master made an agreement to sell the cargo to him, deliverable, from time to time, as he should want it, at St. Ander; but before the cargo could be delivered, the vessel was chased off by Spanish armed ships, and after making several attempts to return, was compelled to proceed to the Balize for repairs; after which, she again approached the coast, but found it still in possession of the royalists, General Mina having retired into the interior; the objects of the voyage being thus defeated, the vessel returned to New York, with the original cargo on board; and the insured then abandoned to the underwriters, not having before had information of the breaking up of the voyage: Held, that the

insured were not entitled to recover as for a total loss of the voyage. *Smith v. Universal Ins. Co.*, 6 Wheat. 176, 5 L. Ed. 235.

**56. Vessel captured and recaptured.**—*Marine Ins. Co. v. Tucker*, 3 Cranch 357, 2 L. Ed. 466.

If a vessel be captured, during a voyage, and afterwards be recaptured, and performs, or may perform it, there can be no abandonment, after the recapture, for a technical total loss. *Smith v. Universal Ins. Co.*, 6 Wheat. 176, 185, 5 L. Ed. 235.

**Cargo insured by surety.**—If the cargo, after a surety for the payment of the value thereof, in case of condemnation by a foreign court, to whom it had been delivered for indemnity, and who effected an insurance thereon; be taken out of the possession of such surety, by a decree of restitution upon recapture, he may abandon as for a total loss. *Russell v. Union Ins. Co.*, 4 Dall. 421, 1 L. Ed. 892.

**57. Effect of restitution.**—*Marshall v. Delaware Ins. Co.*, 4 Cranch 202, 2 L. Ed. 596.

"It often happens that the cargo of a neutral vessel is condemned as enemy property, and the vessel itself is discharged. Not an instance is recollected, in which the right to abandon in such a case, after the vessel was restored, has been claimed." *Alexander v. Baltimore Ins. Co.*, 4 Cranch 370, 376, 2 L. Ed. 650.

**Where an agent insures for his own protection**, although in the name of his principal, and there is a capture and restitution, there can be no recovery for a total loss, the principal having accepted the property not lost or damaged. In such case, the loss is but a partial one. *Donath v. Insurance Co.*, 4 Dall. 463, 1 L. Ed. 910.

**58. Sale by master.**—*Patapsco Ins. Co. v. Southgate*, 5 Pet. 604, 8 L. Ed. 243; *Ward v. Peck*, 18 How. 267, 15 L. Ed. 383; *Hugg v. Augusta Ins., etc., Co.*, 7 How. 595, 12 L. Ed. 834; *Marine Ins. Co. v. Tucker*, 3 Cranch 357, 2 L. Ed. 466.

As a general proposition, there can be no doubt that the injury to the vessel may be so great as to justify a sale by the master; there must be this implied authority in the master, from the nature of the case; he, from necessity, becomes



**Necessity for Sale and Good Faith of Master.**—There must be a necessity for a sale and good faith in the master in making it; nothing else can justify a sale.<sup>59</sup>

**Repairs or Transshipment Impracticable.**—Where the vessel cannot be repaired at the port of distress in a reasonable time, and at a reasonable expense, and another vessel cannot be procured upon reasonable terms, the cargo may be sold by the master.<sup>60</sup>

(g) *Retardation of Voyage*—aa. *In General.*—The mere retardation of the voyage by any of the perils insured against, not amounting to, nor producing, a total incapacity of the ship eventually to perform the voyage, cannot be admitted to constitute a technical total loss, which will authorize an abandonment.<sup>61</sup>

the agent of both parties, and is bound in good faith to act for the benefit of all concerned; and the underwriter must answer for the consequences, because it is within his contract of indemnity. *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604, 605, 8 L. Ed. 243.

**59. Necessity for sale and good faith of master.**—*Ward v. Peck*, 18 How. 267, 268, 15 L. Ed. 383; *Hugg v. Augusta Ins., etc., Co.*, 7 How. 595, 12 L. Ed. 834.

There must be a necessity for a sale of the vessel, and good faith in the master in making it and the necessity is not to be inferred, from the fact of the sale in good faith; but must be determined from the circumstances. The professional skill, the due and proper diligence of the master, his opinion of the necessity, and the benefit that would result from the sale to all concerned, would not justify it; unless the circumstances under which the vessel was placed rendered the sale necessary, in the opinion of the jury. *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604, 605, 8 L. Ed. 243.

"All the circumstances must be submitted to the jury, and they must find both the necessity and good faith of the master, in order to justify the sale. Necessity and good faith must concur." *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604, 621, 8 L. Ed. 243.

**Barratrous sale.**—See ante, "Barratry," VII, E, 16.

**60. Repairs or transshipment impracticable.**—*Hugg v. Augusta Ins., etc., Co.*, 7 How. 595, 12 L. Ed. 834.

But although it is the duty of the owner of the vessel, either to repair his own or to procure another at the port of distress to carry on the cargo, yet, if it should be made to appear that the repairs or procurement of another vessel would necessarily produce such a retardation of the voyage as would, in all probability, occasion a destruction of the article, in specie, before it could arrive at the port of destination, or, from its damaged condition, it could not be reshipped in time, consistently with the health of the crew or safety of the vessel, or would not be in a fit condition, from pestilential effluvia or otherwise, to be carried on, it then became the duty of the master to sell the goods for the benefit of whom it might

concern. *Hugg v. Augusta Ins., etc., Co.*, 7 How. 595, 12 L. Ed. 834.

**61. Retardation of voyage.**—*Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 9 L. Ed. 1123.

"A retardation for the purpose of repairing damages from the perils insured against, that damage not exceeding one moiety of the value of the ship, falls directly within this doctrine. Under such circumstances, if the ship can be repaired, and is repaired, and is thus capable of performing the voyage, there is no ground of abandonment, founded upon the consideration, that the voyage may not be worth pursuing, for the interest of the shipowner, or that the cargo has been injured, so that it is not worth transporting further on the voyage; for the loss of the cargo for the voyage has nothing to do with an insurance upon the ship for the voyage. This was expressly held by this court, in the case of *Alexander v. Baltimore Ins. Co.*, 4 Cranch 370, 2 L. Ed. 650." *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 400, 9 L. Ed. 1123.

"An insurance on time differs, as to this point, in no essential manner whatsoever, from an insurance upon a particular voyage, except in this, that in the latter case the insurance is upon and for a specific voyage described in the policy; whereas, a policy on time insures no specific voyage, but it covers any voyage or voyages whatsoever, undertaken within, and not exceeding in point of duration the limited period for which the insurance is made. But an insurance on time by no means contains any undertaking on the part of the underwriters, that any particular voyage undertaken by the assured, within the prescribed period, shall be performed before the expiration of the policy. It warrants nothing as to any retardation or prolongation of the voyage; but only, that the ship shall be capable of performing the voyage undertaken, notwithstanding any loss or injury which may accrue to her, during the time for which she is insured; and of resuming it, if interrupted. In other words, the undertaking is, that the ship shall not, by the operation of any peril insured against, during the time for which the policy continues, be totally and permanently lost, or disabled from performing the voyage then

Nor is there any, the slightest, difference in law, whether the retardation or temporary suspension of the voyage be for the purpose of repairs, or to meet any other exigency, which interrupts, but does not finally defeat, the actual resumption of it.<sup>62</sup>

bb. *Repair of Vessel*.—See ante, "Retardation of Voyage," IX, E, 3, b, (2), (g).

(h) *Deterioration of Cargo*.—A technical total loss may arise from the mere deterioration of a moiety in value of the cargo by any of the perils insured against, if the deterioration be ascertained at an intermediate port of necessity, short of the port of destination.<sup>63</sup> But the underwriter is, in all cases of deterioration, entitled to an exemption from partial losses on the memorandum articles.<sup>64</sup>

(i) *Freight*.—There is a constructive total loss of freight, where there has been an actual or constructive total loss of cargo or vessel, followed by abandonment, provided another vessel could not be procured, at a reasonable expense, for the transshipment of the cargo.<sup>65</sup>

**Repair and Transshipment.**—It is the duty of the master to repair the vessel and carry the cargo to the port of destination if this can be done at a reasonable expense within a reasonable time, or if the ship is a total loss to transport the cargo to its destination by another vessel, if one can be procured upon reasonable terms.<sup>66</sup>

in progress, or any other voyage within the scope of the policy." *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 403, 9 L. Ed. 1123.

62. *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 402, 9 L. Ed. 1123.

**Admiralty proceedings.**—See ante, "Arrests, Restraints and Detainments," VII, E, 3.

63. *Deterioration of cargo*.—*Marcardier v. Chesapeake Ins. Co.*, 8 Cranch 39, 47, 3 L. Ed. 481.

"In such case, although the ship be in a capacity to perform the voyage, yet if the voyage be not worth pursuing, or the thing insured be so damaged and spoiled as to be of little or no value, the assured has a right to abandon the projected adventure, and throw upon the underwriter the unprofitable and disastrous subject of insurance. It has, therefore, been held, that if a cargo be damaged, in the course of the voyage, and it appear that what has been saved is less in value than the amount of the freight, it is a clear case of a total loss." *Marcardier v. Chesapeake Ins. Co.*, 8 Cranch 39, 47, 3 L. Ed. 481.

64. *Marcardier v. Chesapeake Ins. Co.*, 8 Cranch 39, 48, 3 L. Ed. 481.

**Memorandum articles excluded.**—Where a technical total loss is sought to be maintained, upon the mere ground of deterioration of the cargo, at an intermediate port, to a moiety of its value, all deterioration of memorandum articles must be excluded from the estimate. Therefore, in a cargo of a mixed character, no abandonment for mere deterioration in value, during the voyage, can be valid, unless the damage on the memorandum articles exceed a moiety of the value of the whole cargo, including the memorandum articles. *Marcardier v. Ches-*

*apeake Ins. Co.*, 8 Cranch 39, 3 L. Ed. 481. See post, "Memorandum Articles," IX, E, 3, b, (2), (k).

65. *Freight*.—*Hugg v. Augusta Ins., etc., Co.*, 7 How. 595, 604, 12 L. Ed. 834.

"The contract of insurance upon freight is, that the goods shall arrive at the port of delivery notwithstanding the perils insured against; and that, if they fail thus to arrive, and the owner is thereby unable to earn his freight, the underwriter will make it good." *Hugg v. Augusta Ins., etc., Co.*, 7 How. 595, 604, 12 L. Ed. 834.

"It does not undertake that the goods shall be delivered in a sound or merchantable state, or that the vessel in which they are shipped shall be safe against the dangers of the sea, but that it shall be in the power of the insured to earn his freight; that is, that the perils insured against shall not prevent the ship from earning full freight for the assured in that voyage. If the ship and cargo remain, notwithstanding the disasters, in a condition to continue the voyage, it is in his power to earn freight, and he is bound to proceed; but if damage happens to either, and the voyage is broken up, so that no freight can be earned, the owner is entitled to recover, as for a total or partial loss, according as he may or may not have earned freight *pro rata itineris*." *Hugg v. Augusta Ins., etc., Co.*, 7 How. 595, 604, 12 L. Ed. 834.

66. *Repair and transshipment*.—*Hugg v. Augusta Ins., etc., Co.*, 7 How. 595, 604, 12 L. Ed. 834.

"If the damage happens to the vessel, and that can be repaired at the port of distress in a reasonable time, and at a reasonable expense, it is the duty of the owner to make the repairs, and to continue the voyage and earn his freight;

**The interest of the insured, or of the underwriter of the cargo, is not taken into the account,** nor in any way regarded in determining whether or not a total loss of the freight has happened from any of the perils insured against, but whether there has been a destruction of the entire cargo in specie, or such damage received as would inevitably prevent the arrival of any portion of it in specie at the destined port.<sup>67</sup>

**Responsibility for Payment of Freight.**—As between the assured and the underwriter on the cargo of a ship, the latter is in no case responsible for the payment of freight, whether there be an abandonment or not. It is a charge on the cargo, against which he does not undertake to indemnify the owner.<sup>68</sup>

**Existence of Lien for Freight.**—As between the assured and the underwriter, the existence of a lien on the cargo for freight does not vary the legal responsibility of the underwriter on such cargo, after an abandonment.<sup>69</sup>

**Freight is not a charge upon the salvage of cargo,** in the hands of the underwriters, whether the assured is owner of the ship or not.<sup>70</sup>

and, on the other hand, if the damage happens to the goods, and the ship be in a capacity to proceed, or, if disabled, another can be procured upon reasonable terms, the owner of the ship will still be entitled to perform the voyage and recover his freight, unless the goods have been totally destroyed. In every case, before he can recover of the underwriter, he must show that he was prevented by one of the perils insured against from completing the voyage, and for that reason had failed to entitle himself to freight from the shippers." *Hugg v. Augusta Ins., etc., Co.*, 7 How. 595, 604, 12 L. Ed. 834.

"The quantity and value of the portion saved are also material circumstances to be considered in exercising a sound discretion in respect to the extent of the repairs required to be made, or of expense in the procurement of another vessel, with a view to the earning of salvage for the benefit of the underwriter on freight. The owner of the cargo is liable for any increased freight arising from the hire of another vessel; and unless it can be procured at an expense not exceeding the amount of the freight to be earned by completing the voyage, the underwriter on freight has no right to insist upon this duty of the master. Beyond this, it becomes a question between him and the owner or underwriter of the cargo." *Hugg v. Augusta Ins., etc., Co.*, 7 How. 595, 609, 12 L. Ed. 834.

**67.** *Hugg v. Augusta Ins., etc., Co.*, 7 How. 595, 608, 12 L. Ed. 834.

In construing the contract of insurance upon freight, the interest of the insured, or of the underwriters of the cargo, is not considered. Therefore, if the vessel is in a condition to carry on the cargo to the port of destination, or another vessel can be procured for that purpose, it is the duty of the owner of the vessel to carry it on, although it may be for the interest of the insured and insurers of the cargo to sell it at the port of distress. If so sold, the insured cannot recover for a total loss of freight. *Hugg v. Augusta Ins., etc., Co.*, 7 How. 595, 12 L. Ed. 834.

"The interest of the owner of the cargo may frequently be adverse to that of the owner of the ship; for although the goods remain in specie, and in that condition capable of being carried on, it may be for the interest of the owner, or of the insurer of the cargo, to have it sold in its then damaged state at the intermediate port, instead of taking the risk of further deterioration. But, in that case, the owner, or those representing him, must act upon their own responsibility; for, if he elects to receive the goods voluntarily at a place short of the port of destination, he is responsible for the freight. The loss cannot be total or partial at his will, or as his interest may dictate." *Hugg v. Augusta Ins., etc., Co.*, 7 How. 595, 608, 12 L. Ed. 834.

**68. Responsibility for payment of freight.**—*Caze v. Baltimore Ins. Co.*, 7 Cranch 358, 362, 3 L. Ed. 370.

**69. Existence of lien for freight.**—*Caze v. Baltimore Ins. Co.*, 7 Cranch 358, 363, 3 L. Ed. 370.

**70.** *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 6 L. Ed. 664.

"As between the owner of the ship and the owner of the cargo, the former has a lien upon the cargo, for all the freight which becomes due and payable to him, whether it be a full or pro rata freight. But freight is a charge upon the cargo, against which the underwriters do not, in any event, whether of abandonment with salvage, or of partial loss, undertake to indemnify the owner of the cargo. In order to obtain the salvage, when in the hands of the shipowner, it may become necessary for the underwriters to pay the amount of the freight, for which they have a lien, as it may to pay any other charge created by the act of the owner of the cargo. But this does not change the nature or extent of the responsibility of the underwriters. As between themselves and the assured, they have a right to deduct the amount so paid from the loss, or to recover it in any other manner, as money paid for the use of the latter. This doctrine was expressly held by the court of king's bench, in *Baillie v. Modigliani*,



(j) *Profits*.—There cannot be a constructive total loss of profits.<sup>71</sup>

(k) *Memorandum Articles*.—See post, "Memorandum Articles," IX, F.

4. *EXTENT OF LIABILITY*.—In case of a total loss, the underwriter is liable for the whole amount insured, but no more.<sup>72</sup>

**F. Memorandum Articles**.—1. *HISTORY, PURPOSE AND FORM OF MEMORANDUM CLAUSE*.—Several cases discuss the history, purpose and form of the memorandum clause.<sup>73</sup>

2. *ARTICLES INCLUDED*.—The number of articles included is very great,<sup>74</sup> among which are corn,<sup>75</sup> hides,<sup>76</sup> jerked beef,<sup>77</sup> and wire.<sup>78</sup>

3. *PROTECTION FROM PARTIAL LOSS AND LIABILITY FOR TOTAL LOSS*.—a. *In General*.—The insurers are not liable on memorandum articles except in case of actual total loss, the assured taking upon himself all partial losses, without exception. The memorandum clause protects the underwriter from all partial losses, however great, to any memorandum articles.<sup>79</sup>

**Constructive Total Loss**.—There can be no recovery from the underwriters for a constructive total loss of memorandum goods.<sup>80</sup>

Marsh. Ins. 628, and was confirmed in the fullest manner in this court, in *Caze v. Baltimore Ins. Co.*, 7 Cranch 358, 3 L. Ed. 370." *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 396, 6 L. Ed. 664.

**71. Profits**.—*Canada Sugar Ref. Co. v. Insurance Co.*, 175 U. S. 609, 619, 44 L. Ed. 292. See ante, "Profits," IX, E, 2, c.

**72. Extent of liability**.—*Insurance Co. v. Piaggio*, 16 Wall. 378, 21 L. Ed. 358.

A brought suit on a policy on vessel and freight, for a total loss. The jury found the whole amount insured with interest and \$5,000 besides for damages, and judgment was entered accordingly. Held, that the party could not recover damages beyond legal interest, and that there was error on the face of the record. *Insurance Co. v. Piaggio*, 16 Wall. 378, 21 L. Ed. 358.

**73. History, purpose and form of clause**.—See *Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co.*, 179 U. S. 1, 8, 45 L. Ed. 49; *London Assur. v. Companhia De Moagens*, 167 U. S. 149, 155, 42 L. Ed. 113. See, also, post, "Operation and Effect," IX, H, 15.

**74. Articles included**.—*Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co.*, 179 U. S. 1, 8, 45 L. Ed. 49, where many articles are named.

**75. Moreau v. United States Ins. Co.**, 1 Wheat. 219, 4 L. Ed. 75.

**76. Biays v. Chesapeake Ins. Co.**, 7 Cranch 415, 3 L. Ed. 389.

**77. Hugg v. Augusta Ins., etc., Co.**, 7 How. 595, 12 L. Ed. 834.

**78. Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co.**, 179 U. S. 1, 45 L. Ed. 49.

**79. Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co.**, 179 U. S. 1, 9, 45 L. Ed. 49; *Biays v. Chesapeake Ins. Co.*, 7 Cranch 415, 3 L. Ed. 389; *Marcadier v. Chesapeake Ins. Co.*, 8 Cranch 39, 3 L. Ed. 481; *Moreau v. United States Ins. Co.*, 1 Wheat. 219, 4 L. Ed. 75; *Hugg v. Augusta, Ins., etc., Co.*, 7 How. 595, 12 L. Ed. 834; *Insurance Co. v. Fogarty*, 19 Wall. 640, 22 L. Ed. 216.

With respect to memorandum articles,

underwriters are free from all partial losses of every kind, which do not arise from a contribution towards a general average. *Biays v. Chesapeake Ins. Co.*, 7 Cranch 415, 418, 3 L. Ed. 389; *Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co.*, 179 U. S. 1, 10, 45 L. Ed. 49.

The term "free from particular average" means that the assurers shall be liable only for a total loss of the subject insured. *Insurance Co. v. Fogarty*, 19 Wall. 640, 642, 22 L. Ed. 216.

Articles warranted free of particular average, or free from average unless general, are insured only against an actual total loss. *Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co.*, 179 U. S. 1, 8, 45 L. Ed. 49.

**Free from average unless general**.—Under an insurance on hides, "warranted by the assured free from average, unless general," the underwriters are free from all partial losses of every kind which do not arise from a contribution towards a general average. *Biays v. Chesapeake Ins. Co.*, 7 Cranch 415, 417, 3 L. Ed. 389.

**Use of term "average" in different senses**.—"Ambiguity may once have existed from the term average being used in different senses, that is, as signifying a contribution to a general loss, and also a particular or partial injury falling on the subject insured." *Biays v. Chesapeake Ins. Co.*, 7 Cranch 415, 418, 3 L. Ed. 389.

**80. Constructive total loss**.—*Hugg v. Augusta Ins., etc., Co.*, 7 How. 595, 599, 12 L. Ed. 834; *Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co.*, 179 U. S. 1, 16, 45 L. Ed. 49.

This is the rule although a rider allows a recovery for an actual total loss of a part. *Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co.*, 179 U. S. 1, 16, 45 L. Ed. 49.

"In the case of memorandum articles, the exception of particular average excludes a constructive total loss; and, of course, the principle which allows an abandonment where the loss exceeds half the value does not apply. There must be

b. *Destruction in Specie*.—There can be an actual total loss of a memorandum article, only when it is physically destroyed, or its value extinguished by a loss of identity. There must be a destruction of the article in specie so long as the goods have not lost their original character, but remain in specie, and in that condition are capable of being shipped to the destined port, there cannot be a total loss of the article, whatever may be the extent of the damage, so as to subject the underwriter. The loss is but partial.<sup>81</sup>

c. *Articles Incapable of Being Carried in Specie*.—If, however, the articles are not capable of being carried, in specie, to the port of destination, arising from danger to the health of the crew or to the safety of the vessel; or the public authorities at the port of distress order the articles to be thrown overboard, from fear of disease, there would be a total loss.<sup>82</sup>

d. *Arrival in Specie*.—There can be no actual total loss when a cargo of memorandum articles has arrived, in whole or in part, in specie, at the port of destination.<sup>83</sup>

an actual total loss of the goods. The object of the clause is to protect the underwriter from any partial loss on articles of a perishable nature, which are liable to inherent decay and damage, independently of the damage occasioned by the perils insured against, and where it would be difficult, if not impossible, to distinguish between them. In case of a total loss, consequent upon the happening of one of the perils, the whole damage is presumed to have arisen from that cause, and thus all dispute is avoided as to the origin or nature of the loss." *Hugg v. Augusta Ins.*, etc., Co., 7 How. 595, 605, 12 L. Ed. 834.

"The legal effect of the memorandum is to protect the underwriter from all partial losses; and if a loss by deterioration, exceeding a moiety in value, would authorize an abandonment, the great object of the stipulation would be completely evaded." *Marcardier v. Chesapeake Ins. Co.*, 8 Cranch 39, 3 L. Ed. 481; *Washburn, etc.*, Mfg. Co. v. *Reliance Marine Ins. Co.*, 179 U. S. 1, 11, 45 L. Ed. 49.

"There is no instance where the assured can demand as for a total loss, that he might not have declined an abandonment, and demand a partial loss. But if the property insured be included within the memorandum, he cannot, under any circumstances, call upon the insurer for a partial loss, and consequently, he cannot elect to turn it into a total loss." *Morean v. United States Ins. Co.*, 1 Wheat. 219, 224, 4 L. Ed. 75; *Washburn, etc.*, Mfg. Co. v. *Reliance Marine Ins. Co.*, 179 U. S. 1, 12, 45 L. Ed. 49.

"If the question turn upon the totality of the loss, unconnected with the subject of loss, by deterioration of the cargo in value, or reduction in quantity, there is no difference between memorandum and other articles. If the loss be total, in reality, or is such as the assured is permitted to treat as such, he is entitled to abandon, and recover as for a total loss, in the case of memorandum articles, but always with this exception, that he is not permitted to turn a partial into a total loss." *Morean v. United States Ins. Co.*, 1 Wheat. 219, 225, 4 L. Ed. 75.

**Under English rule.**—Quære, whether recovery may be had under English rule? *Washburn, etc.*, Mfg. Co. v. *Reliance Marine Ins. Co.*, 179 U. S. 1, 16, 45 L. Ed. 49.

**81. What constitutes actual total loss.**—*Washburn, etc.*, Mfg. Co. v. *Reliance Marine Ins. Co.*, 179 U. S. 1, 13, 45 L. Ed. 49; *Biays v. Chesapeake Ins. Co.*, 7 Cranch 415, 3 L. Ed. 389; *Marcardier v. Chesapeake Ins. Co.*, 8 Cranch 39, 3 L. Ed. 481; *Morean v. United States Ins. Co.*, 1 Wheat. 219, 4 L. Ed. 75; *Hugg v. Augusta Ins.*, etc., Co., 7 How. 595, 605, 12 L. Ed. 834; *Insurance Co. v. Fogarty*, 19 Wall. 640, 22 L. Ed. 216.

"In the case of *Marcardier v. Chesapeake Ins. Co.*, 8 Cranch 39, 3 L. Ed. 481, it is said that 'it seems to be the settled doctrine that nothing short of a total extinction, either physical or in value of memorandum articles at an intermediate port, would entitle the insured to term the case a total loss, where the voyage is capable of being performed. And perhaps even as to an extinction in value, where the commodity specifically remains, it may yet be deemed not quite settled whether, under like circumstances, it would authorize an abandonment for a total loss.'" *Insurance Co. v. Fogarty*, 19 Wall. 640, 643, 22 L. Ed. 216. See, also, *Washburn, etc.*, Mfg. Co. v. *Reliance Marine Ins. Co.*, 179 U. S. 1, 11, 45 L. Ed. 49.

"The technical total losses for which alone he (the underwriter) can be liable, are such as stand unaffected by the perishable nature of the commodity which he insures." *Marcardier v. Chesapeake Ins. Co.*, 8 Cranch 39, 48, 3 L. Ed. 481.

**82.** *Hugg v. Augusta Ins.*, etc., Co., 7 How. 595, 12 L. Ed. 834.

**83. Arrival in specie.**—*Washburn, etc.*, Mfg. Co. v. *Reliance Marine Ins. Co.*, 179 U. S. 1, 10, 45 L. Ed. 49; *Biays v. Chesapeake Ins. Co.*, 7 Cranch 415, 3 L. Ed. 389; *Marcardier v. Chesapeake Ins. Co.*, 8 Cranch 39, 3 L. Ed. 481; *Morean v. United States Ins. Co.*, 1 Wheat. 219, 275, 4 L. Ed. 75; *Hugg v. Augusta Ins.*, etc., Co., 7 How. 595, 605, 12 L. Ed. 834; *Insurance Co. v. Fogarty*, 19 Wall. 640, 22 L. Ed. 216.

"If the property arrive at the port of

e. *Total Loss of Part.*—There cannot be a technical total loss of part of a cargo, consisting of memorandum articles, of only one species.<sup>84</sup>

f. *Sale by Consignee Who Refuses to Accept.*—A consignee cannot injure the market value of uninjured memorandum goods by a refusal to receive them and attempting to abandon to the underwriter, who does not accept the abandonment, and claim that their value was determined by the price they brought

discharge, reduced in quantity or value, to any amount, the loss cannot be said to be total in reality, and the assured cannot treat it as a total, and demand an indemnity for a partial loss." *Morean v. United States Ins. Co.*, 1 Wheat. 219, 224, 4 L. Ed. 75; *Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co.*, 179 U. S. 1, 12, 45 L. Ed. 49.

A total loss "can never happen, where the cargo, or a part of it, has been sent on by the assured, and reaches the original port of its destination. Being there, specifically, the insurer has complied with his engagements; everything like a promise of indemnity against loss or damage to the cargo being excluded from the policy." *Morean v. United States Ins. Co.*, 1 Wheat. 219, 225, 4 L. Ed. 75; *Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co.*, 179 U. S. 1, 12, 45 L. Ed. 49.

84. *Biays v. Chesapeake Ins. Co.*, 7 Cranch 415, 3 L. Ed. 389; *Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co.*, 179 U. S. 1, 10, 45 L. Ed. 49.

"In the case of *Morean v. United States Ins. Co.*, 1 Wheat. 219, 4 L. Ed. 75, more than half of a cargo of corn was thrown overboard and lost. The remainder was saved in a damaged condition and sold at about one-fourth the market value of sound corn. This was held not to be a total loss, because part of the corn was saved, and though damaged was of some value. It was, therefore, only a partial loss." *Insurance Co. v. Fogarty*, 19 Wall. 640, 643, 22 L. Ed. 216.

"In the case of *Biays v. Chesapeake Ins. Co.*, 7 Cranch 415, 3 L. Ed. 389, the plaintiff was insured upon hides, the whole number of which was 14,565. Of these, 789 were totally lost by the sinking of a lighter, and 2,491 of those sunk were fished up in a damaged condition and sold. The hides were memorandum articles, and this court held that inasmuch as less than 800 hides insured as part of a much larger number of the same kind was lost, it could not be a total loss, and overruled the argument that it was a total loss as to the 789 hides." *Insurance Co. v. Fogarty*, 19 Wall. 640, 643, 22 L. Ed. 216. See *Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co.*, 179 U. S. 1, 10, 45 L. Ed. 49.

"The next case is that of *Hugg v. Augusta Ins., etc., Co.*, 7 How. 595, 12 L. Ed. 834. The question there arose on an insurance of jerked beef of four hundred tons, part of which was thrown into the sea and part of the remainder so seriously damaged that the authorities of the city of Nassau refused to allow more than 150

of it to be landed. This was wet and heated, and not in a condition for reshipment. In answer to a question on this subject, certified to this court by the judges of the circuit court, it was replied, 'that if the jury found that the jerked beef was a perishable article within the meaning of the policy, the defendant is not liable as for a total loss of the freight, unless it appears that there was a destruction in specie of the entire cargo so that it had lost its original character at Nassau, or that a total destruction would have been inevitable from the damage received if it had been reshipped before it could have arrived at Matanzas, the port of destination.' And though there are some very strong expressions of the judge who delivered the opinion as to the necessity of the total destruction of the thing insured to establish a total loss in memorandum articles, no doubt the language here certified is the true expression of the court's opinion. And it will be observed that in this case, as in the case of *Marcardier v. Chesapeake Ins. Co.*, 8 Cranch 39, 3 L. Ed. 481, the destruction spoken of is destruction as to species, and not mere physical extinction. Indeed, philosophically speaking, there can be no such thing as absolute extinction. That of which the thing insured was composed must remain in its parts, though destroyed as to its specific identity. In the case of the jerked beef, for instance, it might remain as a viscid mass of putrid flesh, but it would no longer be either beef or jerked beef. And when the case went back for trial in the circuit, the charge of Taney, C. J., to the jury places this point in a very clear light. He says there was not a total loss at Nassau, because a part of the jerked beef remained in specie, and had not been destroyed by the disaster. And if there was reasonable ground for believing that a portion of this beef could, by repairing the vessel, have been transported to Matanzas, although it might arrive there in a damaged condition, but yet retaining the character of jerked beef, there was no total loss. The jury found there was a total loss." *Insurance Co. v. Fogarty*, 19 Wall. 640, 643, 22 L. Ed. 216. See, also, *Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co.*, 179 U. S. 1, 12, 45 L. Ed. 49.

By the memorandum wire of all kinds was expressly "warranted by the assured free from average unless general;" and by the rider, "free of particular average but liable for absolute total loss of a part if amount to 5 per cent." It was held



at a forced sale, nor hold the insurer liable for the loss sustained by reason of the forced sale of the goods.<sup>85</sup>

4. **EXCEPTION OF STRANDING, BURNING, COLLISION, ETC.**—If the vessel be stranded, sunk, burnt or in collision the insured is let in to claim for a partial average loss on memorandum articles, without regard to the fact that the loss was not occasioned by the stranding, etc., and but for the stranding, etc., would have been within the exception in the memorandum clause, and free from particular average as therein provided; but no claim for a partial loss can be let in unless the vessel is stranded, etc. The extent of the damage done by such stranding, etc., is immaterial.<sup>86</sup>

5. **SEPARATE ARTICLES, PARCELS AND PACKAGES.**—The fact that goods of the same specie are shipped as separate articles or in separate parcels or packages does not make the insurance a separate insurance on each article, etc.<sup>87</sup>

**G. Sue and Labor Clause.—Construction.**—The sue and labor clause, whether regarded as embodying a common-law principle, or as new in itself, must receive a liberal application, for the public interest requires both insured and insurer to labor for the preservation of the property.<sup>88</sup>

**Operation and Effect.**—Where the underwriters are not answerable for the principal loss, under the "sue and labor" clause, they cannot be so for the subsequent expenses which were incurred in recovering the property.<sup>89</sup>

**With Respect to Acceptance of Abandonment.**—See post, "Acceptance," IX, H, 14.

that under these provisions the underwriters are not liable for a constructive total loss but are only liable for an actual total loss of the whole; or of a distinct part, if amounting to 5 per cent. Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co., 179 U. S. 1, 45 L. Ed. 49.

The two clauses are in *pari materia* and to be read together. They are not contradictory and the rider operates to qualify the memorandum by allowing recovery for an actual total loss in port. Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co., 179 U. S. 1, 45 L. Ed. 49.

The vessel carrying the cargo insured under the memorandum clause above quoted was stranded, and subsequently sold, on libels for salvage. A large part of the goods insured reached the port of destination in specie, a substantial part of them being wholly uninjured. It was held that the owners could not recover for a constructive total loss nor for an actual total loss of the whole cargo. Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co., 179 U. S. 1, 45 L. Ed. 49.

85. Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co., 179 U. S. 1, 45 L. Ed. 49.

86. London Assur. v. Companhia De Moagens, 167 U. S. 149, 162, 42 L. Ed. 113.

"If a ship be once in collision during the adventure, after the goods are on board, the insurers are by the law of England liable for a loss covered by the general words in the policy although such loss is not the result of the original collision, and but for the collision would have been within the exception contained in the memorandum, and free from particular average as therein provided." London

Assur. v. Companhia De Moagens, 167 U. S. 149, 155, 167, 42 L. Ed. 113.

This construction has been adopted in England by courts and underwriters for more than a hundred years. Whether it prevails in this country is not decided. London Assur. v. Companhia De Moagens, 167 U. S. 149, 155, 167, 42 L. Ed. 113.

As to what constitutes a collision, burning or stranding, see ante, "Collision," VII, E, 6; "Fire," VII, E, 8; "Stranding," VII, E, 9.

87. Biays v. Chesapeake Ins. Co., 7 Cranch 415, 3 L. Ed. 389.

88. Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co., 179 U. S. 1, 18, 45 L. Ed. 49.

89. Biays v. Chesapeake Ins. Co., 7 Cranch 415, 419, 3 L. Ed. 389.

A clause in the policy, which authorizes the assured, "in case of any loss or damage, to sue, labor and travel for, in and about the defense, safeguard and recovery of the goods, or any part thereof, to the charges where of the assurers will contribute, according to the amount of the sum insured," applies only to the case of those losses or injuries (either partial or total) for which the insurers, if they had happened, would have been responsible. When a loss takes place, which cannot be thrown on them, it would require a much stronger and more explicit stipulation to render them liable to contribute to such expenses. Biays v. Chesapeake Ins. Co., 7 Cranch 415, 419, 3 L. Ed. 389.

**Salvage.**—The underwriters are not liable for salvage upon memorandum articles, under the clause which authorizes the insured to labor and travel for the preservation of the cargo, unless, perhaps,

**H. Abandonment**—1. **DEFINITION.**—By the word “abandonment,” is understood a yielding, ceding or giving up; and, in general, it applies to cases where there has been a great loss, and the assured, resorting to the policy for an indemnity, surrenders whatever is left of the property insured to the underwriters.<sup>90</sup>

2. **RIGHT**—a. *Losses from Which Right Arises.*—See ante, “Technical or Constructive Total Loss,” IX, E, 3.

b. *Right as Depending upon Existing Facts.*—The right to abandon is to be determined from the facts as they existed at the time when notice of abandonment was given. The state of the facts, and not the state of the information, at the time of an abandonment, constitutes the criterion by which is to be ascertained whether a total loss has occurred or not, for which an abandonment can be made.<sup>91</sup>

**A technical loss must continue to the time of abandonment.** It is not necessary that it should be known to exist, at the time of abandonment, for that is impossible; but that it should actually exist; a fact which admits of affirmative or negative proof, at the trial of the cause.<sup>92</sup>

**Proofs.**—The fact of such damage or injury is necessarily open to proofs, to be derived from subsequent events.<sup>93</sup>

in a case where the salvage may have prevented an actual total loss of the cargo. *Biays v. Chesapeake Ins. Co.*, 7 Cranch 415, 3 L. Ed. 389. See ante, “Salvage Losses,” IX, C, 5.

90. “**Abandonment.**”—*Camberling v. McCall*, 2 Dall. 280, 284, 1 L. Ed. 381.

91. *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 9 L. Ed. 1123; *Marshall v. Delaware Ins. Co.*, 4 Cranch 202, 2 L. Ed. 596; *Olivera v. Union Ins. Co.*, 3 Wheat. 183, 4 L. Ed. 365; *Alexander v. Baltimore Ins. Co.*, 4 Cranch 370, 2 L. Ed. 650; *Rhineland v. Insurance Co.*, 4 Cranch 29, 2 L. Ed. 540; *Orient Ins. Co. v. Adams*, 123 U. S. 67, 74, 31 L. Ed. 63.

“The state of loss, at the time of the abandonment, must fix the rights of the parties to recover on an action afterwards brought.” *Rhineland v. Insurance Co.*, 4 Cranch 29, 46, 2 L. Ed. 540.

92. *Olivera v. Union Ins. Co.*, 3 Wheat. 183, 195, 4 L. Ed. 365. See *Rhineland v. Insurance Co.*, 4 Cranch 29, 2 L. Ed. 540; *Marshall v. Delaware Ins. Co.*, 4 Cranch 202, 2 L. Ed. 596; *Alexander v. Baltimore Ins. Co.*, 4 Cranch 370, 2 L. Ed. 650.

If, at the time of an offer to abandon, the ship be in possession of the master, in good condition, and at full liberty to proceed on the voyage, the loss of the cargo will not authorize the owner of the vessel to recover as for a total loss of the vessel. *Alexander v. Baltimore Ins. Co.*, 4 Cranch 370, 2 L. Ed. 650.

Quære, as to the application of this principle to a case, where the loss was by a restraint on a blockade, and proof made of the commencement of the blockade, but no proof that it continued to the time of the abandonment. *Olivera v. Union Ins. Co.*, 3 Wheat. 183, 4 L. Ed. 365.

93. *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 397, 9 L. Ed. 1123.

**Proofs derived from subsequent events.**

—“In cases where the abandonment is founded upon a supposed technical total loss, by a damage or injury exceeding one-half the value of the vessel, although the fact of such damage or injury must exist at the time, yet it is necessarily open to proofs, to be derived from subsequent events. Thus, for example, if the repairs, when subsequently made, clearly exceed the half value, it is plain that this affords one of the best proofs of the actual damage or injury. On the other hand, if the subsequent repairs are far below the half value, this, so far as it goes, affords an inference the other way. But it is not, and in many cases it cannot be decisive of the right to abandon.” *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 397, 9 L. Ed. 1128.

**Stranding.**—“In many cases of stranding, the state of the vessel, at the time, may be such, from the imminency of the peril, and the apparent extent of expenditures required to deliver her from it, as to justify an abandonment; although, by some fortunate occurrence, she may be delivered from her peril, without an actual expenditure of one-half of her value, after she is in safety. Under such circumstances, if, in all human probability, the expenditures which must be incurred to deliver her from her peril, are, at the time, so far as any reasonable calculations can be made, in the highest degree of probability, beyond half value, and if her distress and peril be such as would induce a considerate owner, uninsured, and upon the spot, to withhold any attempt to get the vessel off, because of such apparently great expenditures, the abandonment would doubtless be good.” *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 397, 9 L. Ed. 1123; *Orient Ins. Co. v. Adams*, 123 U. S. 67, 75, 31 L. Ed. 63.

3. **NECESSITY.**—Abandonment is necessary when the loss is only constructively total.<sup>94</sup>

**In Case of Actual Total Loss.**—Independent of the abandonment, if there is actual total loss, by storm and disaster of the sea, the assured has a right to recover.<sup>95</sup>

4. **ELECTION AND NOTICE**—a. *Necessity.*—Election to abandon and notice thereof to the underwriter are conditions precedent to a claim for a technical total loss.<sup>96</sup>

b. *Form and Sufficiency.*—No particular form of words is necessary to constitute an abandonment; but in whatever form it is made, it must be explicit and unequivocal.<sup>97</sup> It may be either parol or written.<sup>98</sup>

5. **TIME.**—An abandonment, to be effectual, must be made within a reasonable time.<sup>99</sup> What is a reasonable time depends upon the facts and circumstances of each case.<sup>1</sup>

94. Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co., 179 U. S. 1, 17, 45 L. Ed. 49.

95. Insurance Co. v. Piaggio, 16 Wall. 378, 389, 21 L. Ed. 358.

There can be no abandonment where there has been total destruction. There is nothing upon which it can operate and an insured party may recover for a total loss without it. Hall v. Railroad Companies, 13 Wall. 367, 370, 20 L. Ed. 594.

**When there is nothing left to give up,** there cannot be anything to abandon; and if there is nothing to abandon, it would be absurd, as well as useless, to insist upon a formal act of abandonment. Camberling v. McCall, 2 Dall. 280, 284, 1 L. Ed. 381.

**Profits.**—An abandonment of profits is not necessary. Canada Sugar Ref. Co. v. Insurance Co., 175 U. S. 609, 619, 44 L. Ed. 292.

96. **Election and notice.**—Columbian Ins. Co. v. Catlett, 12 Wheat. 383, 394, 6 L. Ed. 664.

**Sufficiency.**—A clause in a policy to the effect that the assured shall not abandon until sixty days have elapsed after giving to the underwriter notice of his intention so to do, and of the loss or event entitling him thereto, does not require notice of abandonment as a total loss to preclude the actual abandonment sixty days, but a continuing act of abandonment becoming absolute at the end of sixty days is sufficient. Columbian Ins. Co. v. Catlett, 12 Wheat. 383, 394, 6 L. Ed. 664.

97. Patapsco Ins. Co. v. Southgate, 5 Pet. 604, 8 L. Ed. 243; Bell v. Beveridge, 4 Dall. 272, 1 L. Ed. 830; Columbian Ins. Co. v. Catlett, 12 Wheat. 383, 394, 6 L. Ed. 664; Canada Sugar Ref. Co. v. Insurance Co., 175 U. S. 609, 618, 44 L. Ed. 292.

There is some diversity of opinion among the elementary writers, and in the adjudged cases, as to what will constitute a valid abandonment; it seems, however, agreed, that no particular form is necessary; nor is it indispensable that it should be in writing. But in whatever form it is made, it ought to be explicit; and not left open as matter of inference, from some equivocal acts. Patapsco Ins. Co. v.

Southgate, 5 Pet. 604, 605, 8 L. Ed. 243.

Whether there was any formal instrument of abandonment or not is not material, for the law gives to the act of abandonment, when accepted, all the effects which the most accurately drawn assignment would accomplish. Comegys v. Vasse, 1 Pet. 193, 214, 7 L. Ed. 108.

"The rule dispensing with any particular form of abandonment amounts substantially to the rule that it is sufficient for the assured to signify distinctly that he abandoned, and he could not signify this more distinctly than by claiming a total loss. I therefore conclude that the claiming of a total loss is a sufficient expression of an intention to abandon." 2 Phillips on Insurance, 387. Canada Sugar Ref. Co. v. Insurance Co., 175 U. S. 609, 618, 44 L. Ed. 292.

**The informality of a deed of cession** is unimportant, because, if the abandonment be unexceptionable, the property vests immediately in the underwriters, and the deed is not essential to the right of either party. Chesapeake Ins. Co. v. Stark, 6 Cranch 268, 3 L. Ed. 220.

**"Meant to abandon."**—Where the assured only stated, in a letter "that he meant to abandon," it was held that by such declaration, he made his election to abandon. Bell v. Beveridge, 4 Dall. 272, 1 L. Ed. 830.

98. Patapsco Ins. Co. v. Southgate, 5 Pet. 604, 8 L. Ed. 243.

99. Chesapeake Ins. Co. v. Stark, 6 Cranch 268, 273, 3 L. Ed. 220; Maryland Ins. Co. v. Ruden, 6 Cranch 338, 3 L. Ed. 212; Livingston v. Maryland Ins. Co., 6 Cranch 274, 3 L. Ed. 222; Bell v. Beveridge, 4 Dall. 272, 1 L. Ed. 830; Dutilh v. Gatliff, 4 Dall. 446, 1 L. Ed. 903.

In case of a technical total loss, the assured must abandon to the underwriter without unnecessary delay, after he has received notice of such loss. Fuller v. McCall, 2 Dall. 219, 1 L. Ed. 356.

1. Chesapeake Ins. Co. v. Stark, 6 Cranch 268, 3 L. Ed. 220.

In Bell v. Beveridge, 4 Dall. 272, 1 L. Ed. 830, it was held that what constitutes a reasonable time is a question of fact, depending upon the relative situation of



**Restriction upon Time of Abandonment.**—See post, "Continuance and Suspension," IX, H, 6.

6. CONTINUANCE AND SUSPENSION.—Notice of an abandonment legally made is a continuing act of abandonment, although it is not accepted by the underwriter.<sup>2</sup> The right to abandon may be kept in a state of suspense by consent of the parties.<sup>3</sup>

7. MUST BE UNCONDITIONAL.—The abandonment must be unconditional.<sup>4</sup>

8. MUST COVER ENTIRE INTEREST.—The assured must yield up to the underwriter all his rights, title and interest in the subject insured.<sup>5</sup>

9. WHEN RIGHTS OF PARTIES FIXED.—If the abandonment, when made, is good, the rights of the parties are definitely fixed, and do not become changed by any subsequent events. If, on the other hand, the abandonment, when made, is not good, subsequent circumstances will not affect it, so as, retroactively, to impart to it a validity, which it had not at its origin.<sup>6</sup>

10. RELATION BACK.—An abandonment relates back to the time of the loss.<sup>7</sup> If an abandonment is legally made, the title of the underwriters vests as of the

the parties, the time and the place, after notice to the assured of the loss.

**Question for jury.**—What is reasonable time of abandonment is a question compounded of fact and law, which must be found by a jury, under the direction of the court. *Maryland Ins. Co. v. Ruden*, 6 Cranch 338, 3 L. Ed. 242; *Chesapeake Ins. Co. v. Stark*, 6 Cranch 268, 3 L. Ed. 220; *Livingston v. Maryland Ins. Co.*, 7 Cranch 506, 3 L. Ed. 421.

The question whether an abandonment was made in due time is not a question of fact, to be exclusively left to the jury, but to be decided by them under the direction of the court. *Livingston v. Maryland Ins. Co.*, 7 Cranch 506, 3 L. Ed. 421; *Chesapeake Ins. Co. v. Stark*, 6 Cranch 268, 3 L. Ed. 220; *Maryland Ins. Co. v. Ruden*, 6 Cranch 338, 3 L. Ed. 242.

**Delay caused by a public calamity** will be excluded in determining whether the right of abandonment was exercised within a reasonable time. *Bell v. Beveridge*, 4 Dall. 272, 1 L. Ed. 830.

**A special verdict** is defective, which does not find whether the abandonment was in reasonable time. *Chesapeake Ins. Co. v. Stark*, 6 Cranch 268, 3 L. Ed. 220.

2. *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 394, 6 L. Ed. 664. See *Canada Sugar Ref. Co. v. Insurance Co.*, 175 U. S. 609, 618, 44 L. Ed. 292.

A clause in the following terms: "The insured shall not abandon to the insurers, until sixty days have elapsed after having given notice to them of his intention so to do," etc., simply means that notice of intention to abandon "shall not, in point of law be obligatory as an abandonment, until that period." Notice of intention to abandon is a continuing notice and operative as an actual abandonment at the end of sixty days. It is an abandonment in present, to take effect in futuro. *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 394, 6 L. Ed. 664.

"In *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 394, 6 L. Ed. 664, where the

effect of actual abandonment, as dispensing, if accepted, with formal notice, was considered, Justice Story said: "The latter gives notice of an intention to abandon, because in its terms it includes an actual abandonment. It has a tacit reference to the clause in the policy, and must be deemed as a notice to abandon, and, at the same time, a declaration that it shall operate as an abandonment in the case, as soon as by law it may. In our judgment, it was a continuing act of abandonment, and became absolute at the end of the sixty days. It was an abandonment in present, to take effect in futuro. Neither the form of the notice, nor the abandonment, is prescribed in the cause. They may be in one or two instruments; they may be in direct terms, or by fair and natural inference. It matters not how they are given or executed; it is sufficient, in point of fact, that they have been given or executed." *Canada Sugar Ref. Co. v. Insurance Co.*, 175 U. S. 609, 618, 44 L. Ed. 292.

3. *Livingston v. Maryland Ins. Co.*, 6 Cranch 274, 280, 3 L. Ed. 222.

4. **Must be unconditional.**—*Fuller v. McCall*, 2 Dall. 219, 1 L. Ed. 356.

5. *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604, 8 L. Ed. 243.

6. *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 397, 9 L. Ed. 1123; *Rhineland v. Insurance Co.*, 4 Cranch 29, 2 L. Ed. 540; *Marshall v. Delaware Ins. Co.*, 4 Cranch 202, 2 L. Ed. 596; *Orient Ins. Co. v. Adams*, 123 U. S. 67, 75, 31 L. Ed. 63; *Dutilh v. Gatliff*, 4 Dall. 446, 1 L. Ed. 903.

**England.**—In some respects the law of America differs from that of England for by the latter the right to a total loss, vested by an abandonment, may be divested by subsequent events, which change that total loss into a partial loss. *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 397, 9 L. Ed. 1123.

7. *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 9 L. Ed. 1123.

date of the loss and they are responsible for the reasonable expenses incurred by the master after that date in attempting to save the vessel or property insured. The master is the agent of the assured until abandonment, but thereafter both the master and owner become the agent of the underwriters.<sup>8</sup>

**11. REVOCATION OR RELINQUISHMENT.—Where the underwriter refuses to accept the abandonment,** the assured is at liberty to revoke it.<sup>9</sup>

**Exercise of Acts of Ownership by Assured.**—An abandonment, which has not been accepted, is relinquished by the exercise of any act of ownership by the insured.<sup>10</sup>

**12. PERSONS WHO MAY MAKE.**—An abandonment need not be made by the assured, but may be made by a duly authorized agent;<sup>11</sup> and the agent who makes insurance for his principal, has authority to abandon, without a formal letter of attorney.<sup>12</sup>

**Adoption of Unauthorized Abandonment.**—The assured may ratify and adopt an abandonment made by a master who had no authority to abandon to the insurer.<sup>13</sup>

8. *Chesapeake Ins. Co. v. Stark*, 6 Cranch 268, 272, 3 L. Ed. 220; *Columbian Ins. Co. v. Ashby*, 4 Pet. 139, 144, 7 L. Ed. 809; *General Interest Ins. Co. v. Ruggles*, 12 Wheat. 408, 414, 6 L. Ed. 674; *Ward v. Peck*, 18 How. 267, 15 L. Ed. 383.

9. **Underwriters refusing to accept abandonment.**—*Columbian Ins. Co. v. Ashby*, 4 Pet. 139, 7 L. Ed. 809; *Chesapeake Ins. Co. v. Stark*, 6 Cranch 268, 272, 3 L. Ed. 220.

10. *Chesapeake Ins. Co. v. Stark*, 6 Cranch 268, 272, 3 L. Ed. 220; *Columbian Ins. Co. v. Ashby*, 4 Pet. 139, 143, 7 L. Ed. 809. But see *Bell v. Beveridge*, 4 Dall. 272, 1 L. Ed. 830, holding that an election to abandon having been made, it can never afterward be retracted.

If the assured takes possession of the property and puts it to his own use, he thereby relinquishes the abandonment. *Chesapeake Ins. Co. v. Stark*, 6 Cranch 268, 3 L. Ed. 220; *Columbian Ins. Co. v. Ashby*, 4 Pet. 139, 7 L. Ed. 809.

"The revocation of an abandonment, before acceptance by the underwriters, may be inferred from the conduct of the assured; if his acts and interference with the use and management of the subject insured be such as satisfactorily to show that he intended to act as owner, and not for the benefit of the underwriters. But this is always a question of intention, to be collected from the circumstances of the case, and belongs to the jury as matter of fact; and is not to be decided by the court as matter of law." *Columbian Ins. Co. v. Ashby*, 4 Pet. 139, 143, 7 L. Ed. 809.

In the case of the *Chesapeake Ins. Co. v. Stark*, 6 Cranch 268, 272, 3 L. Ed. 220, the court lays down the general rule, as to the effect of an abandonment, but takes a distinction between the acts of an agent and the acts of the assured; that in the latter case, any acts of ownership by the owner himself might be construed into a relinquishment of the abandonment, which

had not been accepted, while the acts of the former agent of the assured interfering with the subject insured will not affect the abandonment. *Columbian Ins. Co. v. Ashby*, 4 Pet. 139, 7 L. Ed. 809.

The court in the case of *Chesapeake Ins. Co. v. Stark*, 6 Cranch 268, 272, 3 L. Ed. 220, did not say, and did not mean to be understood as intimating, that every act of ownership, by the owner himself "must necessarily, and under all possible circumstances, be construed into a relinquishment of an abandonment. The practical operation of so broad a rule would be extremely injurious; it would deter owners from interfering at all for the preservation of the subject insured, and leave it to perish, for fear of prejudicing their rights under the abandonment. All such acts must be judged of from the circumstances of each case. The *quo animo* is the criterion by which they are to be tested." *Columbian Ins. Co. v. Ashby*, 4 Pet. 139, 144, 7 L. Ed. 809.

In the case of *Chesapeake Ins. Co. v. Stark*, 6 Cranch 268, 272, 3 L. Ed. 220, the underwriters had refused to accept the abandonment. But in *Columbian Ins. Co. v. Ashby*, 4 Pet. 139, 144, 7 L. Ed. 809, the owner did not know whether the underwriters would refuse to accept the abandonment. No answer had been received to the letter of abandonment, and the assured was left in uncertainty as to his right of revocation. It was held that, therefore, there was no act of ownership exercised by the owner which the law would pronounce a revocation of the abandonment, or which called upon the court below to instruct the jury that they ought to infer a revocation from any such acts.

11. **Agent.**—*Chesapeake Ins. Co. v. Stark*, 6 Cranch 268, 3 L. Ed. 220.

12. *Chesapeake Ins. Co. v. Stark*, 6 Cranch 268, 3 L. Ed. 220.

13. **Adoption of unauthorized abandonment.**—*Patapsco Ins. Co. v. Southgate*, 5 Pet. 604, 623, 8 L. Ed. 243.

13. **WAIVER.**—The insurers may waive all objections if an abandonment is wanting in any formality, and they do this by calling for the proof and acting as if the abandonment were altogether sufficient.<sup>14</sup>

**Delay in ascertaining the amount of damage** may be considered as waiving an abandonment.<sup>15</sup>

14. **ACCEPTANCE.**—An acceptance of an abandonment is a waiver by the insurer of all objections for want of any formality,<sup>16</sup> or right of abandonment.<sup>17</sup> Whether the insurer accepts or not is a matter of construction of his words and conduct.<sup>18</sup> An acceptance need not be expressly made.<sup>19</sup> It may even be refused, and yet the insurers, by their conduct, may make themselves liable as for a total loss.<sup>20</sup> Acts of the insurer are sometimes construed as an acceptance of a tendered abandonment, when the intention to accept is fairly deducible from the particular conduct, in the absence of explicit refusal.<sup>21</sup> Any act of the underwriter in consequence of an abandonment, which could be justified only under a right derived from it, may be decisive evidence of an acceptance;<sup>22</sup> but any act done for the purpose of making the most of the property, to whomsoever it may prove to belong, ought not to be construed against the party who thus seeks the common interest.<sup>23</sup> The question for the jury is whether, upon the evidence taken in connection with the provisions of the policy, there were any such acts.<sup>24</sup>

The consul of the United States at the port where a vessel was sold, in consequence of her having, in the opinion of the master, sustained damages, the repairs of which would have cost more than half her value at that port, declared in the protest of the master, made at his request, that the master abandoned the vessel, etc., to the underwriters; this protest, as soon as it was received by the assured, the owners of the vessel, was sent to the underwriters; and the owners wrote, at the same time, that they would forward a statement of the loss, with the necessary vouchers, and they soon afterwards did forward the further proofs, and a statement of the loss to them; this constituted a valid abandonment. "This protest, containing the abandonment, was communicated to the underwriters, by the plaintiffs. It became thereby their act, adopted and ratified by them, and must have the same legal effect and operation, as if it had originated with the assured themselves, and constituted a valid abandonment." *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604, 605, 8 L. Ed. 243.

14. *Canada Sugar Ref. Co. v. Insurance Co.*, 175 U. S. 609, 618, 44 L. Ed. 292.

15. **Delay in ascertaining damages.**—*Patapsco Ins. Co. v. Southgate*, 5 Pet. 604, 620, 8 L. Ed. 243.

16. *Canada Sugar Ref. Co. v. Insurance Co.*, 175 U. S. 609, 618, 44 L. Ed. 292.

17. *Richelieu, etc., Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 433, 34 L. Ed. 398; *Copelin v. Insurance Co.*, 9 Wall. 461, 465, 19 L. Ed. 739.

An offered abandonment may be accepted even when the assured has no right to abandon, and if accepted, it must be with its consequences. *Copelin v. Insurance Co.*, 9 Wall. 461, 465, 19 L. Ed. 739; *Richelieu, etc., Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 433, 34 L. Ed. 398.

It is not error to charge that a party assured had no right to abandon, when the

insurers have accepted the abandonment. *Insurance Co. v. Piaggio*, 16 Wall. 378, 21 L. Ed. 358.

Nor to refuse to charge that an abandonment made through error, and so accepted, is void if not warranted by the policy, when no evidence had been given of error by either side. *Insurance Co. v. Piaggio*, 16 Wall. 378, 21 L. Ed. 358.

18. *Richelieu, etc., Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 433, 34 L. Ed. 398.

19. *Copelin v. Insurance Co.*, 9 Wall. 461, 465, 19 L. Ed. 739; *Richelieu, etc., Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 433, 34 L. Ed. 398.

20. *Copelin v. Insurance Co.*, 9 Wall. 461, 465, 19 L. Ed. 739.

21. *Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co.*, 179 U. S. 1, 45 L. Ed. 49.

22. *Richelieu, etc., Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 433, 34 L. Ed. 398.

23. *Richelieu, etc., Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 433, 34 L. Ed. 398.

A policy of marine insurance provided "that the acts of the insured or insurers, or their agents, in recovering, saving and preserving the property insured, in case of disaster, shall not be considered a waiver or an acceptance of the abandonment." On notice of the stranding of the vessel the insurers sent a wrecking party, took possession of and repaired it, being at that time in ignorance of facts which avoided the policy. It was held that such acts do not amount to an acceptance of abandonment; but whether such acts in connection with all the facts and the provisions of the policy, amounted to an acceptance, is a question for the jury. *Richelieu, etc., Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 431, 34 L. Ed. 398.

24. *Richelieu, etc., Nav. Co. v. Boston*



**Acts Which Constitute an Acceptance.**—Taking possession or holding a vessel for an unreasonable time, or taking possession after a pre-emptory abandonment, without qualification or reservation are such acts as imply and constitute an acceptance of the abandonment, and liability for total loss.<sup>25</sup>

15. OPERATION AND EFFECT—*a. In General.*—If an abandonment be legally made, it puts the underwriter completely in the place of the assured,<sup>26</sup> and transfers to him the interest insured, subject to the rights of third persons.<sup>27</sup> The act of abandonment operates as a transfer of the property to the underwriter, and gives to him a right or title to it, or what remains of it, so far as it was covered by the policy, and the proceeds of whatever may be saved; and vests the amount of the insurance in the assured.<sup>28</sup>

Marine Ins. Co., 136 U. S. 408, 433, 34 L. Ed. 398.

25. *Richelieu, etc., Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 434, 34 L. Ed. 398; *Copelin v. Insurance Co.*, 9 Wall. 461, 19 L. Ed. 739.

If a party assuring a vessel which has been sunk, gives notice that he abandons her, as for a total loss, when by the terms of the policy he has no right so to abandon, the company, even if not accepting the abandonment, will nevertheless make itself liable as for a total loss, if taking possession of the vessel under the provisions of the policy, for the purpose of raising, repairing, and returning her, they do not raise, repair, and return in a reasonable time. *Copelin v. Insurance Co.*, 9 Wall. 461, 19 L. Ed. 739.

"The insurers were bound to repair and return without unnecessary delay. In holding longer than was necessary for making repairs, they must be regarded as acting, not as insurers, but as owners, for they had no other authority than that of owners for their failure to return within a reasonable time. Their action was, therefore, a substantial recognition and acceptance of the abandonment of which they had been notified, for in no other way had they become owners." *Copelin v. Insurance Co.*, 9 Wall. 461, 19 L. Ed. 739.

This is so, notwithstanding there is a provision in the policy that the acts of the insurers, in preserving, securing, or saving the property insured, in case of danger or disaster, should not be considered or held an acceptance of abandonment. The provisions refers only to authorized acts. *Copelin v. Insurance Co.*, 9 Wall. 461, 462, 19 L. Ed. 739.

**Carrying cargo to port of destination.**—Where by the terms of the policy the underwriters have the right to carry the cargo from the port of distress to the port of destination, their action in so doing cannot be held to amount to an acceptance of a tendered abandonment. *Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co.*, 179 U. S. 1, 45 L. Ed. 49.

The sue and labor clause expressly provided that acts of the insurer in recovering, saving and preserving the property in case of disaster, were not to be considered as an acceptance of abandonment. The insurer carried the goods from a port

where there was no agent of the assured, no adequate means of protection and no market, to a port at which there were excellent facilities of protection and handling of the cargo, easy access to the head agency of the assured and a good market; it was also the port of destination and the goods were offered to the consignee. It was held that such labor and care rendered in good faith did not operate as an acceptance of an attempted abandonment, especially as there was no right to abandon and a distinct refusal to accept. *Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co.*, 179 U. S. 1, 18, 45 L. Ed. 49.

26. *Chesapeake Ins. Co. v. Stark*, 6 Cranch 268, 272, 3 L. Ed. 220; *Columbian Ins. Co. v. Ashby*, 4 Pet. 139, 144, 7 L. Ed. 809; *General Interest Ins. Co. v. Rugles*, 12 Wheat. 408, 414, 6 L. Ed. 674; *Ward v. Peck*, 18 How. 267, 268, 15 L. Ed. 383.

27. *Chesapeake Ins. Co. v. Stark*, 6 Cranch 268, 3 L. Ed. 220; *Rhineland v. Insurance Co.*, 4 Cranch 29, 45, 2 L. Ed. 540; *Insurance Co. v. Gossler*, 96 U. S. 645, 656, 24 L. Ed. 863.

By an abandonment and acceptance, the whole interest of the assured is transferred to the underwriters. *Richelieu, etc., Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 434, 34 L. Ed. 398; *Copelin v. Insurance Co.*, 9 Wall. 461, 464, 19 L. Ed. 739.

**No greater right than assured possesses.**—By an abandonment, the insurer is placed in the situation of the insured whom he represents, and can have no greater right than the insured would have had. *Insurance Co. v. Gossler*, 96 U. S. 645, 656, 24 L. Ed. 863.

"Unlike that, the lender on bottomry loses his remedy only when the ship or other property hypothecated is wholly lost; and, where parts are preserved, such parts are esteemed his proper goods, being presumed to be the product of his money; and he, therefore, takes preference of the owner or insurer. In case of shipwreck, 'the owners are not personally bound, except to the extent of the fund salvaged which has come into their hands.' *The Virgin*, 8 Pet. 538, 8 L. Ed. 1036." *Insurance Co. v. Gossler*, 96 U. S. 645, 656, 24 L. Ed. 863.

28. *Patapsco Ins. Co. v. Southgate*, 5

b. *Agency of Assured and Master for Underwriter.*—**Agent of Assured as Agent of Underwriter.**—If an abandonment be legally made, the agent of the assured becomes the agent of the underwriter; and the acts of the agent, interfering with the subject insured, will not affect the abandonment.<sup>29</sup> But it is only after a valid abandonment and the passing of the title that the captain then becomes the insurer's agent.<sup>30</sup>

**Assured as Agent of Underwriter.**—The assured, by operation of law, becomes, after the abandonment, the agent of the underwriters, and is bound to use his utmost endeavors to rescue from destruction as much of the property as he can, so as to lighten the burden which was to fall on the underwriters.<sup>31</sup>

c. *Ratification of Unauthorized Sale by Master.*—The abandonment of a ship by her owners to the underwriters does not operate to ratify the title of one who claims her under an unauthorized sale by the master. The abandonment cannot affect the title of such a claimant by way of ratification or estoppel.<sup>32</sup>

Pet. 604, 605, 8 L. Ed. 243; *Comegys v. Vasse*, 1 Pet. 193, 215, 7 L. Ed. 108; *General Interest Ins. Co. v. Ruggles*, 12 Wheat. 408, 410, 6 L. Ed. 674; *Rhineland v. Insurance Co.*, 4 Cranch 29, 45, 2 L. Ed. 540; *The Falcon*, 19 Wall. 75, 80, 22 L. Ed. 98.

"By the act of abandonment, the assured renounces and yields up to the underwriter all his right, title and claim to what may be saved; and leaves it to him to make the most of it for his own benefit. The underwriter then stands in the place of the assured, and becomes legally entitled to all that can be rescued from destruction." *Comegys v. Vasse*, 1 Pet. 193, 214, 7 L. Ed. 108.

The law gives to the act of abandonment to underwriters, when accepted, all the effects which the most accurately drawn assignment would accomplish. *Comegys v. Vasse*, 1 Pet. 193, 7 L. Ed. 108.

An abandonment divests the assured of all interest. *The Propeller Monticello v. Mollison*, 17 How. 152, 156, 15 L. Ed. 68.

**Title to vessel.**—Where a vessel is abandoned as a total loss by her owner for the purposes of the policy of insurance with the privilege to the insurance company of treating her as a vessel and repairing her if it can; her ownership by the insurance company, resulting from the abandonment, is of the same character as would have been her ownership by any other person who had purchased her in her then condition from a former owner. *Craig v. Continental Ins. Co.*, 141 U. S. 638, 645, 35 L. Ed. 886.

**Compensation for loss.**—"Whatever may be afterwards recovered or received, whether in the course of judicial proceedings or otherwise, as a compensation for the loss, belongs to the underwriters." *Comegys v. Vasse*, 1 Pet. 193, 214, 7 L. Ed. 108.

The abandonment passes any compensation by way of indemnity for property unjustly captured. *Comegys v. Vasse*, 1 Pet. 193, 215, 7 L. Ed. 108.

**Damages under treaty with Spain.**—The right to compensation for damages and in-

juries, to which citizens of the United States were entitled, and which, under the treaty with Spain, were to be the subjects of compensation, passed, by abandonment, to the underwriters upon property, which had been seized or captured. *Comegys v. Vasse*, 1 Pet. 193, 7 L. Ed. 108.

**Property restored after capture.**—The assignment by abandonment, passes the property itself or its proceeds, if restored, after an unjust capture. *Comegys v. Vasse*, 1 Pet. 193, 215, 7 L. Ed. 108.

**Salvage.**—"Where there is only a technical total loss, and any part of the subject insured remains; the interest in the salvage, whatever it may be, becomes transferred to the underwriters." *General Interest Ins. Co. v. Ruggles*, 12 Wheat. 408, 414, 6 L. Ed. 674.

29. *Chesapeake Ins. Co. v. Stark*, 6 Cranch 268, 272, 3 L. Ed. 220; *Columbian Ins. Co. v. Ashby*, 4 Pet. 139, 144, 7 L. Ed. 809; *General Interest Ins. Co. v. Ruggles*, 12 Wheat. 408, 414, 6 L. Ed. 674; *Ward v. Peck*, 18 How. 267, 268, 15 L. Ed. 383.

"The agency is, of course, transferred with the subject; and the agent thereafter becomes responsible to the underwriters for the faithful discharge of his trust. No action could be sustained against him by the assured, for the proceeds, or any misconduct in the management thereof." *General Interest Ins. Co. v. Ruggles*, 12 Wheat. 408, 414, 6 L. Ed. 674.

30. *Richelieu, etc., Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 434, 34 L. Ed. 398.

Where there has been no acceptance of an abandonment, the underwriters are not bound by the action of the master who moved the vessel into a dry dock and superintended the repairs. He does not act in this respect as the agent of the underwriters. *Richelieu, etc., Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 434, 34 L. Ed. 398.

31. *Columbian Ins. Co. v. Ashby*, 4 Pet. 139, 143, 7 L. Ed. 809.

32. *Ward v. Peck*, 18 How. 267, 15 L. Ed. 383.

Whether the abandonment is accepted or not, the act of the master in selling the

d. *Effect of Sale by Underwriter on Obligation of Carrier*.—Where insurers, to whom the owners have abandoned, take possession, at an intermediate place or port, of goods damaged during a voyage by the fault of the carrier, and there sell them, they cannot hold the carrier liable on his engagement to deliver at the end of the voyage in good order and condition.<sup>33</sup>

e. *Right of Transference of Property*.—See the title INSURANCE, vol. 7, p. 197.

f. *Right to Proceeds*.—See ante, "In General," IX, H, 15, a.

#### X. Right to Proceeds.

See the title INSURANCE, vol. 7, p. 196. See, also, ante, "In General," IX, H, 15, a.

#### XI. Notice and Proof of Loss, Adjustment and Payment.

A. *Waiver of Clause Requiring Adjustment*.—The underwriter may waive a clause requiring an adjustment before payment.<sup>34</sup>

B. *Payment No Bar to Suit against Wrongdoer*.—The reception of the amount of the loss from the insurers is no bar to an action subsequently commenced against a wrongdoer who caused the loss to recover possession for the injury.<sup>35</sup>

#### XII. Contribution and Subrogation.

**Contribution**.—See the title INSURANCE, vol. 7, p. 196.

**Subrogation**.—See the title SUBROGATION.

#### XIII. Assignment of Policy.

See the title INSURANCE, vol. 7, p. 182.

#### XIV. Transfer of Property.

See ante, "Effect of Sale," V, E. See the title INSURANCE, vol. 7, pp. 117, 147, 197.

#### XV. Alteration, Cancellation and Termination of Policy.

The parties to a policy of marine insurance may agree to cancel it. A contract varying a policy is as much an instrument as the policy itself, and therefore, can only be executed in the manner prescribed by law. The force of the policy might indeed have been terminated by actually canceling it, but a contract to cancel it is as solemn an act as a contract to make it, and to become the act of the company must be executed according to the forms in which by law they are enabled to act.<sup>36</sup>

vessel without authority, "can receive no ratification from allegations or admissions made by any party in a dispute on the contract of assurance, where the inquiry as to the act of the master was irrelevant. The defendant, having obtained possession unlawfully, was a trespasser, and can no more plead the abandonment as a confirmation of his title than if he had obtained it by theft or piracy; moreover, if the circumstances would have justified a sale by the master, no abandonment was necessary. It cannot, therefore, by any possible implication, amount to a confirmation of such sale." *Ward v. Peck*, 18 How. 267, 15 L. Ed. 383.

33. *Propeller Mohawk*, 8 Wall. 153, 19 L. Ed. 406.

34. *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 392, 6 L. Ed. 664.

The object of a clause in a policy of marine insurance in the following terms: "In case of loss the same shall be paid in sixty days after proof" and adjustment thereof, is, in the case of an undisputed

loss, to obtain a delay of payment for sixty days after the adjustment. But from its very terms, it can only apply to the case where there has been proof of loss, and also an adjustment. If proof of the loss has been offered, and no adjustment made, as in case of a disputed loss, the clause has been supposed not to apply. The underwriter is, then, understood to waive the privilege. *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 392, 6 L. Ed. 664.

35. *The Atlas*, 93 U. S. 302, 310, 23 L. Ed. 863.

This rule applies to a suit for compensation for injuries occasioned by a collision. *The Atlas*, 93 U. S. 302, 310, 23 L. Ed. 863.

36. *Head v. The Providence Ins. Co.*, 2 Cranch 127, 168, 2 L. Ed. 229. See the title INSURANCE, vol. 7, pp. 97, 147.

**Corporation**.—The cancellation must be in the mode in which the underwriting company is authorized by its charter to act. If it can only act by writing, the cancellation must be made in writing.



**Effect of Change in Relative Situation of Parties.**—If the insured make a proposition to the underwriters to cancel the policy, which proposition is rejected; and the underwriters afterwards assent to the proposition, but before information of such assent reaches the insured, they have notice of the loss of the vessel insured, such proposition and assent do not in law amount to an agreement to cancel the policy.<sup>37</sup>

**Notice of Termination.**—See the title *INSURANCE*, vol. 7, p. 147.

#### **XVI. Reformation.**

See post, "Reformation," XVIII, A, 1.

#### **XVII. Reinsurance.**

See the title *INSURANCE*, vol. 7, p. 202.

#### **XVIII. Remedies.**

**A. Form**—1. **REFORMATION.**—A mutual mistake regarding the voyage will be reformed so as to conform to the contract.<sup>38</sup>

**The evidence of the knowledge of the underwriters** of the intention of the insured, at the time of making the policy, ought to be very clear, to justify a court of equity in conforming the policy to that intention.<sup>39</sup>

2. **ACTION OF COVENANT.**—See post, "Pleading," XVIII, F.

**B. Jurisdiction**—1. **ADMIRALTY AND MARITIME JURISDICTION.**—The contract of marine insurance is a maritime contract, within the admiralty and maritime jurisdiction, though not within the exclusive jurisdiction of the United States courts.<sup>40</sup>

2. **COURTS OF COMMON LAW.**—The common-law remedies, when applied to the contract of insurance, where so inadequate and clumsy that disputes arising out of the contract were generally left to arbitration, until the year A. D. 1601, when the statute of 43 Elizabeth was passed creating a special court, or commission, for hearing and determining causes arising on policies of insurance.<sup>41</sup>

**C. Time before Which Suit May Not Be Brought.**—See the title *INSURANCE*, vol. 7, p. 207.

**D. Limitation of Actions.**—See the title *INSURANCE*, vol. 7, p. 207, et seq.

**E. Parties**—1. **IN GENERAL.**—See the titles *INSURANCE*, vol. 7, p. 209; *SUBROGATION*.

*Head v. The Providence Ins. Co.*, 2 Cranch 127, 168, 2 L. Ed. 229.

37. *Head v. The Providence Ins. Co.*, 2 Cranch 127, 2 L. Ed. 229.

38. **Mistake as to voyage.**—*Hearne v. Marine Ins. Co.*, 20 Wall. 488, 22 L. Ed. 395.

Where a party proposed to insurers to insure his vessel on a "voyage from Liverpool to Cuba and to Europe via Falmouth," at a rate named, and the company offered to insure at a somewhat higher rate, saying, "It is worth something, you know, to cover the risk at the port of loading in Cuba," held that it was implied that "the port of loading" might be different from the port of discharge, and where the assured accepted this offer, and told the insurer to insure "at and from Liverpool, to Cuba and to Europe via a market port," etc., held further, that a policy which insured "to port of discharge in Cuba, and to Europe via a market port," etc., did not conform to the contract, and was to be reformed so as to do so. *Equitable Ins. Co. v. Hearne*, 20 Wall. 494, 22 L. Ed. 398. See ante, "To," 'at' and 'from,' IV, D, 3, b.

**Case one of mere deviation.**—Where by the terms of a policy a vessel is insured "to a port in Cuba, and at and thence to port of advice and discharge in Europe," and the vessel is lost in going from the port of discharge in Cuba to another port in the same island for relanding; the policy will not be reformed on the ground that there was a usage that vessels going to Cuba might visit two ports—one for discharge and the other for reloading. The contract of insurance implied that she should visit no other port in Cuba than that specified. The usage can have no application, there being no ambiguity in the contract. *Hearne v. Marine Ins. Co.*, 20 Wall. 488, 22 L. Ed. 395. See ante, "Operation and Effect," VIII, E, 4.

39. **Evidence of knowledge of insurer.**—*Graves v. Boston Marine Ins. Co.*, 2 Cranch 419, 2 L. Ed. 324.

40. **Admiralty and maritime jurisdiction.**—*Insurance Co. v. Dunham*, 11 Wall. 1, 20 L. Ed. 90.

41. **Courts of common law.**—*Insurance Co. v. Dunham*, 11 Wall. 1, 31, 20 L. Ed. 90.

2. **SUIT TO RECLAIM INSURANCE MONEY.**—Where the indemnity money under a policy of marine insurance has been received by the agents of the assured and paid over to their principal, without notice of any adverse claim, or reason to suspect it, the assurers, claiming a right to reclaim such money, having been guilty of laches, must look to the principal and cannot maintain a suit against the agents.<sup>42</sup>

3. **AGENT.**—See preceding paragraph.

**F. Pleading.**—It is not necessary, in an action of covenant on a policy, that the declaration should aver that the plaintiff had abandoned to the underwriters.<sup>43</sup>

**G. Evidence.**—1. **SCOPE OF TREATMENT.**—So far as practicable evidence in marine insurance cases has been treated throughout this article in conjunction with the various branches of the substantive law of marine insurance. As for instance, as to evidence pertaining to exclude risks, see ante, "Evidence," VII, F, 4.

2. **PRESUMPTIONS AND BURDEN OF PROOF.**—Where the premium has been paid, the loss has occurred and the indemnity money has been received by the agents of the assured and paid over to their principals, the assurers claim the right to go behind all this, and to reclaim from assured the fund thus received and parted with, it is incumbent upon them to establish everything necessary to entitle them to recover, and they have no right to throw upon the defendant any part of the burden that belonged to themselves. Such is the legal result, notwithstanding the negative form of the averment, to be established.<sup>44</sup>

3. **PAROL EVIDENCE.**—Parol evidence to contradict and vary the terms of a policy of marine insurance is not admissible in an action on such policy.<sup>45</sup>

**An usage of trade** may be proved by parol, although such usage originated in a law or edict of the government of the country.<sup>46</sup>

**To Explain Receipts.**—Parol evidence is admissible to explain receipts ex-

42. *Hooper v. Robinson*, 98 U. S. 528, 25 L. Ed. 219.

43. **Pleading.**—*Hodgson v. Marine Ins. Co.*, 5 Cranch 100, 3 L. Ed. 48.

44. **Presumptions and burden of proof.**—*Hooper v. Robinson*, 98 U. S. 528, 540, 25 L. Ed. 219.

**Insurable interest.**—Where in order to maintain the plaintiffs' case it was necessary to be made to appear that the assured had no insurable interest in the cargo, the cargo being the thing insured, the onus probandi was upon the plaintiffs. *Hooper v. Robinson*, 98 U. S. 528, 540, 25 L. Ed. 219.

In an action against A to recover the amount paid to him by the underwriters, who allege that neither he nor his principal had an insurable interest in such cargo, the burden of proof is on the plaintiffs to show that fact. *Hooper v. Robinson*, 98 U. S. 528, 25 L. Ed. 219.

45. **Parol evidence.**—*Insurance Co. v. Lyman*, 15 Wall. 664, 21 L. Ed. 246.

A., knowing that his vessel had been lost on the 8th of January, 1870, but concealing his knowledge of the fact, applied for, on the 15th following, and got a written policy of insurance dated on that day, on her, "lost or not lost," from the 1st of January, 1870, to the 1st of April following. The insurance company, discovering afterwards that when he applied for this

policy he knew of the loss, refused to pay. He brought suit, setting out his written policy, but declaring on it in such a way as was meant to show that the execution of it was but "a compliance with and a formal statement" of an agreement to make the insurance, which he alleged had been entered into between himself and the insurers on the 31st of December, 1869, and before the loss. Held: (1) That parol proof was not admissible to show that the contract of insurance was actually made before the loss occurred, though executed and delivered, and paid for afterward, for that to allow such proof would be to contradict and vary the terms of the policy in a matter material to the contract. Held: (2) That the terms of the contract having been reduced to writing, signed by one party and accepted by the other at the time the premium of insurance was paid, neither party could abandon that instrument, as of no value in ascertaining what the contract was, and resort to the verbal negotiations which were preliminary to its execution, for that purpose. *Insurance Co. v. Lyman*, 15 Wall. 664, 21 L. Ed. 246. See, also, *Northern Assur. Co. v. Grand View Bldg. Ass'n*, 183 U. S. 308, 350, 46 L. Ed. 213, quoting from *Insurance Co. v. Lyman*, 15 Wall. 664, 21 L. Ed. 246.

46. *Livingston v. Maryland Ins. Co.*, 7 Cranch 506, 3 L. Ed. 421.

pressed to be "in full of all claims for loss or damage by fire," and to show that they were not intended to cover a claim for raising, etc.<sup>47</sup>

4. DOCUMENTARY EVIDENCE.—The usual rules as to documentary evidence have been applied in marine insurance cases as to the admissibility of a letter of instructions to the master.<sup>48</sup>

5. JUDGMENTS AND SENTENCE OF COURTS AS EVIDENCE.—The usual rules as to admissibility and weight as evidence of judgments and sentences of courts has been applied in marine insurance cases.<sup>49</sup>

6. PROTEST.—A marine protest, to be admissible in evidence, must have been made at the first port at which the master arrived, after the loss of his vessel, if practicable.<sup>50</sup>

47. Parol evidence to explain receipts.—*Fire Ins. Ass'n v. Wickham*, 141 U. S. 564, 581, 35 L. Ed. 860.

The plaintiff took out fire insurance policies upon a vessel in 10 companies to the amount of \$40,000 in all. The vessel took fire, and, in order to save it, it was scuttled and sunk, and the fire thus extinguished. It was then raised, taken to port, and repaired. The loss by fire, exclusive of the expense of raising the vessel, etc., was \$15,364.78. The owner made claim upon the insurers for this amount for "loss and damage by fire and water as per agreement," stating that he would make further claims "for expenses of raising the propeller," and was "preparing the statement of such expenses to submit with his subsequent claim." The companies declined to pay such subsequent claim, but paid in advance the amount of the loss by fire so stated, taking receipts, expressed to be in full of all claims for loss or damage by fire, and in which it was further stated that the policies were canceled and surrendered. The parties further signed a paper in which "the loss and damage by fire" was certified at that aggregate amount, "payable without discount upon presentation," and the amount was apportioned among the several companies. In an action brought by the owner to recover from the companies the amount of the claim for raising and saving the vessel, some \$15,000, it was held that parol evidence was admissible to explain the receipts, and to show that they were not intended to cover the claim for raising, etc. *Fire Ins. Ass'n v. Wickham*, 141 U. S. 564, 565, 35 L. Ed. 860.

"The only clause in these receipts which can possibly be claimed to partake of the nature of a contract is that providing for a cancellation and surrender of the policy. There was a similar provision endorsed on the policies. These, however, were inserted in pursuance of a clause in the policy to the effect that the insurance might be terminated at any time, at the option of the company, upon giving notice to the insured; and that in such case he should be entitled to claim a ratable proportion of the premium for the unexpired term for which the policy was to run. The court instructed the jury correctly upon this point, that if they found that the pol-

icies were surrendered in consideration of the unearned premiums stated in the receipts, endorsed on the policies, the surrender was no defense; and while it had a tendency to show the plaintiffs' relinquishment of all their rights under the policy, it was not conclusive, if the jury found that it was made in consideration of the unearned premiums." *Fire Ins. Ass'n v. Wickham*, 141 U. S. 564, 581, 35 L. Ed. 860.

48. Documentary evidence.—See the title DOCUMENTARY EVIDENCE, vol. 5, p. 431.

Letter of instruction to master.—In *Story v. Strettel*, 1 Dall. 10, 1 L. Ed. 15, a letter of instructions from the owners of the vessel insured to the master, sworn by the master to be the only instruction he had, was given in evidence.

49. Insurers not parties to suit to enforce lien for repairs.—The record in a suit instituted by a dry dock company against a vessel which had been stranded, to enforce a lien for the repairs, is not admissible against the underwriters, to show the acceptance of an abandonment. The record is not admissible to show the amount due to the dry dock company, and also to show that the steamer was sold to satisfy the decree in that suit, and therefore to establish a constructive acceptance of abandonment by the insurers. The insurers were not parties to that suit and the cost of the repairs and the amount of the loss were properly shown by other and competent evidence, while the sale of the vessel had no tendency to prove the acceptance of the abandonment, but rather that the underwriters did not consider themselves bound in the premises. *Richelieu, etc., Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 436, 34 L. Ed. 398.

Sentence of court of admiralty.—The sentence of a foreign court of admiralty, condemning a vessel for breach of blockade, is conclusive evidence of that fact, in an action on a policy of marine insurance. *Croudson v. Leonard*, 4 Cranch 434, 2 L. Ed. 670.

50. Protest.—*Boyce v. Moore*, 2 Dall. 196, 1 L. Ed. 346; *Richette v. Stewart*, 1 Dall. 317, 1 L. Ed. 154.

"Protests are only admitted, from necessity; and the rule which requires that they should be made at the first port, is a good



**Before Whom Made.**—When there is no notary, a protest may be made before a magistrate.<sup>51</sup>

**Attestation.**—The protest of the master must be attested by his oath and ought to be accompanied by the attestation of a majority of the crew.<sup>52</sup>

**Admission made by the master of a vessel in his protest,** after the loss of the ship, are not ordinarily admissible in evidence so long as the captain is living, unless to contradict him if he varied from it; but when made a part of the proofs of loss by being directly referred to in such proofs, it is admissible, as the admission of the proofs of loss involve the admission of the explanatory writing.<sup>53</sup>

**H. Variance.**—See ante, "Proof of Interest Other than That Alleged," V, F, 2.

**I. Verdict**—1. **PARTIAL LOSS WHERE TOTAL LOSS CLAIMED.**—On a declaration for a total loss, and proof of a loss in its nature total, the jury may give damages for less than a total loss.<sup>54</sup> Where there has been a capture and condemnation, the jury may find damages for a partial loss; although the declaration claimed for a total loss; and although there was no proof of an actual abandonment, or an offer to abandon to the underwriters.<sup>55</sup>

2. **SPECIAL VERDICT.**—See ante, "Time," IX, H, 5.

**MARINERS.**—See the title SEAMEN.

**MARINES.**—See the title ARMY AND NAVY, vol. 2, p. 498.

**MARITAL RIGHTS.**—See the title HUSBAND AND WIFE, vol. 6, p. 716, and references there given.

**MARITIME.**—See note 1.

one, to prevent abuses. If it be not practicable to make it at the first port, it must be made at the next, where it is practicable." *Boyce v. Moore*, 2 Dall. 196, 1 L. Ed. 346.

In *Story v. Strettel*, 1 Dall. 10, 1 L. Ed. 15, the protest of a master of a vessel was admitted in evidence, and in *Nixon v. Long*, 1 Dall. 6, 1 L. Ed. 13.

**Captain living.**—"Undoubtedly the protest of the captain, so long as he was living, would not be evidence on one side or the other, unless to contradict him if he varied from it; and it is said in *Arnold on Insurance* (2d Ed. by Perkins,) vol. 2, p. 1353, that it would not be made evidence as against the assured, if the brokers showed it to the underwriters with other papers relating to the loss on demand of payment. But it was admissible in this case, not on the ground of agency, but because it was made part of the proofs of loss, being directly referred to in the proofs in the statement that the vessel ran ashore, 'and became a wreck and total loss, and was duly abandoned by the owners to her insurers, as will appear by certified copy of the protest of her master and mariners, heretofore served upon you.' Hence the admission of the proofs of loss involved the admission of the explanatory writing. *Insurance Co. v. Newton*, 22 Wall. 32, 22 L. Ed. 793." *Richelieu, etc., Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 433, 34 L. Ed. 398.

**51. Before whom made.**—*Boyce v. Moore*, 2 Dall. 196, 1 L. Ed. 346.

**52. Oath.**—*Richette v. Stewart*, 1 Dall. 317, 1 L. Ed. 154.

A process verbal made by the master of a vessel, who was also a part owner, on arrival at a French port and there delivered into the admiralty, but unattested by the oath of the master, or of any of the mariners, is not admissible in evidence in an action on a policy of marine insurance. *Richette v. Stewart*, 1 Dall. 317, 1 L. Ed. 154.

**53. Richelieu, etc., Nav. Co. v. Boston Marine Ins. Co.**, 136 U. S. 408, 435, 34 L. Ed. 398.

**54. Partial law where total loss claimed.**—*Watson v. Insurance Co.*, 4 Dall. 283, 1 L. Ed. 835.

**55. Watson v. Insurance Co.**, 4 Dall. 283, 1 L. Ed. 835.

**1. Maritime belt.**—"The maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian states, which can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether fish, or pearls, or amber, or other products of the sea." *Louisiana v. Mississippi*, 202 U. S. 1, 52, 50 L. Ed. 913. See, generally, the title NAVIGABLE WATERS.

**Maritime contracts.**—See the titles ADMIRALTY, vol. 1, p. 137; MARITIME LIENS.

**Maritime law.**—See the titles ADMIRALTY, vol. 1, p. 154; SHIPS AND SHIP-PING.

# MARITIME LIENS.

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### CROSS REFERENCES.

See the titles ADMIRALTY, vol. 1, p. 119; BOTTOMRY AND RESPONDENTIA, vol. 3, p. 448; COLLISION, vol. 3, p. 870; DEATH BY WRONGFUL ACT, vol. 5, p. 200; GENERAL AVERAGE, vol. 6, p. 549; LIENS, vol. 7, p. 890; MASTERS OF VESSELS; MORTGAGES AND DEEDS OF TRUST; PENALTIES AND FORFEITURES; SALVAGE; SEAMEN; SHIPS AND SHIPPING; TOWAGE, TUGS AND TOWS.

As to effect of action at common law as barring right to sue to enforce maritime lien, see the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 17, note, 7. As to liability of vessel for injury to seamen, see the title SEAMEN. As to effect of bill of exchange on owner of vessel as creating a lien in holder's favor, see the title BILLS, NOTES AND CHECKS, vol. 3, p. 314. As to admiralty jurisdiction over mortgages of vessels, see the title ADMIRALTY, vol. 1, p. 140.

### I. Definitions and General Considerations.

**A. Definition and Nature**—1. DEFINITION.—The maritime privilege or lien is adopted from the civil law, and imports a tacit hypothecation of the subject of it. It is a "jus in re," without actual possession or any right of possession. It accompanies the property even into the hands of a bona fide purchaser, and can be executed and divested only by a proceeding in rem.<sup>1</sup>

2. RIGHT OF PROPERTY.—A maritime lien is a "jus in re;"<sup>2</sup> it is a right of

**1. Definition and nature of lien.**—*Vandewater v. Mills*, 19 How. 82, 89, 15 L. Ed. 554; *The J. E. Rumbell*, 148 U. S. 1, 9, 37 L. Ed. 345; *The Glide*, 167 U. S. 606, 612, 42 L. Ed. 296; *The Kalorama*, 10 Wall. 204, 211, 19 L. Ed. 941. See post, "Lien Not Dependent on Possession," I, A, 3.

A maritime lien is a privilege in the thing, and is not dependent upon possession or registry. *The Kalorama*, 10 Wall. 204, 211, 19 L. Ed. 941.

A maritime lien, is the foundation of the proceeding in rem, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such lien exists a proceeding in rem may be had, it will

be found to be equally true, that in all cases where a proceeding in rem is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing to be carried into effect by legal process. *The Rock Island Bridge*, 6 Wall. 213, 215, 18 L. Ed. 753. See, also, *The Maggie Hammond*, 9 Wall. 435, 19 L. Ed. 772.

**2. Lien a "jus in re."**—*The Rock Island Bridge*, 6 Wall. 213, 18 L. Ed. 753; *The J. E. Rumbell*, 148 U. S. 1, 11, 37 L. Ed. 345; *Moran v. Sturges*, 154 U. S. 256, 282, 38 L. Ed. 981; *The Lottawanna*, 21 Wall. 558, 22 L. Ed. 654; *The John G. Stevens*, 170 U. S. 113, 117, 42 L. Ed. 969; *The China*, 7 Wall. 53, 19 L. Ed. 67.

property and not a mere matter of procedure,<sup>3</sup> and confers upon its holder such a right in the thing that he may subject it to condemnation and sale to satisfy his claim.<sup>4</sup>

3. **LIEN NOT DEPENDENT ON POSSESSION.**—A maritime lien, unlike a lien at common law, may, in many cases, exist without possession of the thing, upon which it is asserted, either actual or constructive; it travels with the thing, wherever that goes, and into whosoever hands it may pass.<sup>5</sup>

**B. Distinctions.**—1. **DISTINGUISHED FROM LIENS BY BOTTOMRY.**—See the title *BOTTOMRY AND RESPONDENTIA*, vol. 3, p. 450.

2. **DISTINGUISHED FROM COMMON-LAW LIENS.**—See ante, "Lien Not Dependent on Possession," I, A, 3.

## II. Creation and Existence of Lien.

**A. Power of Congress to Provide for Lien.**—It seems that congress, under the power to regulate commerce, has authority to establish a lien on vessels of the United States in favor of materialmen, uniform throughout the whole country.<sup>6</sup>

**B. Property Subject to Lien.**—1. **IN GENERAL.**—A maritime lien can only exist upon movable things engaged in navigation, or upon things which are the subjects of commerce on the high seas or navigable waters. It may arise with reference to vessels, steamers, and rafts, and upon goods and merchandise carried by them. But it cannot arise upon anything which is fixed and immovable.<sup>7</sup>

2. **BRIDGES OR WHARVES.**—Bridges and wharves may aid commerce by facilitating intercourse on land, or the discharge of cargoes, but they are not in any sense the subjects of maritime lien.<sup>8</sup>

3. **FREIGHT.**—Freight is subject to a lien for seamen's wages.<sup>9</sup>

4. **PROPERTY OF UNITED STATES.**—Personal property of the United States on board of a vessel, for transportation from one point to another, is liable to a lien for salvage services rendered in saving the property.<sup>10</sup>

5. **PROCEEDS OF VESSEL OR PROPERTY.**—Where a vessel is subject to a maritime lien, the lien follows and attaches to the proceeds of the vessel.<sup>11</sup> Thus,

3. **Not a mere matter of procedure.**—*The Lottawanna*, 21 Wall. 558, 22 L. Ed. 654; *The J. E. Rumbell*, 148 U. S. 1, 11, 37 L. Ed. 345.

The lien is rather in the nature of the hypothecation of the civil law. *The China*, 7 Wall. 53, 68, 19 L. Ed. 67.

4. **Right of holder to subject res to sale.**—*The Rock Island Bridge*, 6 Wall. 213, 215, 18 L. Ed. 753; *The J. E. Rumbell*, 148 U. S. 1, 11, 37 L. Ed. 345.

5. **Lien not dependent on possession.**—*Vandewater v. Mills*, 19 How. 82, 89, 15 L. Ed. 554; *The J. E. Rumbell*, 148 U. S. 1, 9, 37 L. Ed. 345; *The Glide*, 167 U. S. 606, 612, 42 L. Ed. 296; *The Kalorama*, 10 Wall. 204, 211, 19 L. Ed. 941; *The Rock Island Bridge*, 6 Wall. 213, 215, 18 L. Ed. 753; *The China*, 7 Wall. 53, 68, 19 L. Ed. 67.

"A maritime lien does not include or require possession. The word is used in maritime law, not in the strict legal sense in which we understand it in courts of common law, in which case there could be no lien where there was no possession, actual or constructive; but to express, as if by analogy, the nature of claims which neither presuppose nor originate in possession." *The John G.*

*Stevens*, 170 U. S. 113, 115, 42 L. Ed. 969.

6. **Power of congress to provide for liens.**—*The Lottawanna*, 21 Wall. 558, 559, 22 L. Ed. 654. See the title *INTER-STATE AND FOREIGN COMMERCE*, vol. 7, p. 269.

7. **Property subject to lien.**—*The Rock Island Bridge*, 6 Wall. 213, 18 L. Ed. 753.

8. **Bridges or wharves.**—*The Rock Island Bridge*, 6 Wall. 213, 216, 18 L. Ed. 753.

9. **Freight as subject to lien for wages.**—*Sheppard v. Taylor*, 5 Pet. 675, 711, 8 L. Ed. 269.

10. **Property of United States.**—*The Davis*, 10 Wall. 15, 19 L. Ed. 875.

11. **Lien as attaching to proceeds of sale.**—*Cutler v. Rae*, 7 How. 729, 731, 12 L. Ed. 890; *Sheppard v. Taylor*, 5 Pet. 675, 8 L. Ed. 269; *The Lottawanna*, 20 Wall. 201, 221, 22 L. Ed. 259; *O'Brien v. Miller*, 168 U. S. 287, 305, 42 L. Ed. 469; *The Edith*, 94 U. S. 518, 24 L. Ed. 167.

Where the lien is attached to the vessel or cargo, it will, until it is discharged, adhere to the property in the hands of third persons, and will follow the proceeds, in certain cases, in the hands of assignees. And in such cases, the lien may be enforced in a court of admiralty,

where the vessel is sold the lien attaches to the proceeds,<sup>12</sup> and in case of seizure and forfeiture, the lien will attach to money awarded by way of indemnity to the owners by the government making the seizure.<sup>13</sup> While any person having a specific lien on, or a vested right in, a surplus fund in court, may apply by petition for the protection of his interest under the forty-third admiralty rule,<sup>14</sup> the court cannot marshal a fund except as between lien

by a proceeding in personam, against the party who holds the property or proceeds. *Cutler v. Rae*, 7 How. 729, 731, 12 L. Ed. 890; *Sheppard v. Taylor*, 5 Pet. 675, 8 L. Ed. 269.

A right of action for the value of the owner's interest in a ship and freight is to be considered as a substitute for the ship itself. *O'Brien v. Miller*, 168 U. S. 287, 305, 42 L. Ed. 469.

**12. Lien attaches to proceeds of sale.**—*The Siren*, 7 Wall. 152, 19 L. Ed. 129. See *The Edith*, 94 U. S. 518, 24 L. Ed. 167; *The Lottawanna*, 21 Wall. 558, 559, 22 L. Ed. 654.

By the admiralty law, all maritime claims upon the vessel extend equally to the proceeds arising from its sale, and are to be satisfied out of them. These principles were thus applied: A prize ship, in charge of a prize master and crew, on her way from the place of capture to the port of adjudication, committed a maritime tort by running into and sinking another vessel. Upon the libel of the government, the ship was condemned as lawful prize, and sold, and the proceeds paid into the registry. The owners of the sunken vessel, and the owners of her cargo, thereupon intervened by petition, asserting a claim upon the proceeds for the damages sustained by the collision. Held, that they were entitled to have their damages assessed and paid out of the proceeds before distribution to the captors. *The Siren*, 7 Wall. 152, 19 L. Ed. 129.

**13. Indemnity paid for seizure of vessel.**—*Sheppard v. Taylor*, 5 Pet. 675, 8 L. Ed. 269.

The ship *Warren*, owned in Baltimore, sailed from that port, in 1806, the officers and seamen having shipped to perform a voyage to the northwest coast of America, thence to Canton, and thence to the United States; the ship proceeded, under the instructions of the owners, to Conception Bay, on the coast of Chili, by the orders of the supercargo, he having full authority for that purpose; the cargo had, in fact, been put on board for an illicit trade against the laws of Spain, on that coast. After the arrival of the *Warren*, she was seized by the Spanish authorities, the vessel and cargo condemned, and the proceeds ordered to be deposited in the royal chest; the officers and seamen were imprisoned, and returned to the United States; some after eighteen months, and others not until four years from the term of their departure; the king of Spain subsequently

ordered the proceeds of the *Warren* and cargo to be repaid to the owners, but this was not done; afterwards, the owners having become insolvent, assigned their claims for the restoration of the proceeds, and for indemnity from Spain, to their separate creditors; and the commissioners under the Florida treaty awarded to be paid to the assignees a sum of money, part for the cargo, part for the freight, and part for the ship *Warren*. The officers and seamen having proceeded against the owners of the ship, by libel for their wages, claiming them by reason of the change of voyage, from the time of her departure until their return to the United States, respectively, and having afterwards claimed payment out of the money paid to the assignees of the owners, under the treaty, it was held, that they were entitled, towards the satisfaction of the same, to the sum awarded by the commissioners for the loss of the ship and her freight, with certain deductions for the expenses of prosecuting the claim before the commissioners; with interest on the amount, from the period when a claim for the same from the assignees was made by a petition. *Sheppard v. Taylor*, 5 Pet. 675, 8 L. Ed. 269.

If the ship had been specifically restored, the seamen might have proceeded against her in the admiralty, in a suit in rem, for the whole compensation due to them; they have by the maritime laws an indisputable lien to this extent. *Sheppard v. Taylor*, 5 Pet. 675, 8 L. Ed. 269.

"There is no difference between the case of a restitution in specie of the ship itself, and a restitution in value; the lien reattaches to the thing and to whatever is substituted for it. This is no peculiar principle of the admiralty. It is found incorporated into the doctrines of courts of common law and equity. The owner and the lien holder, whose claims have been wrongfully displaced, may follow the proceeds, wherever they can distinctly trace them. In respect, therefore, to the proceeds of the ship, we have no difficulty in affirming that the lien in this case attaches to them." *Sheppard v. Taylor*, 5 Pet. 675, 710, 8 L. Ed. 269.

**14. Right of lien holders to fund.**—*The Lottawanna*, 21 Wall. 558, 559, 22 L. Ed. 654.

Over the subject of seamen's wages, the admiralty has an undisputed jurisdiction in rem, as well as in personam; and wherever the lien for the wages



holders.<sup>15</sup>

**C. Who May Subject Vessel to Lien.**—1. **OWNER.**—The fact that the owner is present when the repairs and supplies are furnished, and that he gave directions for them in person; does not defeat the lien, where the repairs and supplies were expressly made on the credit of the vessel.<sup>16</sup>

2. **MASTER**—a. *In General.*—The master of a vessel has power to create a lien upon it for repairs and supplies obtained in a foreign port in a case of necessity, and he does so when he obtains them, in a case of necessity, on the credit of the vessel.<sup>17</sup> It is no objection to his authority that he acted on the occasion under the express instructions of the owner, nor will the lien of those who made the repairs and furnish the supplies be defeated by the fact that his authority emanated from the owner instead of being implied by law.<sup>18</sup>

b. *When Owner Is Present.*—When the owner of the vessel is present the reason for the existence of the power in the master to subject the ship to implied liens ceases, and the contract is inferred to be with the owner himself, on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived.<sup>19</sup>

exists, and attaches upon the proceeds, it is the familiar practice of that court to exert its jurisdiction over them, by way of monition to the parties holding the proceeds. This is familiarly known in the cases of prize, and bottomry, and salvage; and is equally applicable to the case of wages; the lien will follow the ship, and its proceeds, into whose hands soever they may come, by title or purchase from the owner. *Sheppard v. Taylor*, 5 Pet. 675, 8 L. Ed. 269.

15. **Necessity of lien.**—The district court can marshal the fund in its registry only between lien holders and owners. *The Edith*, 94 U. S. 518, 24 L. Ed. 167.

Where claims on the proceeds in the registry of a vessel sold are not maritime liens, the district court cannot distribute those proceeds in payment of the claims if the owners of the vessel oppose such distribution. *The Lottawanna*, 20 Wall. 201, 22 L. Ed. 259.

A creditor by judgment in a state court, of the owners of the vessel, even though he have a decree in personam also in the admiralty against them, cannot seize, or attach, on execution, proceeds of the vessel in the registry of the admiralty. *The Lottawanna*, 20 Wall. 201, 22 L. Ed. 259.

16. **Power of owner to give lien.**—*The Guy*, 9 Wall. 758, 19 L. Ed. 710; *The Kalorama*, 10 Wall. 204, 19 L. Ed. 941.

"Implied liens, it is said, can be created only by the master, but if it is meant by that proposition that the owner, or owners, if more than one, cannot order repairs and supplies on the credit of the vessel, the court cannot assent to the proposition, as the practice is constantly otherwise." *The Kalorama*, 10 Wall. 204, 214, 19 L. Ed. 941.

Undoubtedly the presence of the owner defeats the implied authority of the master, but the presence of the owner would not destroy such credit as is necessary to furnish food to the mariners

and save the vessel and cargo from the perils of the sea. *The Kalorama*, 10 Wall. 204, 214, 19 L. Ed. 941.

17. **Power of master to create lien.**—*Thomas v. Osborn*, 19 How. 22, 15 L. Ed. 534; *The Kate*, 164 U. S. 458, 465, 41 L. Ed. 512; *The Kalorama*, 10 Wall. 204, 213, 19 L. Ed. 941; *The St. Jago De Cuba*, 9 Wheat. 409, 416, 6 L. Ed. 122; *The Valencia*, 165 U. S. 264, 268, 41 L. Ed. 710; *The J. E. Rumbell*, 148 U. S. 1, 37 L. Ed. 345; *Insurance Co. v. Baring*, 20 Wall. 159, 163, 22 L. Ed. 250; *The Lulu*, 10 Wall. 192, 197, 19 L. Ed. 906; *The Patapsco*, 13 Wall. 329, 333, 20 L. Ed. 696; *The Aurora*, 1 Wheat. 96, 101, 4 L. Ed. 45.

The law maritime attaches the power of pledging or subjecting the vessel to materialmen, to the office of ship master, and considers the owner as vesting him with those powers, by the mere act of constituting him ship master. The necessities of commerce require, that when remote from his owner, he should be able to subject his owner's property to that liability, without which, it is reasonable to suppose, he will not be able to pursue his owner's interests. *The St. Jago De Cuba*, 9 Wheat. 409, 416, 6 L. Ed. 122; *The Valencia*, 165 U. S. 264, 268, 41 L. Ed. 710.

18. **Master acting under express authorities.**—*The Kalorama*, 10 Wall. 204, 213, 19 L. Ed. 941.

If the owner gives directions to that effect, the master may still order necessary repairs and supplies, and if the ship is at the time in a foreign port, or in the port of a state other than that of the state to which she belongs, those who make the advances will have a maritime lien, if they were made on the credit of the vessel. *The Kalorama*, 10 Wall. 204, 213, 19 L. Ed. 941.

19. **Power of master when owner present.**—*The St. Jago De Cuba*, 9 Wheat.

c. *Where Master Is Charterer and Special Owner.*—The power of the master to create an implied lien on the vessel extends to a case where he is charterer and special owner *pro hac vice*.<sup>20</sup>

3. PERSON OTHER THAN MASTER OR OWNER.—It is not in the power of any one but the shipmaster or the owner to give implied liens on the vessel.<sup>21</sup>

**D. Claims Giving Rise to Lien**—1. CONTRACT CLAIMS—a. *Ordinary Debts of Owner.*—The vessel is not subject to a lien for a common debt of the master or owner. It is only under very special circumstances, and in an unforeseen and unexpected emergency, that an implied maritime hypothecation can be created.<sup>22</sup>

b. *Advances.*—One who lends money on the credit of a vessel, in case of necessity, in order to enable the master to pay the furnishers of repairs and supplies or other necessary expenses has a lien on the vessel under the same circumstances as if he had furnished the repairs and supplies himself.<sup>23</sup> Thus one who advances money to the master to enable him to pay charges for towage, pilotage, custom house duties, consular fees, and charges for medical attendance upon sailors is entitled to a lien on the vessel.<sup>24</sup> So advances to enable

409, 416, 6 L. Ed. 122; *The Kalorama*, 10 Wall. 204, 213, 19 L. Ed. 941.

**20. Where master is charterer and special owner.**—*Thomas v. Osborn*, 19 How. 22, 15 L. Ed. 534.

"Nor do we think the fact that the master was charterer and owner *pro hac vice* necessarily deprived him of this power. It is true it does not exist in a place where the owner is present. (*The St. Jago De Cuba*, 9 Wheat. 409, 6 L. Ed. 122.) But this doctrine cannot be safely extended to the case of an owner *pro hac vice* in command of the vessel. Practically this special ownership leaves the enterprise subject to the same necessities as if the master were master merely, and not charterer, and the maritime law gives him the same power to borrow to meet that necessity, as if he were not charterer." *Thomas v. Osborn*, 19 How. 22, 19, 15 L. Ed. 534.

But the master cannot bind the general owners personally for supplies which he, as charterer, was to furnish. *Thomas v. Osborn*, 19 How. 22, 30, 15 L. Ed. 534.

**21. Persons other than master or owner.**—*The St. Jago De Cuba*, 9 Wheat. 409, 416, 6 L. Ed. 122.

**22. No lien for ordinary debts of owner.**—*Pratt v. Reed*, 19 How. 359, 361, 15 L. Ed. 660; *Tod v. Pratt*, 19 How. 362, 15 L. Ed. 662; *Taylor v. Carryl*, 20 How. 583, 602, 15 L. Ed. 1028 (where it was said that a general creditor of a shipowner has no lien on the vessel).

**23. Advances.**—*Thomas v. Osborn*, 19 How. 22, 28, 15 L. Ed. 534; *The Emily Souder*, 17 Wall. 666, 21 L. Ed. 683; *Insurance Co. v. Baring*, 20 Wall. 159, 22 L. Ed. 250; *The General Smith*, 4 Wheat. 438, 4 L. Ed. 609.

Advances made on the credit of a ship for necessary repairs or supplies in a foreign port create a maritime lien upon the ship. *Insurance Co. v. Baring*, 20 Wall. 159, 163, 22 L. Ed. 250.

It is not material whether the implied hypothecation is made directly to the

furnishers of repairs and supplies, or to one who lends money, on the credit of the vessel, in a case of necessity, to pay such furnishers. *Thomas v. Osborn*, 19 How. 22, 15 L. Ed. 534.

**24. Expenses for which advances may be made.**—*The Emily Souder*, 17 Wall. 666, 670, 21 L. Ed. 683.

In June, 1865, the American steamer *Emily Souder*, owned by residents in New York, whilst on a voyage to that port from Rio Janeiro lost her propelling screw, and put into the port of Maranhão, on the coast of Brazil, in distress. She was towed into that port by another steamer for which she had signalled. The captain was without adequate funds to make the repairs required and furnish the vessel with the supplies necessary to enable her to proceed on her voyage, or to pay the expenses of her towage into port, and of pilotage, custom house dues, fees of the consul in the port, and expenses of medical attendance upon the sailors. Both he and the owners of the vessel were unknown in Maranhão, and without credit there. Under these circumstances the captain borrowed of the libelants the necessary funds to enable him to pay these several expenses. Held, that the items of expense for towage, pilotage, custom house dues, consular fees, and medical attendance upon the sailors stood in the same rank with the repairs and supplies to the vessel, and that the libelants advancing funds for their payment were equally entitled as security to a lien upon the vessel. *The Emily Souder*, 17 Wall. 666, 21 L. Ed. 683.

After the libelants in one of the cases had agreed with the captain to advance all the funds required by him, the libelant in the other case, who had been first applied to by the captain, agreed to advance a portion of the funds, and did so. Held, that this subsequent agreement did not affect the implied hypothecation of the vessel for the whole, the advances by

a vessel to procure a cargo give rise to a lien on the vessel.<sup>25</sup> The lien for advances is governed by the same principles, and arises under the same circumstances as that for repairs and supplies.<sup>26</sup>

c. *Repairs and Supplies*—(1) *Foreign Vessels*—(a) *In General*.—Perhaps no rule of the maritime law is better settled than that which gives one furnishing necessities, such as supplies and repairs, to a ship while in a foreign port.<sup>27</sup> And in this particular the several states of this Union are treated as foreign to each other.<sup>28</sup>

(b) *Necessity for Repairs and Supplies*.—In order to give rise to a maritime lien, it must be shown that the repairs or supplies were necessary, or believed, upon due inquiry and credible representation, to be necessary.<sup>29</sup> Necessity for repairs and supplies is proved where such circumstances of exigency are shown as would induce a prudent owner, if present, to order them, or to provide funds for the cost of them on the security of the ship.<sup>30</sup> And it has been held that the ordering by the master of supplies and repairs on the credit of the ship is sufficient proof of such necessity to support an implied hypothecation in favor of

both libelants having been made on the credit of the vessel and not solely on the personal credit of the captain or owners. *The Emily Souder*, 17 Wall. 666, 21 L. Ed. 683.

25. *Advances to enable vessel to procure cargo*.—*Insurance Co. v. Baring*, 20 Wall. 159, 163, 22 L. Ed. 250 (holding that such advances constitute an insurable interest).

26. *Lien for advances governed by same rules as lien for repairs and supplies*.—*Thomas v. Osborn*, 19 How. 22, 15 L. Ed. 534. See post, "Repairs and Supplies," II, D, 1, c.

27. *Repairs or supplies in foreign port*.—*The Aurora*, 1 Wheat. 96, 105, 4 L. Ed. 45; *The Kate*, 164 U. S. 458, 465, 41 L. Ed. 512; *The St. Jago De Cuba*, 9 Wheat. 409, 6 L. Ed. 122; *The Grapeshot*, 9 Wall. 129, 19 L. Ed. 651; *The Lulu*, 10 Wall. 192, 19 L. Ed. 906; *The Kalorama*, 10 Wall. 204, 212, 19 L. Ed. 941; *The Patapsco*, 13 Wall. 329, 20 L. Ed. 696; *Harmony v. United States*, 2 How. 209, 210, 234, 11 L. Ed. 239; *The Valencia*, 165 U. S. 264, 269, 41 L. Ed. 710; *The J. E. Rumbell*, 148 U. S. 1, 37 L. Ed. 345; *The Emily Souder*, 17 Wall. 666, 21 L. Ed. 683; *The Resolute*, 168 U. S. 437, 440, 42 L. Ed. 533; *The William M. Hoag*, 168 U. S. 443, 42 L. Ed. 537; *Thomas v. Osborn*, 19 How. 22, 15 L. Ed. 534; *The Guy*, 9 Wall. 758, 19 L. Ed. 710; *The Glide*, 167 U. S. 606, 610, 42 L. Ed. 296; *Insurance Co. v. Baring*, 20 Wall. 159, 164, 22 L. Ed. 250; *The Roanoke*, 189 U. S. 185, 193, 47 L. Ed. 770; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 390, 12 L. Ed. 465; *The Ship Virgin*, 8 Pet. 538, 8 L. Ed. 1036; *The General Smith*, 4 Wheat. 438, 4 L. Ed. 609; *The Lottawanna*, 21 Wall. 558, 22 L. Ed. 654; *The John G. Stevens*, 170 U. S. 113, 117, 42 L. Ed. 969; *The Julia Blake*, 107 U. S. 418, 428, 27 L. Ed. 595; *The Lottawanna*, 20 Wall. 201, 218, 22 L. Ed. 259.

Materialmen and others who furnish supplies to a foreign ship have a lien on

the ship. *The Aurora*, 1 Wheat. 96, 105, 4 L. Ed. 45.

28. *States considered as foreign to each other*.—*The Roanoke*, 189 U. S. 185, 193, 47 L. Ed. 770; *The General Smith*, 4 Wheat. 438, 4 L. Ed. 609; *The Kalorama*, 10 Wall. 204, 212, 19 L. Ed. 941; *The Lulu*, 10 Wall. 192, 19 L. Ed. 906.

A decree by the circuit court that the vessel was a foreign vessel—an issue whether it was so or not having been raised in the pleadings—if pleaded or put in evidence in the district and circuit courts of another circuit, to which the case finally gets on a new libel in rem by the original libelants against the vessel, which, on a subtraction of it from the first district and circuit, they have pursued into a new district and circuit, and seized anew, is conclusive of the foreign character of the vessel. *The Rio Grande*, 23 Wall. 458, 23 L. Ed. 158.

29. *Necessity for repairs and supplies*.—*The Grapeshot*, 9 Wall. 129, 19 L. Ed. 651; *The Guy*, 9 Wall. 758, 19 L. Ed. 710; *Pratt v. Reed*, 19 How. 359, 15 L. Ed. 660.

30. *What constitutes necessity*.—*The Grapeshot*, 9 Wall. 129, 19 L. Ed. 651; *The Guy*, 9 Wall. 758, 19 L. Ed. 710.

Proof of absolute and indispensable necessity is not required in order to the establishment of such a lien, where supplies and materials are furnished on the credit of the ship, or of the ship and owners, in a foreign port. In such cases, courts of admiralty do not scrutinize narrowly the account against the ship. They will reject, undoubtedly, all unwarranted charges; but upon proof that the furnishing was in good faith, on the order of the master, and really necessary, or honestly and reasonably believed by the furnisher to be necessary for the ship while lying in port, or to fit her for an intended voyage, the lien will be supported; unless it is made to appear affirmatively that the credit to the ship was unnecessary, either by reason of the master having funds in his possession



the materialman, or of the ordinary lender of money to meet the wants of the ships, who acts in good faith.<sup>31</sup>

(c) *Necessity for Credit*—aa. *In General*.—To constitute a case of apparent necessity, so as to give one furnishing repairs or supplies a maritime lien, not only must the repairs and supplies be needful, but it must be apparently necessary for the master to have a credit in order to procure them.<sup>32</sup>

bb. *Duty of Master to Exhaust Own Funds*.—If the master has funds of his own, which he ought to apply to the purchase of repairs and supplies, and which he is bound by the contract of hiring to furnish himself, no case of actual necessity to have the credit exists, and no maritime lien arises, where the person furnishing the repairs and supplies knows or could, by the exercise of due diligence, know the facts.<sup>33</sup>

cc. *Duty of Master to Exhaust Owner's Funds*.—If the master has funds of the owners which he ought to apply to pay for repairs and supplies, no case of actual necessity to have a credit exists, and no lien arises in favor of one chargeable with knowledge of that fact.<sup>34</sup>

dd. *Duty of Master to Exhaust Own or Owner's Credit*.—If the master can raise funds on his own or his owner's credit and fails to do so, and this fact is known or could, by the exercise of due diligence, have been known to the person furnishing the repairs and supplies, no maritime lien arises.<sup>35</sup>

(d) *Necessity for Credit to Be Given to Vessel*.—In order for a materialman to have a lien on a vessel for repairs and supplies furnished in a foreign port, they must have been furnished on the credit of the vessel and not merely on the personal credit of the owner or charterer.<sup>36</sup>

applicable to the expenses incurred, or credit of his own or of his owners, upon which funds could be raised by the use of reasonable diligence; and that the materialmen knew, or could, by proper inquiry, have readily informed himself of the facts. *The Grapeshot*, 9 How. 129, 136, 19 L. Ed. 651.

31. *The Grapeshot*, 9 Wall. 129, 130, 19 L. Ed. 651; *The Guy*, 9 Wall. 758, 19 L. Ed. 710.

32. *Necessity for credit*.—*Thomas v. Osborn*, 19 How. 22, 31, 15 L. Ed. 534; *The Kate*, 164 U. S. 458, 469, 41 L. Ed. 512; *The Valencia*, 165 U. S. 264, 41 L. Ed. 710; *Pratt v. Reed*, 19 How. 359, 15 L. Ed. 660.

33. *Duty of master to exhaust own funds*.—*Thomas v. Osborn*, 19 How. 22, 31, 15 L. Ed. 534; *The Emily Souder*, 17 Wall. 666, 21 L. Ed. 683; *The Grapeshot*, 9 How. 129, 136, 19 L. Ed. 651; *Insurance Co. v. Baring*, 20 Wall. 159, 163, 22 L. Ed. 250; *The Lulu*, 10 Wall. 192, 197, 19 L. Ed. 906; *The Patapsco*, 13 Wall. 329, 333, 20 L. Ed. 696.

Proof that the repairs and supplies were necessary will not in any case be sufficient to entitle the furnisher or lender to recover by a suit in rem against the vessel if it appear that the master had funds sufficient to execute the repairs and furnish the supplies, and that the party who made and furnished the same knew that fact, or that facts and circumstances were known to him sufficient to put him upon inquiry, and to show that if he had used due diligence he would have ascertained that no funds except such as the master already pos-

sessed were necessary for any such purpose. *The Lulu*, 10 Wall. 192, 201, 19 L. Ed. 906.

34. *Duty of master to exhaust owners' funds*.—*Thomas v. Osborn*, 19 How. 22, 31, 15 L. Ed. 534; *The Kate*, 164 U. S. 458, 469, 41 L. Ed. 512; *The Valencia*, 165 U. S. 264, 41 L. Ed. 710; *The Emily Souder*, 17 Wall. 666, 21 L. Ed. 683; *The Grapeshot*, 9 How. 129, 136, 19 L. Ed. 651; *Insurance Co. v. Baring*, 20 Wall. 159, 163, 22 L. Ed. 250; *The Lulu*, 10 Wall. 192, 197, 19 L. Ed. 906; *The Patapsco*, 13 Wall. 329, 333, 20 L. Ed. 696.

35. *Duty of master to exhaust his own or owner's credit*.—*The Grapeshot*, 9 Wall. 129, 136, 19 L. Ed. 651; *Pratt v. Reed*, 19 How. 359, 15 L. Ed. 660; *The Patapsco*, 13 Wall. 329, 20 L. Ed. 696.

Hence, where a running account for coal was kept with a vessel trading upon the lakes, the master of which was also the owner, it does not appear that the coal could be procured only by creating a lien upon the vessel. *Pratt v. Reed*, 19 How. 359, 15 L. Ed. 660.

In a contest, therefore, between a libellant for supplies and mortgages of the vessel, the latter are entitled to the proceeds of sale of the boat. *Pratt v. Reed*, 19 How. 359, 15 L. Ed. 660.

This is under the general admiralty law. No opinion is expressed as to the effect of the local laws of the states. *Pratt v. Reed*, 19 How. 359, 15 L. Ed. 660.

36. *Necessity for credit to be given to vessel*.—*The Resolute*, 168 U. S. 437, 440, 42 L. Ed. 533; *The William M. Hoag*, 168 U. S. 443, 42 L. Ed. 537; *Carrington v. Pratt*, 18 How. 63, 68, 15 L. Ed. 267;

(e) *Good Faith of Creditor*.—Good faith is undoubtedly required of a party seeking to enforce a maritime lien against a vessel for advances or repairs and supplies.<sup>37</sup> While the lien is not defeated without notice, either express or implied, of the existence of facts which, if known, would have prevented its attaching,<sup>38</sup> it is well settled that if the person furnishing the repairs and supplies knew,<sup>39</sup> or, by the exercise of reasonable care, could have known, of their existence,<sup>40</sup> the lien is defeated. Thus, no lien arises where the person claiming it knew, or by the exercise of reasonable diligence could have known, that there was no necessity for borrowing money,<sup>41</sup> or that the master of the ves-

Thomas v. Osborn, 19 How. 22, 31, 15 L. Ed. 534; The Kate, 164 U. S. 458, 469, 41 L. Ed. 512; The Valencia, 165 U. S. 264, 265, 41 L. Ed. 710; The Patapsco, 13 Wall. 329, 20 L. Ed. 696.

**Sufficiency of evidence that credit was given to owner.**—Entries in a journal, and in a ledger, charging apparently the owners rather than the vessel—proof of the form of entry in the day book not appearing, owing to its being dispensed with by the materialmen—held not sufficient to displace the lien. The Patapsco, 13 Wall. 329, 20 L. Ed. 696.

**37. Necessity for good faith.**—The Lulu, 10 Wall. 192, 19 L. Ed. 906; The Kate, 164 U. S. 458, 468, 41 L. Ed. 512; Thomas v. Osborn, 19 How. 22, 15 L. Ed. 534; The Julia Blake, 107 U. S. 418, 428, 27 L. Ed. 595.

Courts of admiralty will not recognize and enforce a lien upon a vessel when the transaction upon which the claim rests originated in the fraud of the master upon the owner, or in some breach of the master's duty to the owner, of which the libellant had knowledge, or in respect of which he closed his eyes, without inquiry as to the facts. The Kate, 164 U. S. 458, 469, 41 L. Ed. 512; The Valencia, 165 U. S. 264, 41 L. Ed. 710.

**38. Lien not defeated without notice, either express or implied.**—The Kate, 164 U. S. 458, 468, 41 L. Ed. 512; The Lulu, 10 Wall. 192, 19 L. Ed. 906.

**Notice of funds on hand.**—The fact that the master had funds which he ought to have applied to that object is no evidence to establish the charge of bad faith in such a case, unless it appears that the libellant knew that fact, or that such facts and circumstances were known to him as were sufficient to put him upon inquiry within the principles of law already explained. The Kate, 164 U. S. 458, 468, 41 L. Ed. 512; The Lulu, 10 Wall. 192, 201, 204, 19 L. Ed. 906.

**39. Express knowledge of facts as defeating lien.**—The Lulu, 10 Wall. 192, 201, 19 L. Ed. 906; The Kate, 164 U. S. 458, 468, 41 L. Ed. 512; The Grapeshot, 9 Wall. 129, 139, 19 L. Ed. 651.

**40. Knowledge of facts making inquiry necessary.**—The Lulu, 10 Wall. 192, 201, 19 L. Ed. 906; The Kate, 164 U. S. 458, 468, 41 L. Ed. 512; The Grapeshot, 9 Wall. 129, 19 L. Ed. 651.

**Express knowledge of the fact that the**

master had sufficient funds for the purpose is not necessary to maintain the charge of bad faith, as it is well-settled law that a party to a transaction, where his rights are liable to be injuriously affected by notice, cannot willfully shut his eyes to the means of knowledge which he knows are at hand, and thereby escape the consequences which would flow from the notice if it had actually been received; or in other words, the general rule is that knowledge of such facts and circumstances as are sufficient to put a party upon inquiry, and to show that if he had exercised due diligence he would have ascertained the truth of the case, is equivalent to actual notice of the matter in respect to which the inquiry ought to have been made. The Kate, 164 U. S. 458, 468, 41 L. Ed. 512; The Lulu, 10 Wall. 192, 19 L. Ed. 906.

**Proof of failure to institute inquiries is no defense to such a claim even if the master had funds, unless that fact was known to the libellant or such facts and circumstances were known to him as were sufficient to put him on inquiry and fairly subject him to the charge of collusion with the master or of bad faith in omitting to avail himself of the means of knowledge at hand to ascertain the true state of the case.** The Lulu, 10 Wall. 192, 202, 19 L. Ed. 906.

**Inquiry certainly need not be made as to the necessity for credit, if the master has no funds nor any other means of repairing his vessel or furnishing her with supplies.** The Lulu, 10 Wall. 192, 202, 19 L. Ed. 906.

**41. Want of necessity.**—The Kate, 164 U. S. 458, 466, 41 L. Ed. 512; Thomas v. Osborn, 19 How. 22, 15 L. Ed. 534; The Emily Souder, 17 Wall. 666, 671, 21 L. Ed. 683; The Valencia, 165 U. S. 264, 41 L. Ed. 710.

**It is the duty of the lender to see that a case of apparent necessity for a loan exists.** Thomas v. Osborn, 19 How. 22, 15 L. Ed. 534.

**In Thomas v. Osborn, 19 How. 22, 31, 32, 15 L. Ed. 534, the court said that all the commentators agree "that if one lend money to a master, knowing he has not need to borrow, he does not act in good faith, and the loan does not oblige the owner."** The Kate, 164 U. S. 458, 466, 41 L. Ed. 512.

**When it is sought to create a lien upon**

sel<sup>42</sup> or the charterer,<sup>43</sup> to whom the repairs and supplies were furnished, was without authority to subject the vessel to a lien therefor, or that the master had funds which he ought to have applied to pay the debt for which the lien is claimed.<sup>44</sup>

(f) *Effect of State Statute as to Liens on Foreign Vessels.*—Maritime liens upon foreign vessels are governed wholly by the maritime law, cannot be controlled or affected by state statute, and state statutes purporting to give or regulate liens upon vessels are to be construed as applying to domestic vessels only,

a vessel for supplies furnished upon the order of the master, the libel will be dismissed if it satisfactorily appears that the libellant knew, or ought reasonably to be charged with knowledge, that there was no necessity for obtaining the supplies. *The Kate*, 164 U. S. 458, 466, 41 L. Ed. 512; *The Valencia*, 165 U. S. 264, 41 L. Ed. 710.

**42. Want of authority of master.**—*The Kate*, 164 U. S. 458, 466, 41 L. Ed. 512; *The Valencia*, 165 U. S. 264, 41 L. Ed. 710.

There are many cases in which the recognition or rejection of liens under the maritime law have depended upon the diligence of parties in ascertaining the limitations imposed by the owners of vessels upon the authority of masters. These cases proceed upon the ground that good faith must have been exercised by the party seeking to enforce a lien upon the vessel. *The Kate*, 164 U. S. 458, 466, 41 L. Ed. 512.

**43. Want of authority of charterer.**—*The Kate*, 164 U. S. 458, 466, 41 L. Ed. 512; *The Valencia*, 165 U. S. 264, 41 L. Ed. 710.

There is no implied lien for supplies furnished to a charterer, when the libellant at the time knew, or by such diligence as good faith required could have ascertained, that the party upon whose order they were furnished was without authority from the owner to obtain supplies on the credit of the vessel, but had undertaken, as between itself and the owner, to provide and pay for all supplies required by the vessel. *The Kate*, 164 U. S. 458, 466, 41 L. Ed. 512.

Where the charterer had agreed to provide and pay for all coal used by the vessel, he had no authority to bind the vessel for supplies furnished to it, and where his want of authority to charge the vessel for such an expense was known or could have been known to the person furnishing coal by the exercise of due diligence on its part, the latter is not entitled to deliver the coal on the credit of the vessel, nor to hold the vessel liable. The law cannot approve or encourage such an attempt to wrong the owners of the vessel. *The Kate*, 164 U. S. 458, 466, 41 L. Ed. 512.

One furnishing supplies or making repairs on the order simply of a person of corporation acquiring the control and possession of a vessel under such a charter party cannot acquire a maritime lien, if the circumstances attending the transaction put him on inquiry as to the existence and terms of such charter party, but he

failed to make inquiry, and chose to act on a mere belief that the vessel would be liable for his claim. *The Valencia*, 165 U. S. 264, 272, 41 L. Ed. 710.

**Effect of New York statutes.**—The statute of New York gives a lien upon a vessel for a debt contracted by the master, owner, charterer, builder or consignee, on account of work done or materials or other articles furnished in the state "for or towards the building, repairing, fitting, furnishing or equipping" the vessel, or for such provisions and stores furnished within the state "as may be fit and proper for the use of such vessel at the time when the same were furnished." While literally or narrowly construed, the statute takes no account of any arrangement or agreement between the charterer and the owner whereby the authority of the former to pledge the credit of the vessel is restricted, although the conditions under which the charterer obtained possession and control of the vessel were known or could reasonably have become known to the person whom the charterer contracted, the statute need not and should not be so construed; it ought not to be so interpreted as to put it in the power of the charterer and the person with whom he contracts to combine for the purpose of accomplishing a result inconsistent with the known agreement between the charterer and the owner. *The Kate*, 164 U. S. 458, 470, 41 L. Ed. 512.

**44. Knowledge that master had funds on hand.**—*The Lulu*, 10 Wall. 192, 19 L. Ed. 906; *The Kate*, 164 U. S. 458, 468, 41 L. Ed. 512; *Thomas v. Osborn*, 19 How. 22, 15 L. Ed. 534; *The Grapeshot*, 9 Wall. 129, 19 L. Ed. 651.

Hence, where the master had received freight money, and, with the assistance of the libellants, invested it in a series of adventures as a merchant, partly carried on by means of the vessel, the command of which he had deserted for the purpose of conducting these adventures, and money was advanced by the libellants to enable the master to repair and supply the vessel, and purchase a cargo to be transported and sold in the course of such private adventures; and the freight money earned by the vessel was sufficient to pay for the repairs and supplies, and might have been commanded for that use if it had not been wrongfully diverted from it by the master, with the assistance of the libellants, it was held that the latter had



and if applicable to foreign vessels, are unconstitutional and void as being an unlawful interference with the admiralty and maritime jurisdiction.<sup>45</sup>

(2) *Domestic Vessels*—(a) *Under Maritime Law*.—As a general rule, under the maritime law, no lien is implied for repairs and supplies, or necessities, furnished a vessel in her home port, but the case is governed altogether by the local law.<sup>46</sup> But even in the home port, a vessel may be subjected to the liabilities of a vessel in a foreign port by being falsely held as foreign by her owners.<sup>47</sup>

(b) *Under State Statutes*—aa. *Validity of Statutes*—(aa) *Validity of Provision Creating Lien*.—It is well settled that the states may provide for liens in favor of materialmen for necessities furnished to a vessel in her home port, or in a port of the state to which she belongs, though the contract to furnish the same is a maritime contract, and such liens can be enforced by proceedings in rem in the district courts of the United States.<sup>48</sup> Statutes giving a lien for

no lien on the vessel for their advances. *Thomas v. Osborn*, 19 How. 22, 15 L. Ed. 534.

**45. Effect of state statute as to liens on foreign vessels.**—*The Roanoke*, 189 U. S. 185, 47 L. Ed. 770.

The statute of Washington, providing for an absolute lien upon the ship for work done or material furnished at the request of the contractor or subcontractor, makes no provision for the protection of the owner in case the contractor has been paid the full amount of his bill before notice of the claim of the subcontractor is received, establishing a new order of priority in payment of liens, abolishing the ancient and "equitable rule regarding "stale claims," permitting the assertion of a lien at any time within three years, regardless of the fact that the vessel may have been sold to a bona fide purchaser, not only without notice of the claim, but without the possibility of informing himself by a resort to the public records, and creating the presumption of, a lien, though the materials be furnished upon the order of the owner in person, in so far as it attempts to control the administration of the maritime law by creating and superadding conditions for the benefit of a particular class of creditors, and thereby depriving the owners of vessels of defenses to which they would otherwise have been entitled, is an unlawful interference with that jurisdiction, and to that extent is unconstitutional and void. *The Roanoke*, 189 U. S. 185, 196, 47 L. Ed. 770.

**46. Repairs or supplies in home port.**—*The General Smith*, 4 Wheat. 438, 4 L. Ed. 609; *The Lottawanna*, 21 Wall. 558, 22 L. Ed. 654; *The Edith*, 94 U. S. 518, 24 L. Ed. 167; *The Roanoke*, 189 U. S. 185, 193, 47 L. Ed. 770; *Maguire v. Card*, 21 How. 248, 257, 16 L. Ed. 118; *People's Ferry Co. v. Beers*, 20 How. 393, 401, 15 L. Ed. 961; *The Lottawanna*, 20 Wall. 201, 217, 22 L. Ed. 259; *The J. E. Rumbell*, 148 U. S. 1, 13, 37 L. Ed. 345; *The St. Jago De Cuba*, 9 Wheat. 409, 429, 6 L. Ed. 122; *The Glide*, 167 U. S. 606, 622, 42 L. Ed. 296; *The Robert v. Parsons*, 191 U. S. 17, 24, 48 L. Ed. 73; *The Belfast*, 7 Wall. 624, 19 L. Ed. 266;

*Leon v. Galceran*, 11 Wall. 185, 192, 20 L. Ed. 74; *Norton v. Switzer*, 93 U. S. 355, 365, 23 L. Ed. 903; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 390, 12 L. Ed. 465; *Waring v. Clarke*, 5 How. 441, 475, 12 L. Ed. 226.

The common law being the law of Maryland, on this subject, it was held, that materialmen could not maintain a suit in rem, in the district court of Maryland, for supplies furnished to a domestic ship, although they might have maintained a suit in personam, in that court. *The General Smith*, 4 Wheat. 438, 4 L. Ed. 609.

A ship wright who has taken a ship into his possession to repair it, is not bound to part with the possession until he is paid for the repairs; but if he parts with the possession (of a domestic ship) or has worked upon it, without taking possession, he has no claim upon the ship itself. *The General Smith*, 4 Wheat. 438, 4 L. Ed. 609.

"The civil law gives a lien for repairs for domestic ships; but this court has not felt justified in doing it without a statute, because not done in England. *Vattier v. Hinde*, 7 Pet. 252, 8 L. Ed. 675. And in *Hobart v. Drogan*, 10 Pet. 108, 122, 9 L. Ed. 363." *Waring v. Clarke*, 5 How. 441, 475, 12 L. Ed. 226.

**47. Misrepresentation as to character of vessel as foreign.**—*The St. Jago De Cuba*, 9 Wheat. 409, 417, 6 L. Ed. 622.

**48. Power of states to provide for liens.**—*The General Smith*, 4 Wheat. 438, 4 L. Ed. 609; *Peyroux v. Howard*, 7 Pet. 324, 8 L. Ed. 700; *The Steamer St. Lawrence*, 1 Black 522, 17 L. Ed. 180; *The Moses Taylor*, 4 Wall. 411, 18 L. Ed. 397; *Hine v. Trevor*, 4 Wall. 555, 18 L. Ed. 451; *The Belfast*, 7 Wall. 624, 19 L. Ed. 266; *The Lottawanna*, 21 Wall. 558, 22 L. Ed. 654; *Johnson v. Chicago, etc., Elevator Co.*, 119 U. S. 388, 397, 30 L. Ed. 447; *The J. E. Rumbell*, 148 U. S. 1, 12, 37 L. Ed. 345; *The Robert W. Parsons*, 191 U. S. 17, 24, 48 L. Ed. 73; *The Glide*, 167 U. S. 606, 623, 42 L. Ed. 296; *Knapp, etc., Co. v. McCaffrey*, 177 U. S. 638, 44 L. Ed. 921; *The Winnebago*, 205 U. S. 354, 363, 51 L. Ed. 836; *The Kate*, 164 U. S. 458, 470, 41 L. Ed. 512; *Maguire v. Card*, 21 How. 248, 251, 16 L.

repairs or supplies furnished to a vessel in her home port have been enacted in Louisiana,<sup>49</sup> Massachusetts,<sup>50</sup> New York,<sup>51</sup> and Washington.<sup>52</sup>

(bb) *Validity of Provision Providing Remedies*—aaa. *Proceedings in Rem in State Court*.—A state statute which, in effect, provides for the enforcement, in the state courts, of a lien created by state statute for a maritime cause of action, by a proceeding which is strictly one in rem according to the admiralty practice, is void as unduly interfering with the admiralty and maritime jurisdiction.<sup>53</sup>

bbb. *Common-Law Remedies*.—But a state may provide for the enforcement, in the state courts, of a lien created by state statute for a maritime cause of action by a proceeding according to the course of the common law, which may be either by a simple proceeding in personam,<sup>54</sup> or by a proceeding in personam with ancillary attachment against the vessel or thing subject to the lien.<sup>55</sup>

bb. *Construction of Statutes*.—The construction of state statutes giving lien on vessels for repairs and supplies in their home port is for the state courts, and their decision is binding on the United States courts.<sup>56</sup>

d. *Freight*.—See the titles CARRIERS, vol. 3, pp. 615, 617; SHIPS AND SHIPPING.

e. *Lien of Shipper against Vessel*.—It is a principle of maritime law that the owner of the cargo has a lien on the vessel for any injury he may sustain by the fault of the vessel or the master.<sup>57</sup> But the law creates no lien on a vessel as a security for the performance of a contract to transport a cargo until some lawful contract of affreightment is made, and the cargo to which it relates has been delivered to the custody of the master or some one authorized to receive it.<sup>58</sup>

Ed. 118; *The Lottawanna*, 20 Wall. 201, 217, 22 L. Ed. 259; *People's Ferry Co. v. Beers*, 20 How. 393, 15 L. Ed. 961; *The Roanoke*, 189 U. S. 185, 47 L. Ed. 770.

So long as congress does not interpose to regulate the subject, the rights of materialmen furnishing necessities to a vessel in her home port may be regulated in each state by state legislation. *The J. E. Rumbell*, 148 U. S. 1, 13, 37 L. Ed. 345; *The Lottawanna*, 21 Wall. 558, 580, 22 L. Ed. 654.

Liens granted by the laws of a state in favor of materialmen for furnishing necessities to a vessel in her home port in said state are valid, though the contract to furnish the same is a maritime contract, and can only be enforced by proceedings in rem in the district courts of the United States. *The Lottawanna*, 21 Wall. 558, 22 L. Ed. 654.

49. *Louisiana*.—*The Lottawanna*, 21 Wall. 558, 578, 22 L. Ed. 654; *Peyroux v. Howard*, 7 Pet. 324, 8 L. Ed. 700.

By the civil code of Louisiana, workmen employed in the construction or repairs of ships or boats enjoys a lien or privilege without being bound to reduce their contracts to writing, whatever may be their amount. *Peyroux v. Howard*, 7 Pet. 324, 8 L. Ed. 700.

50. *Massachusetts*.—*The Glide*, 167 U. S. 606, 42 L. Ed. 296.

51. *New York*.—*The Robert W. Parsons*, 191 U. S. 17, 48 L. Ed. 73; *The Edith*, 94 U. S. 518, 24 L. Ed. 167; *The Kate*, 164 U. S. 458, 470, 41 L. Ed. 512.

Repairs to a canal boat, which is engaged in commerce wholly within the

state, made while the vessel is in dry dock, give rise to a lien under the New York statutes. *The Robert W. Parsons*, 191 U. S. 17, 48 L. Ed. 73.

52. *Washington*.—*The Roanoke*, 189 U. S. 185, 193, 47 L. Ed. 770.

53. *Proceeding in rem in state courts*.—*The Robert W. Parsons*, 191 U. S. 17, 48 L. Ed. 73; *The Glide*, 167 U. S. 606, 42 L. Ed. 296; *The Lottawanna*, 21 Wall. 558, 22 L. Ed. 654; *The Belfast*, 7 Wall. 624, 19 L. Ed. 266; *The Moses Taylor*, 4 Wall. 411, 18 L. Ed. 397. See the title ADMIRALTY, vol. 1, pp. 130, 131. And see post, "Jurisdiction," VII, A.

54. *Proceeding in personam*.—See the title ADMIRALTY, vol. 1, pp. 128, 129.

55. *Proceeding in personam with ancillary attachment*.—See the title ADMIRALTY, vol. 1, pp. 129, 130. And see post, "Jurisdiction," VII, A.

56. *Construction of statutes*.—*The Winnebago*, 205 U. S. 354, 51 L. Ed. 836.

57. *Lien of shipper against vessel*.—*The Keokuk*, 9 Wall. 517, 519, 19 L. Ed. 744; *Schooner Freeman v. Buckingham*, 18 How. 182, 188, 15 L. Ed. 341; *The Maggie Hammond*, 9 Wall. 435, 19 L. Ed. 772; *Bulkley v. Naumkeag Steam Cotton Co.*, 24 How. 386, 392, 16 L. Ed. 599. See the title SHIPS AND SHIPPING.

The owner of the cargo has a lien, by the maritime law, upon the ship for the safe custody, due transport, and right delivery of the same. *The Maggie Hammond*, 9 Wall. 435, 19 L. Ed. 772.

58. *Necessity of contract of affreightment*.—*Vandewater v. Mills*, 19 How. 82, 91, 15 L. Ed. 554; *Bulkley v. Naumkeag*

f. *Wharfage*.—If the vessel or water craft is a foreign one, or belongs to a port of a state other than that where the wharf is used, the claim of the wharfinger for such use is a maritime lien against the vessel, which he may enforce by a proceeding in rem, or he may resort to a libel in personam against the owner of such vessel or water craft.<sup>59</sup>

g. *Service of Seamen or Master*.—Seamen have a maritime lien on the vessel<sup>60</sup> or freight<sup>61</sup> for their wages wherever the services may be rendered, and the fact that the vessel was in the hands of a receiver appointed by the state court at the time the services were rendered, does not absolutely negative the existence of a lien thereon.<sup>62</sup> But as to the master's claim for his services, no lien exists against the vessel,<sup>63</sup> except in cases where it is created by statute.<sup>64</sup>

h. *Shipbuilding Contracts*—(1) *Under Maritime Law*.—It is well settled that under the maritime law, a lien does not arise on a contract to furnish materials for the purpose of building a ship.<sup>65</sup>

Steam Cotton Co., 24 How. 386, 392, 16 L. Ed. 599; *The Keokuk*, 9 Wall. 517, 519, 19 L. Ed. 744; *Schooner Freeman v. Buckingham*, 18 How. 182, 188, 15 L. Ed. 341.

Such a contract cannot be implied against a transportation company from the fact that a man has loaded a barge belonging to the company, by means of his own men, without any knowledge by the company of what he has done, and then delivered bills of lading to the agent of a steamer of the line, the agent at the moment being very much engaged with other matters, just before the steamer, which it was expected by the shipper would tow the barge, sets off; no sufficient statement being made by the shipper, when so delivering the bills, what bills they are, and the agent himself having no knowledge of what has been done in the particular case, nor of the contents of the bills. *The Keokuk*, 9 Wall. 517, 19 L. Ed. 744.

59. *Wharfage*.—Ex parte Easton, 95 U. S. 68, 24 L. Ed. 373.

60. *Lien of seaman on vessel for services*.—*The Steamboat Orleans*, 11 Pet. 175, 184, 9 L. Ed. 677; *Norton v. Switzer*, 93 U. S. 355, 365, 23 L. Ed. 903; *The William M. Hoag*, 168 U. S. 443, 42 L. Ed. 537; *The Resolute*, 168 U. S. 437, 42 L. Ed. 533; *Sheppard v. Taylor*, 5 Pet. 675, 8 L. Ed. 269; *Grant v. Poillon*, 20 How. 162, 166, 15 L. Ed. 871; *Leon v. Galceran*, 11 Wall. 185, 20 L. Ed. 74; *The St. Jago De Cuba*, 9 Wheat. 409, 6 L. Ed. 122; *Cutler v. Rae*, 7 How. 729, 731, 12 L. Ed. 890. See, generally, the title SEAMEN.

61. *Lien of seaman on freight*.—*Sheppard v. Taylor*, 5 Pet. 675, 711, 8 L. Ed. 269.

Freight, being the earnings of the ship, in the course of the voyage, is the natural fund out of which the wages are contemplated to be paid; for although the ship is bound by the lien of the wages, the freight is relied on as the fund to discharge it, and is also relied on by the master to discharge his personal responsibilities for disbursements and wages. *Sheppard v. Taylor*, 5 Pet. 675, 8 L. Ed. 269.

62. *Vessel in hands of receiver, where services rendered*.—"The averment relied

upon in this libel is that the vessel was, at the time the services were rendered, in the hands of a receiver appointed by a state court. This fact, however, is not absolutely inconsistent with a lien in rem for seamen's wages. It may have been expressly bargained for by the receiver, it may be implied from the peculiar circumstances under which the services were rendered, or it might be held to have arisen from the peremptory language of the statute, Rev. Stat., § 4535." *The Resolute*, 168 U. S. 437, 440, 42 L. Ed. 533; *The William M. Hoag*, 168 U. S. 443, 42 L. Ed. 537.

63. *Master has no implied lien*.—*Norton v. Switzer*, 93 U. S. 355, 365, 23 L. Ed. 903; *The Steamboat Orleans*, 11 Pet. 175, 184, 9 L. Ed. 677; *Peyroux v. Howard*, 7 Pet. 324, 343, 8 L. Ed. 700. See *The William M. Hoag*, 168 U. S. 443, 444, 42 L. Ed. 537.

By the maritime law, the master has no lien on the ship, even for maritime wages; a fortiori, the claim would be inadmissible, for services on voyages not maritime. *The Steamboat Orleans*, 11 Pet. 175, 184, 9 L. Ed. 677.

*The denial of the lien of the master* was based upon the theory that he had a lien on the freight for his wages, and having the freight in his own hands, was presumed to pay himself. *The William M. Hoag*, 168 U. S. 443, 444, 42 L. Ed. 537, where it was not decided whether the ancient rule is applicable at present, where the purchaser, and not the master, collects the freight and pays the bills.

64. *Lien of master given by statute*.—*Norton v. Switzer*, 93 U. S. 355, 365, 23 L. Ed. 903.

65. *Shipbuilding contracts do not give rise to lien*.—*Edwards v. Elliott*, 21 Wall. 532, 551, 22 L. Ed. 487; *People's Ferry Co. v. Beers*, 20 How. 393, 15 L. Ed. 961; *Roach v. Chapman*, 22 How. 129, 16 L. Ed. 294; *Norton v. Switzer*, 93 U. S. 355, 366, 23 L. Ed. 903; *Tucker v. Alexandroff*, 183 U. S. 424, 438, 46 L. Ed. 264; *Johnson v. Chicago, etc., Elevator Co.*, 119 U. S. 388, 30 L. Ed. 447; *The Robert W. Parsons*, 191 U. S. 17, 25, 48 L. Ed. 73.



(2) *Under State Statutes*—(a) *Power of States to Create Lien*.—With respect to contracts for building ships, it is competent for the states to create such liens as their legislatures may deem just and expedient, not amounting to a regulation prescribing the mode of their enforcement, if not inconsistent with the exclusive jurisdiction of the admiralty courts.<sup>66</sup>

(b) *Power of States to Provide Remedies to Enforce Lien*.—For causes of action arising out of a shipbuilding contract, which is not cognizable in admiralty, either in rem or in personam, the states may not only grant liens, but may provide remedies for their enforcement.<sup>67</sup>

2. **TORT CLAIMS**—a. *Personal Injuries*.—A state statute giving a lien upon a vessel for all damages arising from injuries done to persons or property "by such ship, boat or vessel" does not give a lien to a seaman who is injured by the negligence of those in charge of the vessel.<sup>68</sup>

b. *Death by Wrongful Act*.—Where the negligence of those in charge of the vessel results in loss of life, no lien is given upon the vessel in the absence of a local law to that effect.<sup>69</sup>

c. *Collision*.—It is well settled that a maritime lien or privilege, constituting a present right of property in the ship, to be afterwards enforced in admiralty by process in rem, arises from a collision and for the damage caused thereby.<sup>70</sup> The foundation of the rule that collision gives to the party injured a jus in re

66. **Power of states to create liens**.—Edwards v. Elliott, 21 Wall. 532, 22 L. Ed. 487; People's Ferry Co. v. Beers, 20 How. 393, 15 L. Ed. 961; Roach v. Chapman, 22 How. 129, 16 L. Ed. 294; Morewood v. Enequist, 23 How. 491, 16 L. Ed. 516; Norton v. Switzer, 93 U. S. 355, 23 L. Ed. 903; The Winnebago, 205 U. S. 354, 51 L. Ed. 836; Graham, etc., Transp. Co. v. Craig Shipbuilding Co., 203 U. S. 577, 51 L. Ed. 325; The J. E. Rumbell, 148 U. S. 1, 37 L. Ed. 345; The Robert W. Parsons, 191 U. S. 17, 25, 48 L. Ed. 73.

67. **Power of states to provide remedies for enforcement**.—People's Ferry Co. v. Beers, 20 How. 393, 15 L. Ed. 961; Edwards v. Elliott, 21 Wall. 532, 22 L. Ed. 487; Johnson v. Chicago, etc., Elevator Co., 119 U. S. 388, 30 L. Ed. 447; The Robert W. Parsons, 191 U. S. 17, 25, 48 L. Ed. 73; The J. E. Rumbell, 148 U. S. 1, 11, 37 L. Ed. 345; Roach v. Chapman, 22 How. 129, 16 L. Ed. 294; Norton v. Switzer, 93 U. S. 355, 366, 23 L. Ed. 903; Morewood v. Enequist, 23 How. 491, 16 L. Ed. 516; The Winnebago, 205 U. S. 354, 356, 51 L. Ed. 836; Graham, etc., Transp. Co. v. Craig Shipbuilding Co., 203 U. S. 577, 51 L. Ed. 325. See the title ADMIRALTY, vol. 1, p. 138.

"A contract for building a ship, being a contract made on land and to be performed on land, is not a maritime contract, and a lien to secure it, given by local statute, is not a maritime lien, and cannot, therefore, be enforced in admiralty. People's Ferry Co. v. Beers, 20 How. 393, 15 L. Ed. 961; Roach v. Chapman, 22 How. 129, 16 L. Ed. 294; Edwards v. Elliott, 21 Wall. 532, 22 L. Ed. 487." The J. E. Rumbell, 148 U. S. 1, 11, 37 L. Ed. 345.

68. **Personal injuries**.—The statute only covers cases of collision with other vessels or with structures affixed to the land, and other cases where the damage is done

by the ship itself, as the offending thing, to persons or property outside of the ship, through the negligence or mismanagement of the ship by the officers or seamen in charge. The Osceola, 189 U. S. 158, 47 L. Ed. 760 (construing § 3348 of the Revised Statutes of 1898 of Wisconsin).

69. **Death by wrongful act**.—The Albert Dumois, 177 U. S. 240, 257, 44 L. Ed. 751; The Corsair, 145 U. S. 335, 36 L. Ed. 727.

Neither article 2315 nor article 3237 of the civil code of Louisiana gives a lien upon a vessel for negligence by those in charge thereof resulting in loss of life. The Albert Dumois, 177 U. S. 240, 257, 44 L. Ed. 751; The Corsair, 145 U. S. 335, 36 L. Ed. 727.

70. **Collision**.—General Mut. Ins. Co. v. Sherwood, 14 How. 351, 14 L. Ed. 452; The Rock Island Bridge, 6 Wall. 213, 18 L. Ed. 753; The China, 7 Wall. 53, 19 L. Ed. 67; The John G. Stevens, 170 U. S. 113, 42 L. Ed. 969; The Siren, 7 Wall. 152, 19 L. Ed. 129; Workman v. New York City, 179 U. S. 552, 573, 45 L. Ed. 314; Homer Ramsdell Transp. Co. v. La Compagnie Generale Transatlantique, 182 U. S. 406, 413, 45 L. Ed. 1155; Ralli v. Troop, 157 U. S. 386, 402, 39 L. Ed. 742; The Resolute, 168 U. S. 437, 440, 42 L. Ed. 533; The William M. Hoag, 168 U. S. 443, 42 L. Ed. 537.

"According to the admiralty law, the collision impresses upon the wrongdoing vessel a maritime lien. This the vessel carries with it into whosoever hands it may come. It is inchoate at the moment of the wrong, and must be perfected by subsequent proceedings." The John G. Stevens, 170 U. S. 113, 122, 42 L. Ed. 969; Homer Ramsdell Transp. Co. v. La Compagnie Generale Transatlantique, 182 U. S. 406, 413, 45 L. Ed. 1155; The Siren, 7 Wall.

in the offending ship is the principle of the maritime law that the ship, by whomsoever owned or navigated, is considered as herself the wrongdoer, liable for the tort, and subject to a maritime lien for the damages.<sup>71</sup>

3. GENERAL AVERAGE.—As to lien for general average, see the title GENERAL AVERAGE, vol. 6, p. 549.

4. SALVAGE.—Salvors of a vessel have a lien thereon which is absolute and unconditional and not dependent on possession.<sup>72</sup>

5. FINES OR PENALTIES.—Fines or penalties imposed for violations of the statutes of the United States as to the number of passengers to be carried by vessels are, by statute, expressly made a lien upon the vessel.<sup>73</sup> But the stat-

152, 155, 19 L. Ed. 129; *The China*, 7 Wall. 53, 68, 19 L. Ed. 67.

"The collision, as soon as it takes place, creates, as security for the damages, a maritime lien or privilege, *in rem*, a proprietary interest in the offending ship, and which, when enforced by admiralty process *in rem*, relates back to the time of the collision. The offending ship is considered as herself the wrongdoer, and as herself bound to make compensation for the wrong done. The owner of the injured vessel is entitled to proceed *in rem* against the offender, without regard to the question who may be her owners, or to the division, the nature or the extent of their interests in her. With the relations of the owners of those interests as among themselves, the owner of the injured vessel has no concern. All the interests, existing at the time of the collision, in the offending vessel, whether by way of part ownership, of mortgage, of bottomry bond or of other maritime lien for repairs or supplies, arising out of contract with the owners or agents of the vessel, are parts of the vessel herself, and as such are bound by and responsible for her wrongful acts. Any one who had furnished necessary supplies to the vessel before the collision, and had thereby acquired, under our law, a maritime lien or privilege in the vessel herself, was, as was said in *The Bold Buccleugh*, before cited, of the holder of an earlier bottomry bond, under the law of England, 'so to speak, a part owner in interest at the date of the collision, and the ship in which he and others were interested was liable to its value at that date for the injury done, without reference to his claim.'" *The John G. Stevens*, 170 U. S. 113, 122, 42 L. Ed. 969.

**Collision with government vessel.**—A maritime lien for collision may not be enforceable, and so may be said to render the offending thing not the subject of a maritime lien, because of the ownership and possession of such thing being in the government of the nation. *The Siren*, 7 Wall. 152, 19 L. Ed. 129. See, also, *Workman v. New York City*, 179 U. S. 552, 573, 45 L. Ed. 314.

**Collision due to negligence of pilot.**—In *The China*, 7 Wall. 53, 19 L. Ed. 67, a vessel, in charge of a pilot whom she had been compelled by law to take on board, and brought by his negligence into col-

lision with another vessel, was held, upon a libel *in rem*, to be liable in damages to the owners of that vessel. "That decision proceeded, not upon any authority or agency of the pilot, derived from the civil law of master and servant, or from the common law, as the representative of the owners of the ship and cargo; nor upon the law of contribution in general average as between them; but upon a distinct principle of the maritime law, namely, that the vessel, in whosoever hands she lawfully is, is herself considered as the wrongdoer, liable for the tort, and subject to a maritime lien for the damages." *Ralli v. Troop*, 157 U. S. 386, 402, 39 L. Ed. 742; *Homer Ramsdell Transp. Co. v. La Compagnie Generale Transatlantique*, 182 U. S. 406, 413, 45 L. Ed. 1155. See, also, the title COLLISION, vol. 3, pp. 877, 878.

**71. Ship considered as wrongdoer.**—*The John G. Stevens*, 170 U. S. 113, 120, 42 L. Ed. 969.

"This principle, as has been observed by careful text-writers on both sides of the Atlantic, has been more clearly established, and more fully carried out, in this country than in England." *The John G. Stevens*, 170 U. S. 113, 120, 42 L. Ed. 969.

**72. Salvage.**—*Cutler v. Rae*, 7 How. 729, 731, 12 L. Ed. 890; *The Resolute*, 168 U. S. 437, 441, 42 L. Ed. 533; *The William M. Hoag*, 168 U. S. 443, 42 L. Ed. 537.

Salvage services import a lien of the very highest rank; but it has sometimes been held that, if such services are rendered by seamen in the employ of a wrecking tug, or by a municipal fire department, no lien arises, for the reason that the men are originally employed for the very purpose of rescuing property from perils of the sea, or loss by fire. *The Resolute*, 168 U. S. 437, 441, 42 L. Ed. 533; *The William M. Hoag*, 168 U. S. 443, 42 L. Ed. 537.

**73. Fine for carrying excessive number of passengers.**—Rev. Stat., § 4270 (imposing a lien for violation of §§ 4252, 4253); *The Strathairly*, 124 U. S. 558, 31 L. Ed. 580.

The fine imposed upon the master of a vessel by § 4253 of the Revised Statutes, for the violation of that and the preceding section is a lien upon the vessel itself, to be recovered by a proceeding *in rem*. *The Strathairly*, 124 U. S. 558, 567, 31 L. Ed. 580.

The direct and express meaning of §

ute providing for the delivery by the master of a vessel, to the collector of the district in which such vessel shall arrive, of a list of all the passengers taken on board the vessel at any foreign port or place verified by his oath, does not subject the vessel to a lien.<sup>74</sup>

### III. Mode of Perfecting Lien.

In order for a lien for repairs and supplies furnished to a vessel in her home port to be valid, the lien must be perfected in the manner pointed out by the state statute.<sup>75</sup> In Louisiana<sup>76</sup> and Massachusetts,<sup>77</sup> the lien, to be valid, must be recorded.

### IV. Construction and Operation of Lien.

**A. Lien Not to Be Extended by Construction.**—Since a maritime lien is a secret one, existing without possession, and may operate against creditors and purchasers, it is *stricti juris*, and not to be extended by construction, analogy or inference.<sup>78</sup>

**B. Rights of Bona Fide Purchasers.**—A maritime lien or privilege, though adhering to the vessel, is a secret one, and may operate to the prejudice of general creditors and purchasers without notice.<sup>79</sup>

4270 is to make the vessel liable in rem as itself guilty of the offense for every pecuniary penalty that may be assessed for a violation of any of the previous provisions of the statute regulating the carriage of passengers in merchant vessels. *The Strathairly*, 124 U. S. 558, 572, 31 L. Ed. 580.

If the master pays the fine, the vessel is not subject to the lien. *The Strathairly*, 124 U. S. 558, 31 L. Ed. 580.

The word "penalty" is used in the law as including fines, which are pecuniary penalties. *The Strathairly*, 124 U. S. 558, 571, 31 L. Ed. 580.

**74. Fine for failure to deliver list of passengers to collector.**—*The Strathairly*, 124 U. S. 558, 31 L. Ed. 580.

Section 4266 of the Revised Statutes, providing that the master of the vessel arriving in the United States from any foreign place whatever, at the same time that he delivers a manifest of the cargo or makes report or entry of the vessel pursuant to law, shall also deliver a report, to the collector of the district in which such vessel shall arrive, of a list of all passengers taken on board at any foreign port or place, verified by his oath, in the same manner as directed by law in relation to the manifest of the cargo, does not subject the vessel itself to any liability for his penalty, and in the absence of any general provision of the statute imposing such a liability on the vessel, akin to that contained in § 3088 making the vessel liable whenever her owner or master is subject to a penalty for a violation of the revenue laws of the United States, it follows that the penalty imposed for a violation of § 4266 cannot be charged as a lien on the vessel, under the third count of the libel, unless that section is made applicable to vessels propelled in whole or in part by steam. This can be only on the supposition that this effect is given to it by the amendment to § 4264. *The*

*Strathairly*, 124 U. S. 558, 578, 31 L. Ed. 580.

**75. Lien to be perfected as required by statute.**—*The Lottawanna*, 21 Wall. 558, 578, 22 L. Ed. 654.

**76. Recording required in Louisiana.**—*The Lottawanna*, 21 Wall. 558, 578, 22 L. Ed. 654.

**77. Recording required in Massachusetts.**—*Moss Public Statutes*, c. 192, § 15; *The Glide*, 167 U. S. 606, 42 L. Ed. 296.

**78. Not to be extended by construction.**—*Vandewater v. Mills*, 19 How. 82, 15 L. Ed. 554; *The Glide*, 167 U. S. 606, 612, 42 L. Ed. 296; *The J. E. Rumbell*, 148 U. S. 1, 9, 37 L. Ed. 345; *Pratt v. Reed*, 19 How. 359, 361, 15 L. Ed. 660; *Tod v. Pratt*, 19 How. 362, 15 L. Ed. 662.

Maritime liens, in the coasting business, and in the business upon the lakes and rivers, are greatly increasing; and, as they are tacit and secret, are not to be encouraged, but should be strictly limited to the necessities of commerce which created them. Any relaxation of the law, in this respect, will tend to perplex and embarrass business, rather than furnish facilities to carry it forward. *Pratt v. Reed*, 19 How. 359, 361, 15 L. Ed. 660; *Tod v. Pratt*, 19 How. 362, 15 L. Ed. 662.

"Analogy," says *Pardessus (Droit Civ., vol. 3, 597)*, "cannot afford a decisive argument, because privileges are of strict right. They are an exception to the rule by which all creditors have equal rights in the property of their debtor, and an exception should be declared and described in express words; we cannot arrive at it by reasoning from one case to another." *Vandewater v. Mills*, 19 How. 82, 89, 15 L. Ed. 554.

**79. Good against creditors and purchasers without notice.**—*Vandewater v. Mills*, 19 How. 82, 89, 15 L. Ed. 554; *The J. E. Rumbell*, 148 U. S. 1, 9, 37 L. Ed. 345; *The Glide*, 167 U. S. 606, 612, 42 L.



## V. Priority of Lien.

**A. Contract Liens—1. SEAMEN'S WAGES.**—While seamen have a lien, prior to that of the holder of a bottomry bond, for their wages, yet as the owners are also personally liable for such wages, if the bottomry holder is compelled to discharge that lien, he has a resulting right to compensation over against the owners, in the same manner as he would have, if they had previously mortgaged the ship.<sup>80</sup>

**2. REPAIRS AND SUPPLIES—a. In General.**—By the admiralty law, maritime liens or privileges for necessary advances made, or supplies furnished, to keep a vessel fit for sea, take precedence of all prior claims upon her, unless for seamen's wages or salvage.<sup>81</sup>

**b. Priority over Mortgages—(1) Implied Maritime Liens.**—A lien for advances or supplies, made or furnished in good faith to the master in a foreign port, is preferred to a prior mortgage.<sup>82</sup>

**(2) Lien under State Statutes.**—The lien created by the statute of a state, for repairs or supplies furnished to a vessel in her home port, has the like precedence over a prior mortgage that is accorded to a lien for repairs or supplies in a foreign port under the general maritime law, as recognized and adopted in the United States.<sup>83</sup>

**c. Successive Liens for Repairs and Supplies.**—As between successive liens for repairs or supplies, the general rule is that they are to be paid in inverse order, because it is for the benefit of all the interests in the ship that she should be kept in condition to be navigated.<sup>84</sup>

Ed. 296; *Moran v. Sturges*, 154 U. S. 256, 282, 38 L. Ed. 981. See post, "Sale of Vessel," VI, D.

**80. Seaman's wages.**—*The Ship Virgin*, 8 Pet. 538, 8 L. Ed. 1036.

**81. Lien for repairs and supplies.**—*The J. E. Rumbell*, 148 U. S. 1, 9, 37 L. Ed. 345.

In *The St. Jago De Cuba*, 9 Wheat. 409, 6 L. Ed. 122, Mr. Justice Johnson, in delivering judgment, and speaking of the lien of materialmen and other implied liens under maritime contracts, said: "The whole object of giving admiralty process and priority of payment to privileged creditors is to furnish wings and legs to" the vessel, "to get back for the benefit of all concerned; that is, to complete her voyage. In every case, the last lien given will supersede the proceeding. The last bottomry bond will ride over all that precede it; and an abandonment to a salvor will supersede every prior claim. The vessel must get on; this is the consideration which controls every other; and not only the vessel, but even the cargo, is sub modo subjected to this necessity." *The J. E. Rumbell*, 148 U. S. 1, 9, 37 L. Ed. 345.

**82. Priority of supply and repair lien over mortgage.**—*The J. E. Rumbell*, 148 U. S. 1, 9, 37 L. Ed. 345; *The St. Jago De Cuba*, 9 Wheat. 409, 6 L. Ed. 122; *The Emily Souder*, 17 Wall. 666, 21 L. Ed. 683; *The Valencia*, 165 U. S. 264, 268, 41 L. Ed. 710.

A claim arising under a mortgage of the vessel is not to be preferred to the claim for supplies and necessities furnished in her home port in the state of Illinois since the mortgage was recorded. *The J. E. Rumbell*, 148 U. S. 1, 21, 37 L. Ed. 345.

"In *The Lottawanna*, 21 Wall. 558, 578,

22 L. Ed. 654, the mortgage was preferred to the claim of the materialmen in the home port, only because the latter had not recorded their lien as required by the law of the state to make it valid; and it was clearly implied in the opinion of the court, delivered by Mr. Justice Bradley, as well as distinctly asserted in the dissenting opinion of Mr. Justice Clifford, that their lien, if valid, would take precedence of the mortgage." *The J. E. Rumbell*, 148 U. S. 1, 16, 37 L. Ed. 345.

**Liens for advances of funds for the necessities of vessels in a foreign port** have priority over existing mortgages to creditors at home. *The Emily Souder*, 17 Wall. 666, 667, 21 L. Ed. 683.

**83. Lien on domestic vessel and mortgage.**—Each rests upon the furnishing of supplies to the ship, on the credit of the ship herself, to preserve her existence and secure her usefulness, for the benefit of all having any title or interest in her. Each creates a just in re, a right of property in the vessel, existing independently of possession, and arising as soon as the contract is made, and before the institution of judicial proceedings to enforce it. The contract in each case is maritime, and the lien which the law gives to secure it is maritime in its nature, and is enforced in admiralty by reason of its maritime nature only. The mortgage, on the other hand, is not a maritime contract, and constitutes no maritime lien, and the mortgagee can only share in the proceeds in the registry after all maritime liens have been satisfied. *The J. E. Rumbell*, 148 U. S. 1, 19, 37 L. Ed. 345; *The Glide*, 167 U. S. 606, 623, 42 L. Ed. 296.

**84. Priority as between successive liens for repairs and supplies.**—*The John G.*

3. **SALVAGE.**—An abandonment of a vessel to salvors supersedes all prior claims and liens.<sup>85</sup>

4. **BOTTOMRY.**—See the title *BOTTOMRY AND RESPONDENTIA*, vol. 3, p. 457.

**B. Liens for Tort.**—Liens for reparation for wrong done are superior to any prior liens for repairs and supplies, money borrowed, wages, pilotage, etc.<sup>86</sup> But they stand on an equality with regard to each other if they arise from the same cause.<sup>87</sup>

## VI. Loss or Waiver of Lien.

**A. In General.**—The lien implied by the general admiralty law may be waived by the express contract of the parties, or by necessary implication; and the implication arises in all cases where the express contract is inconsistent with an intention to rely upon the lien.<sup>88</sup>

**B. Forfeiture of Vessel.**—A lien for repairs and supplies furnished to a vessel in a foreign port,<sup>89</sup> or of seamen for wages, although the services for which the wages are due were rendered subsequent to the act which subjected the vessel to forfeiture,<sup>90</sup> are not displaced by the forfeiture of the vessel to the government for violation of law, where the holders of the lien were ignorant of the illegal character of the voyage, when their claims were contracted.

Stevens, 170 U. S. 113, 119, 42 L. Ed. 969; *Galveston Railroad v. Cowdrey*, 11 Wall. 459, 460, 20 L. Ed. 199.

**85. Salvage.**—*The St. Jago De Cuba*, 9 Wheat. 409, 416, 6 L. Ed. 122.

**86. Liens for torts.**—*Norwich Co. v. Wright*, 13 Wall. 104, 122, 20 L. Ed. 585; *The John G. Stevens*, 170 U. S. 113, 126, 42 L. Ed. 969.

A lien upon a tug, for damages to her tow by negligent towage bringing the tow into collision with a third vessel, is to be preferred, in admiralty, to a statutory lien for supplies furnished to the tug in her home port before the collision. *The John G. Stevens*, 170 U. S. 113, 114, 42 L. Ed. 969.

**87. Equality of liens arising from same tort.**—*Norwich Co. v. Wright*, 13 Wall. 104, 122, 20 L. Ed. 585.

A lien for the loss of the schooner and her cargo, arising from collision with a steamer, is on an equality with the lien for the loss of the cargo of the steamer, from the same cause. *Norwich Co. v. Wright*, 13 Wall. 104, 122, 20 L. Ed. 585.

**88. Waiver of lien in general.**—*Carrington v. Pratt*, 18 How. 63, 68, 15 L. Ed. 267.

**89. Lien for supplies and repairs.**—*The St. Jago De Cuba*, 9 Wheat. 409, 6 L. Ed. 122; *The Siren*, 7 Wall. 152, 159, 19 L. Ed. 129; *The Patapsco*, 13 Wall. 329, 335, 20 L. Ed. 696; *The J. E. Rumbell*, 148 U. S. 1, 9, 37 L. Ed. 345; *The Emily Souder*, 17 Wall. 666, 21 L. Ed. 683; *The Valencia*, 165 U. S. 264, 268, 41 L. Ed. 710. See, also, *The Nassau*, 4 Wall. 634, 635, 18 L. Ed. 413.

Liens for advances and supplies are not displaced by a forfeiture to the United States for a precedent violation of the navigation laws. *The St. Jago De Cuba*, 9 Wheat. 409, 6 L. Ed. 122; *The Emily Souder*, 17 Wall. 666, 21 L. Ed. 683; *The J. E. Rumbell*, 148 U. S. 1, 9, 37 L. Ed. 345.

**Claims of materialmen for supplies,** where the parties were innocent of all knowledge of, or participation in, the illegal voyage, are to be preferred to the claim of forfeiture on the part of the government. *The St. Jago De Cuba*, 9 Wheat. 409, 6 L. Ed. 122.

Whether a maritime lien for work and materials alleged to have been furnished to a vessel prior to her capture *jure belli* is lost by such capture, is a proper subject for investigation and decision by the prize court before which the captured vessel is brought for adjudication; and which the parties setting up such lien can, on presentation of their claim to that tribunal properly have decided. But if such parties do not so present and ask to have it decided, the question is not properly before the federal supreme court for review, in a case where the district court has only dismissed the libel as improperly filed on its instance side. *The Nassau*, 4 Wall. 634, 635, 18 L. Ed. 413.

**90. Lien for seamen's wages.**—*The St. Jago De Cuba*, 9 Wheat. 409, 6 L. Ed. 122; *The Siren*, 7 Wall. 152, 159, 19 L. Ed. 129.

In *The St. Jago De Cuba*, 9 Wheat. 409, 6 L. Ed. 122, a libel was filed by the United States to forfeit a vessel for violation of the laws prohibiting the slave trade. Claims of seamen for wages, when the parties were ignorant of the illegal voyage of the vessel, were allowed and paid out of the proceeds, although these claims arose subsequent to the illegal acts which created the forfeiture, yet they were not superseded by the claim of the government. "In case of wreck and salvage," said the court, "it is unquestionable that the forfeiture would be superseded; and we see no ground on which to preclude any other maritime claim fairly and honestly acquired." *The Siren*, 7 Wall. 152, 159, 19 L. Ed. 129.

**C. Death or Insolvency of Owner.**—A maritime lien for advances, or repairs and supplies, is not divested by death or insolvency of owner.<sup>91</sup>

**D. Sale of Vessel**—1. **IN GENERAL.**—As a general rule, a maritime lien is not divested by a sale by the owner of the vessel to a bona fide purchaser without notice of its existence.<sup>92</sup>

2. **SALE BY MASTER IN CASE OF DISASTER.**—When a ship is lawfully sold by the master, in case of emergency or disaster, the purchaser takes an absolute title divested of all liens, and the liens are transferred to the proceeds of the ship, which, in the sense of the admiralty law, becomes the substitute for the ship.<sup>93</sup>

3. **SALE BY COURT OF ADMIRALTY.**—Where a vessel subject to maritime liens is lawfully sold by a court of admiralty, the liens are transferred from the ship to the proceeds of the sale.<sup>94</sup>

**E. Taking Bill or Note for Debt as Waiver of Lien.**—As a general rule, a maritime lien is not waived by the creditor by his acceptance of a bill or note for the debt for which the lien exists, in the absence of an agreement to that effect.<sup>95</sup>

**91. Death or insolvency of owner.**—*Insurance Co. v. Baring*, 20 Wall. 159, 163, 22 L. Ed. 250.

**92. Lien not divested by sale.**—*Moran v. Sturges*, 154 U. S. 256, 282, 38 L. Ed. 981; *Vandewater v. Mills*, 19 How. 82, 89, 15 L. Ed. 554; *The J. E. Rumbell*, 148 U. S. 1, 9, 37 L. Ed. 345; *The Glide*, 167 U. S. 606, 612, 42 L. Ed. 296.

**93. Sale of vessel by master.**—*The Amelie*, 6 Wall. 18, 30, 18 L. Ed. 806.

**94. Sale by court of admiralty.**—*The Lottawanna*, 20 Wall. 201, 221, 22 L. Ed. 259; *Cutler v. Rae*, 7 How. 729, 731, 12 L. Ed. 890; *Sheppard v. Taylor*, 5 Pet. 675, 8 L. Ed. 269.

Beyond doubt maritime liens upon the property sold by the order of the admiralty court follow the proceeds, but the proceeds arising from such a sale, if the title of the owner is unincumbered and not subject to any maritime lien of any kind, belong to the owner, as the admiralty courts are not courts of bankruptcy or of insolvency, nor are they invested with any jurisdiction to distribute such property of the owner, any more than any other property belonging to him, among his creditors. Such proceeds, if unaffected by any lien, when all legal claims upon the fund are discharged, become by operation of law the absolute property of the owner. *The Lottawanna*, 20 Wall. 201, 221, 22 L. Ed. 259.

**95. Taking bill or note as waiver of lien.**—*The Steamer St. Lawrence*, 1 Black 522, 523, 17 L. Ed. 180, reaffirmed in *The Ship Potomac*, 2 Black 581, 17 L. Ed. 263; *Peyroux v. Howard*, 7 Pet. 324, 8 L. Ed. 700; *The Bird of Paradise*, 5 Wall. 545, 18 L. Ed. 662; *The Emily Souder*, 17 Wall. 666, 21 L. Ed. 683; *The Guy*, 9 Wall. 758, 19 L. Ed. 710; *The Kimball*, 3 Wall. 37, 18 L. Ed. 50. See *Ramsay v. Allegre*, 12 Wheat. 611, 6 L. Ed. 746.

"Some of the older authorities seem to give countenance to the doctrine that an express contract operates as a waiver of the lien; but it is settled, at the present

day, that an express contract for a stipulated sum is not of itself a waiver of a lien; but that, to produce that effect, the contract must contain some stipulations inconsistent with the continuance of such lien, or from which a waiver may fairly be inferred." *Peyroux v. Howard*, 7 Pet. 324, 8 L. Ed. 700.

A lien for supplies is not waived by a materialman who accepts the notes of the owner for the amount due, if it was understood by the parties that the lien should continue. *The Steamer St. Lawrence*, 1 Black 522, 523, 17 L. Ed. 180, reaffirmed in *The Ship Potomac*, 2 Black 581, 17 L. Ed. 263.

The fact that the person calling himself owner and agent of the vessel gave acceptances for the amount charged for the repairs held not to affect the case, the acceptor having been insolvent and unworthy of credit, and the credit having in fact been given to the boat. *The Guy*, 9 Wall. 758, 19 L. Ed. 710.

A lien for advances to the master to enable him to pay necessary expenses to a lien is not affected by the fact that he took a draft on the owners for the amount thereof. *The Emily Souder*, 17 Wall. 666, 21 L. Ed. 683.

**Lien for freight.**—It is not to be presumed that the owner of a ship, having a lien upon a cargo for the payment of the freight, intended to waive his lien by taking the notes of the charterers drawn so as to be payable at the time of the expected arrival of the ship in port. The notes being unpaid, he may return them and enforce his lien. *The Kimball*, 3 Wall. 37, 18 L. Ed. 50.

As a bill of exchange or promissory note given for a precedent debt does not extinguish the debt, unless such was the agreement of the parties, a bill or note falling due before the unloading of the cargo, and protested and unpaid, is no discharge of the lien for freight and the shipowner, in such a case, may stand upon it as fully as if the acceptance had never



**F. Relinquishment of Possession.**—A maritime lien is not displaced, as in a contract of affreightment, when possession is relinquished, unless the circumstances are such as to show that it was waived.<sup>96</sup>

**G. Discharge of Vessel by Giving Bond.**—In New York, where a seizure has been seasonably made, a bond in conformity to the statute, when executed and delivered to the creditor by the owner, is a substitute for the lien, and works a discharge of the vessel.<sup>97</sup>

**H. Fraud.**—Where a bottomry bond is taken for a larger amount than was actually advanced, with a fraudulent purpose to enable the owner of the vessel to recover the amount of the bond from the underwriters, the bond is not only void but the lender of the money loses his maritime lien upon the vessel for the sum actually advanced.<sup>98</sup>

## VII. Enforcement.

**A. Jurisdiction**—1. LIENS FOR MARITIME CAUSES OF ACTION—*a. Proceedings in Rem*—(1) *Implied Maritime Liens*.—The district courts of the United States, as courts of admiralty, have exclusive jurisdiction of proceedings in rem for the enforcement of liens implied by the maritime law.<sup>99</sup> Thus, admiralty has exclusive jurisdiction of a suit in rem for the enforcement of a lien for advances, or supplies and repairs, furnished to a vessel in a foreign

been given. *The Bird of Paradise*, 5 Wall. 545, 18 L. Ed. 662.

Hence, where, in the case of a vessel chartered from Liverpool to San Francisco, freight was to "be paid in Liverpool on unloading and right delivery of the cargo," at a rate fixed by the parties, "such freight to be paid, say one-fourth in cash and one-fourth by charterer's acceptance, at six months from the final sailing of the vessel, and the remainder by like bill at three months from date of delivery, at charterer's office in Liverpool, of the certificate of the right delivery of the cargo agreeably to bill of lading, or in cash, under discount at five per cent., at freighter's option. The ship and her freight are bound to this venture,"—Held, that the "charterer's acceptance at six months from the final sailing of the vessel" having been dishonored and he became bankrupt, it was no payment of the one-fourth agreed to be so paid for, and that the lien for that fourth was not displaced, and that as to "the remainder," which was to be by like bill, at three months from date of delivery, at charterer's office in Liverpool, of the right delivery of the cargo agreeably to bill of lading—the lien had been displaced, notwithstanding that the charterer had become bankrupt before the vessel arrived at San Francisco. *The Bird of Paradise*, 5 Wall. 545, 18 L. Ed. 662.

**96. Relinquishment of possession.**—*The Kalorama*, 10 Wall. 204, 211, 19 L. Ed. 941.

**97. Discharge of vessel by giving bond.**—*The Edith*, 94 U. S. 518, 24 L. Ed. 167.

**98. Fraud.**—*Carrington v. Pratt*, 18 How. 63, 15 L. Ed. 267.

**99. Proceedings in rem to enforce lien under maritime law.**—*Norton v. Switzer*, 93 U. S. 355, 356, 23 L. Ed. 903; *The Maggie Hammond*, 9 Wall. 435, 19 L. Ed. 772;

*Moran v. Sturges*, 154 U. S. 256, 282, 38 L. Ed. 981; *The Belfast*, 7 Wall. 624, 19 L. Ed. 266; *The J. E. Rumbell*, 148 U. S. 1, 11, 37 L. Ed. 345; *The General Smith*, 4 Wheat. 438, 4 L. Ed. 609; *The Kalorama*, 10 Wall. 204, 215, 19 L. Ed. 941; *Cutler v. Rae*, 7 How. 729, 12 L. Ed. 890; *The Rock Island Bridge*, 6 Wall. 213, 215, 18 L. Ed. 753; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 390, 12 L. Ed. 465.

In all cases where a maritime lien arises, the original jurisdiction to enforce it by a proceeding in rem is exclusive in the district courts of the United States, as provided by the ninth section of the judiciary act of 1789. *The Belfast*, 7 Wall. 624, 19 L. Ed. 266; *The Kalorama*, 10 Wall. 204, 215, 19 L. Ed. 941.

One having a maritime lien may, if he sees fit, proceed in rem in the admiralty, and, if he elects to enforce the maritime lien which arises in the case, he cannot proceed in any other mode or forum, as the jurisdiction of the admiralty courts to enforce a maritime lien is exclusive, and cannot be exercised in any other mode than by a proceeding in rem. *Norton v. Switzer*, 93 U. S. 355, 356, 23 L. Ed. 903.

"A suit in the admiralty to enforce and execute a lien is not an action against any particular person to compel him to do or forbear anything; but a claim against all mankind; a suit in rem, asserting the claim of the libellant to the thing, as against all the world. *The Rock Island Bridge*, 6 Wall. 213, 18 L. Ed. 753; *The J. E. Rumbell*, 148 U. S. 1, 11, 37 L. Ed. 345." *Moran v. Sturges*, 154 U. S. 256, 282, 38 L. Ed. 981.

Where a lien exists by the maritime law of foreign jurisdictions, our admiralty has jurisdiction to enforce it here even though all the parties be foreigners. Its enforcement is but a question of comity. The

port,<sup>1</sup> or of a suit upon a maritime lien arising out of a contract of affreightment.<sup>2</sup>

(2) *Liens Given by State Statute.*—It is well settled that wherever any lien is given by a state statute for a cause of action cognizable in admiralty, either in rem or in personam, proceedings in rem to enforce such lien are within the exclusive jurisdiction of the admiralty courts.<sup>3</sup> At one time the admiralty rules denied jurisdiction in such case,<sup>4</sup> but the rules now in force expressly confirm

Maggie Hammond, 9 Wall. 435, 19 L. Ed. 772.

**1. Lien for repairs and supplies in foreign port.**—The General Smith, 4 Wheat. 438, 443, 4 L. Ed. 609; The St. Jago De Cuba, 9 Wheat. 409, 417, 6 L. Ed. 122; The Ship Virgin, 8 Pet. 538, 550, 8 L. Ed. 1036; Thomas v. Osborn, 19 How. 22, 15 L. Ed. 534; The Grapeshot, 9 Wall. 129, 19 L. Ed. 651; The Lulu, 10 Wall. 192, 19 L. Ed. 906; The Kalorama, 10 Wall. 204, 19 L. Ed. 941; The J. E. Rumbell, 148 U. S. 1, 11, 37 L. Ed. 345. The Glide, 167 U. S. 606, 622, 42 L. Ed. 296; Brig Malek Adhel v. United States, 2 How. 210, 234, 11 L. Ed. 239; The John G. Stevens, 170 U. S. 113, 118, 42 L. Ed. 969; The Lottawanna, 20 Wall. 201, 218, 22 L. Ed. 259; The Moses Taylor, 4 Wall. 411, 18 L. Ed. 397; Hine v. Trevor, 4 Wall. 555, 18 L. Ed. 451; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 390, 12 L. Ed. 465.

**2. Lien arising out of contract of affreightment.**—The Belfast, 7 Wall. 624, 19 L. Ed. 266.

Upon an ordinary contract of affreightment, the lien of the shipper is a maritime lien; and a proceeding in rem, to enforce it, is within the exclusive original cognizance of the district courts of the United States, albeit the contract be for transportation between ports and places within the same state, and all the parties be citizens of the same state, provided only that such contract be for transportation upon navigable waters to which the general jurisdiction of the admiralty extends. The Belfast, 7 Wall. 624, 19 L. Ed. 266.

**3. Lien added to maritime cause of action.**—Knapp, etc., Co. v. McCaffrey, 177 U. S. 638, 642, 44 L. Ed. 921; The Moses Taylor, 4 Wall. 411, 18 L. Ed. 397; Hine v. Trevor, 4 Wall. 555, 18 L. Ed. 451; Johnson v. Chicago, etc., Elevator Co., 119 U. S. 388, 397, 30 L. Ed. 447; The Glide, 167 U. S. 606, 42 L. Ed. 296; Knapp, etc., Co. v. McCaffrey, 177 U. S. 638, 642, 44 L. Ed. 921; The Resolute, 168 U. S. 437, 440, 42 L. Ed. 533; The William M. Hoag, 168 U. S. 443, 42 L. Ed. 537; The Steamboat Orleans, 11 Pet. 175, 184, 9 L. Ed. 677; Peyroux v. Howard, 7 Pet. 324, 343, 8 L. Ed. 700; The Belfast, 7 Wall. 624, 625, 19 L. Ed. 266; The Winnebago, 205 U. S. 354, 363, 51 L. Ed. 836; The General Smith, 4 Wheat. 438, 4 L. Ed. 609; The Robert W. Parsons, 191 U. S. 17, 48 L. Ed. 73; Moran v. Sturges, 154 U. S. 256, 283, 38 L. Ed. 981; The J. E. Rumbell, 148 U. S. 1, 20, 37 L. Ed. 345; Peyroux v. Howard, 7 Pet. 324, 8 L. Ed. 700; The Steamer St. Law-

rence, 1 Black 522, 17 L. Ed. 180; The Lottawanna, 21 Wall. 558, 22 L. Ed. 654.

State legislatures have no authority to create a maritime lien, nor can they confer any jurisdiction upon a state court to enforce such a lien by a suit or proceeding in rem, as practiced in the admiralty courts. Edwards v. Elliott, 21 Wall. 532, 556, 22 L. Ed. 487; The Belfast, 7 Wall. 624, 644, 19 L. Ed. 266; The Moses Taylor, 4 Wall. 411, 18 L. Ed. 397; Hine v. Trevor, 4 Wall. 555, 18 L. Ed. 451; Leon v. Galceran, 11 Wall. 185, 190, 20 L. Ed. 74; Norton v. Switzer, 93 U. S. 355, 356, 23 L. Ed. 903.

It is well settled law that common-law remedies are not appropriate nor competent to enforce a maritime lien by a proceeding in rem, and consequently that the jurisdiction conferred upon the district courts, so far as respects that mode of proceeding, is exclusive. Leon v. Galceran, 11 Wall. 185, 190, 20 L. Ed. 74.

"In enforcing the statutory lien in maritime causes, admiralty courts do not adopt the statute itself, or the construction placed upon it by courts of common law or in equity, when they apply it. Everything required by the statute, as a condition on which the lien arises and vests, must, of course, be regarded by courts of admiralty; for they can only act in enforcing a lien when the statute has, according to its terms, conferred it; but beyond that the statute, as such, does not furnish the rule for governing the decision of the cause in admiralty, as between conflicting claims and liens. The maritime law treats the lien, because conferred upon a maritime contract by the statute, as if it had been conferred by itself, and consequently upon the same footing as all maritime liens; the order of payment between them being determinable upon its own principles." The J. E. Rumbell, 148 U. S. 1, 20, 37 L. Ed. 345.

**4. Admiralty jurisdiction formerly denied by rule of court.**—The Lottawanna, 20 Wall. 201, 218, 22 L. Ed. 259; Maguire v. Card, 21 How. 248, 16 L. Ed. 118; The Steamer St. Lawrence, 1 Black 522, 17 L. Ed. 180; The Ship Potomac, 2 Black 581, 17 L. Ed. 263; The Glide, 167 U. S. 606, 613, 42 L. Ed. 296.

The abrogation of the rule of 1844 which permitted a proceeding in admiralty for the enforcement of a lien added to a maritime cause of action by that of 1858 did not imply that the court had become convinced, in the interval, that it wanted jurisdiction in cases to which the former



the admiralty jurisdiction.<sup>5</sup> Thus, admiralty has exclusive jurisdiction of suits in rem for the enforcement of a lien given by a state statute for repairs and supplies to a vessel in a port of the state to which she belongs,<sup>6</sup> and of suits

rule applied. The abrogation meant merely that various considerations made it advisable not to permit that particular form of process to be used by persons who might claim it on the sole ground that the state law gave them a lien, where none was given by the maritime code. The *Steamer St. Lawrence*, 1 Black 522, 17 L. Ed. 180, reaffirmed in *The Ship Potomac*, 2 Black 581, 17 L. Ed. 263.

Congress has given to the federal supreme court the authority to alter and change the forms and modes of proceeding, and it was under this authority that the 12th rule of admiralty practice was made in 1844, which permitted a proceeding in rem wherever the state law gave a lien. The *Steamer St. Lawrence*, 1 Black 522, 17 L. Ed. 180, reaffirmed in *The Ship Potomac*, 2 Black 581, 17 L. Ed. 263.

It was by virtue of the same authority that the rule was changed in 1858, and the privilege denied to a suitor of taking out process in rem, on the mere ground that state law made his claim a lien. The *Steamer St. Lawrence*, 1 Black 522, 17 L. Ed. 180, reaffirmed in *The Ship Potomac*, 2 Black 581, 17 L. Ed. 263.

Separate libels were filed in 1871, against a steamboat, for wages for salvage, for supplies furnished at her home port, and for the amount due on a mortgage. Held, on the evidence, that the lien for supplies had not been perfected under the state law; and, if it had been, that the libels for such supplies could not be sustained prior to the recent change in the twelfth admiralty rule. The *Lottawanna*, 21 Wall. 558, 559, 22 L. Ed. 654.

The change in the rule was prospective in its operation, and does not defeat a suit previously commenced. The *Steamer St. Lawrence*, 1 Black 522, 523, 17 L. Ed. 180, reaffirmed in *The Ship Potomac*, 2 Black 581, 17 L. Ed. 263.

A proceeding in rem against personal property is unknown to the common law, and is peculiar to the process of courts of admiralty. The foreign and other attachments of property in the state courts, though by analogy loosely termed proceedings in rem, are not within the category. *Vandewater v. Mills*, 19 How. 82, 89, 15 L. Ed. 554; *The Glide*, 167 U. S. 606, 612, 42 L. Ed. 296; *The J. E. Rumbell*, 148 U. S. 1, 9, 37 L. Ed. 345.

State courts are without jurisdiction of proceedings in rem for the enforcement of a maritime lien. *Moran v. Sturges*, 154 U. S. 256, 283, 38 L. Ed. 981; *The Belfast*, 7 Wall. 624, 625, 19 L. Ed. 266; *Leon v. Galceran*, 11 Wall. 185, 191, 20 L. Ed. 74; *Norton v. Switzer*, 93 U. S. 355, 356, 23 L. Ed. 903.

5. Present rule as to proceeding in admiralty to enforce statutory lien.—Ad-

miralty Rule 12, as amended in 1872, *Webb v. Sharp*, 13 Wall. 14, 20 L. Ed. 478; *The J. E. Rumbell*, 148 U. S. 1, 12, 37 L. Ed. 345. See *The Glide*, 167 U. S. 606, 613, 42 L. Ed. 296.

6. Repairs and supplies to domestic ships.—*The Glide*, 167 U. S. 606, 618, 42 L. Ed. 296; *The J. E. Rumbell*, 148 U. S. 1, 13, 37 L. Ed. 345; *The Lottawanna*, 21 Wall. 558, 580, 22 L. Ed. 654; *Peyroux v. Howard*, 7 Pet. 324, 8 L. Ed. 700; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 390, 12 L. Ed. 465; *The Steamer St. Lawrence*, 1 Black 522, 17 L. Ed. 180; *The Belfast*, 7 Wall. 624, 19 L. Ed. 266; *The Roanoke*, 189 U. S. 185, 194, 47 L. Ed. 770; *The Robert W. Parsons*, 191 U. S. 17, 24, 48 L. Ed. 73.

"State laws, it is true, cannot exclude the contract for furnishing such necessities from the domain of admiralty jurisdiction, for it is a maritime contract, and they cannot alter the limits of that jurisdiction; nor can they confer it upon the state courts so as to enable them to proceed in rem for the enforcement of liens created by such state laws, for it is exclusively conferred upon the district courts of the United States. They can only authorize the enforcement thereof by common-law remedies, or such remedies as are equivalent thereto. But the district courts of the United States, having jurisdiction of the contract as a maritime one, may enforce liens given for its security, even when created by the state laws." *The J. E. Rumbell*, 148 U. S. 1, 13, 37 L. Ed. 345; *The Lottawanna*, 21 Wall. 558, 580, 22 L. Ed. 654.

A libel was filed in the district court of the United States for the eastern district of Louisiana, against the steamboat *Planter*, by H. & V., citizens of New Orleans, for the recovery of a sum of money alleged to be due to them, as shipwrights, for work done and materials found in the repairs of the *Planter*; the libel asserted that, by the admiralty law and the laws of the state of Louisiana, they had a lien and privilege upon the boat, her tackle, etc., for the payment of the sums due for the repairs and materials, and prayed admiralty process against the boat, etc.; the answer of the owner of the *Planter* averred that they were citizens of Louisiana, residing in New Orleans, that the libelants are also citizens, and that the court have no jurisdiction of the cause. Held, that this was a case of admiralty jurisdiction. *Pevroux v. Howard*, 7 Pet. 324, 8 L. Ed. 700.

Proceedings under New York statute.—A suit in rem to enforce a lien on a canal boat under the New York statute must be brought in admiralty. *The Robert W. Parsons*, 191 U. S. 17, 48 L. Ed. 73.



in rem to enforce a lien given by a state statute in case of contracts of affreightment.<sup>7</sup>

b. *Proceedings in Personam*—(1) *In Admiralty*.—One entitled to a maritime lien may, if he pleases, waive the lien and maintain a suit in admiralty in personam against his debtor.<sup>8</sup>

(2) *Common-Law Remedies*.—And a person having a maritime lien may waive it and resort to his common-law remedy in a state court.<sup>9</sup>

2. LIENS GIVEN BY STATE STATUTE FOR NONMARITIME CAUSE OF ACTION.—Where a lien is given by a state statute for a cause of action of a non-maritime character, the admiralty courts have no jurisdiction of suits brought for its enforcement, and jurisdiction is exclusive in the state courts.<sup>10</sup> Thus, the admiralty courts cannot entertain jurisdiction of a suit to enforce a lien given by the law of the state where the vessel was built.<sup>11</sup>

**Proceedings under Massachusetts statute.**—The form of proceeding against the vessel, provided for in the statute of Massachusetts to enforce a lien given for repairs and supplied to domestic vessels, is clearly in the nature of admiralty process in rem, and is exclusively within the admiralty jurisdiction of the courts of the United States. *The Glide*, 167 U. S. 606, 623, 42 L. Ed. 296.

7. **Suits in rem to enforce lien arising out of contracts of affreightment.**—These principles applied to the provision of the statute of October 7th, 1864, of the state of Alabama, under which contracts of affreightment are authorized to be enforced in rem through courts of the state, by proceedings, the same in form, as those used in courts of admiralty of the United States; and the statute held unconstitutional and void. *The Belfast*, 7 Wall. 624, 625, 19 L. Ed. 266; *Leon v. Galceran*, 11 Wall. 185, 190, 20 L. Ed. 74.

8. **Proceedings in personam.**—*Norton v. Switzer*, 93 U. S. 355, 356, 23 L. Ed. 903; *Leon v. Galceran*, 11 Wall. 185, 192, 20 L. Ed. 74; *The General Smith*, 4 Wheat. 438, 4 L. Ed. 609.

Causes of action which give rise to a maritime lien, whether contracts or torts, may be prosecuted in other modes of proceeding as well as in rem in the admiralty. *Norton v. Switzer*, 93 U. S. 355, 356, 23 L. Ed. 903.

Quære: Whether a suit in personam in the admiralty may be maintained against the owner of a ship, by materialmen furnishing supplies for the ship, in her home port, where the local law gives no specific lien upon the ship which can be enforced by a proceeding in rem? However this may be, in general, such suit cannot be maintained, where the owner has given a negotiable promissory note for the debt, which is not tendered to be given up, or actually surrendered, at the hearing. *Ramsay v. Allegre*, 12 Wheat. 611, 6 L. Ed. 746.

In cases of prize, bottomry, and salvage, as well as seaman's wages, the party entitled to the lien may proceed in admiralty in personam against the party holding the proceeds of property to which

the lien had attached. *Cutler v. Rae*, 7 How. 729, 731, 12 L. Ed. 890.

9. **Common-law remedy.**—*Norton v. Switzer*, 93 U. S. 355, 356, 23 L. Ed. 903; *Leon v. Galceran*, 11 Wall. 185, 192, 20 L. Ed. 74.

10. **Lien given by state statute for non-maritime cause of action.**—*Roach v. Chapman*, 22 How. 129, 16 L. Ed. 294; *People's Ferry Co. v. Beers*, 20 How. 393, 15 L. Ed. 961; *The Winnebago*, 205 U. S. 354, 363, 51 L. Ed. 836; *Johnson v. Chicago, etc., Elevator Co.*, 119 U. S. 388, 30 L. Ed. 447; *Knapp, etc., Co. v. McCaffrey*, 177 U. S. 638, 643, 44 L. Ed. 921.

The state courts have jurisdiction of a suit to enforce a lien given by the statute of Illinois for damage done by a vessel to a building abutting on the water. *Johnson v. Chicago, etc., Elevator Co.*, 119 U. S. 388, 30 L. Ed. 447. See, also, *Knapp, etc., Co. v. McCaffrey*, 177 U. S. 638, 643, 44 L. Ed. 921.

A state may create a lien upon a vessel for damages done by it upon land, to be enforced by attachment against the vessel, for such a lien is not a maritime lien and is not enforceable in admiralty. *Johnson v. Chicago, etc., Elevator Co.*, 119 U. S. 388, 30 L. Ed. 447.

A bill in equity to enforce a possessory lien on a raft for towage may be brought in the state courts. *Knapp, etc., Co. v. McCaffrey*, 177 U. S. 638, 44 L. Ed. 921.

11. **Lien for construction of vessel.**—*Roach v. Chapman*, 22 How. 129, 16 L. Ed. 294; *Norton v. Switzer*, 93 U. S. 355, 366, 23 L. Ed. 903; *The Winnebago*, 205 U. S. 354, 360, 51 L. Ed. 836; *People's Ferry Co. v. Beers*, 20 How. 393, 15 L. Ed. 961.

Where a steamboat was built at Louisville, in Kentucky, and the persons who furnished the boilers and engines libelled the vessel in admiralty, in the district court of the United States for the eastern district of Louisiana, that court had no jurisdiction of the case. A contract for building a ship, or supplying engines, timber, etc., is not a maritime contract. The federal supreme court so decided in *Combs v. Hodge*, 20 How. 397, 400, 16 L. Ed. 115, and now reaffirms that decision. The state law of Kentucky, which creates

**B. Laches and Limitations**—1. IMPLIED MARITIME LIENS.—Laches or delay in the judicial enforcement of maritime liens, will, under proper circumstances, constitute a valid defense.<sup>12</sup> No arbitrary or fixed period of time has been or will be established, as an inflexible rule; but the delay which will defeat such a suit must, in every case, depend on the peculiar equitable circumstances of that case.<sup>13</sup>

2. LIENS GIVEN BY STATUTE.—One claiming a lien under a state statute for repairs and supplies furnished to a vessel in her home port, must proceed to enforce it within the time required by the statute.<sup>14</sup>

**C. Enforcement of Lien on Property of United States.**—A lien against government property cannot be enforced by the courts by a suit against the United States,<sup>15</sup> nor by a proceeding in rem when the possession of the property can only be had by taking it out of the actual possession of the officers or agents of the government charged therewith;<sup>16</sup> but it may be enforced by a proceeding in rem where the process of the court can be enforced without disturbing the possession of the government, which, being thus compelled to appear in the court to assert its claim, must discharge the lien before the property will be delivered to it.<sup>17</sup>

**D. Presumptions and Burden of Proof**—1. PRESUMPTIONS—*a. Presumption as to Necessity for Credit*—(1) *Force and Effect of Presumption.*—Where proof is made of necessity for the repairs or supplies, or for funds raised to pay for them by the master, and of credit given to the ship, a prima facie

a lien in such a case, cannot confer jurisdiction on the courts of the United States; and the preceding decisions of the court do not justify an inference to the contrary. *Roach v. Chapman*, 22 How. 129, 16 L. Ed. 294.

The admiralty jurisdiction of the courts of the United States does not extend to cases where a lien is claimed by the builders of a vessel for work done and materials found in its construction. *People's Ferry Co. v. Beers*, 20 How. 393, 15 L. Ed. 961.

Items really furnished for the completion of a vessel, and which are fairly a part of her original construction, although furnished after her launching, do not give rise to a maritime contract. *The Winnebago*, 205 U. S. 354, 51 L. Ed. 836.

12. **Laches.**—*The Key City*, 14 Wall. 653, 20 L. Ed. 896; *The Kalorama*, 10 Wall. 204, 211, 19 L. Ed. 941; *The China*, 7 Wall. 53, 68, 19 L. Ed. 67. See the title ADMIRALTY, vol. 1, p. 168.

13. **No fixed time for enforcing lien.**—*The Key City*, 14 Wall. 653, 20 L. Ed. 896.

When an admiralty lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defense will be held valid under shorter time, and a more rigid scrutiny of the delay than when the claimant is the party who owned the property when the lien accrued. *The Key City*, 14 Wall. 653, 20 L. Ed. 896.

A maritime lien is not lost by delay, unless for such a time as to show gross laches and to afford a reasonable presumption that it was abandoned. *The Kalorama*, 10 Wall. 204, 211, 19 L. Ed. 941.

When two corporations united their vessels and other property used in naviga-

tion, and formed a new corporation, in which no money was paid by either party, and in the contract of consolidation made arrangements for the payment of the debts of one or both before any dividends should be declared in the new stock, the new corporation cannot avail itself of the doctrine applicable to such a purchaser without notice; and a lien, three years and a half old, will be enforced against one of the vessels so transferred to the new corporation. *The Key City*, 14 Wall. 653, 654, 20 L. Ed. 896.

14. **Time of enforcing lien under local statute.**—*The Edith*, 94 U. S. 518, 24 L. Ed. 167; *The William M. Hoag*, 168 U. S. 443, 42 L. Ed. 537.

A creditor, claiming the benefit of the provisions of the statute of New York passed April 24, 1862, which purport to give a lien for repairs and supplies in the home port, must take it subject to all the conditions which they impose; and he loses it if it be not enforced within the time prescribed. *The Edith*, 94 U. S. 518, 24 L. Ed. 167.

**Departure of ship from port where supplies furnished.**—In Louisiana, the lien given by the state statute for repairs and supplies to a vessel in her home port ceases if the ship is allowed to depart, without the creditors exercising their rights. *Peyroux v. Howard*, 7 Pet. 324, 8 L. Ed. 700.

15. **Suit against United States to enforce lien.**—*The Davis*, 10 Wall. 15, 19 L. Ed. 875.

16. **Proceeding in rem against property of United States.**—*The Davis*, 10 Wall. 15, 19 L. Ed. 875.

17. *The Davis*, 10 Wall. 15, 16, 19 L. Ed. 875.



presumption will arise, conclusive in the absence of evidence to the contrary, of necessity for credit.<sup>18</sup>

(2) *Rebuttal of Presumption*.—The prima facie presumption that the repairs and supplies were made and furnished on the credit of the vessel, is rebutted, where it appears that the master had funds on hand or at his command which he ought to have applied to the accomplishment of those objects, and that the materialmen knew that fact or that such facts and circumstances were known to them as were sufficient to put them upon inquiry and to show that if they had used due diligence in that behalf they might have ascertained that the master had no authority to contract for such repairs and supplies on the credit of the vessel.<sup>19</sup>

b. *Presumption That Credit Was Given to Vessel*—(1) *Force and Effect of Presumption*.—Where it appears that the advances, or repairs and supplies, were necessary to preserve the ship in port, or to enable her to proceed on her voyage, and that they were made and furnished in good faith, the presumption is that the ship, as well as the master and owner, is responsible to those who made the necessary advances.<sup>20</sup>

**18. Presumption as to necessity for credit.**—The *Grapeshot*, 9 Wall. 129, 19 L. Ed. 651; The *Guy*, 9 Wall. 758, 19 L. Ed. 710; *Insurance Co. v. Baring*, 20 Wall. 159, 163, 22 L. Ed. 250; The *Lulu*, 10 Wall. 192, 197, 19 L. Ed. 906; The *Patapsco*, 13 Wall. 329, 333, 20 L. Ed. 696; The *Kalorama*, 10 Wall. 204, 212, 19 L. Ed. 941; The *Kate*, 164 U. S. 458, 468, 41 L. Ed. 512; The *Valencia*, 165 U. S. 264, 267, 41 L. Ed. 710.

Necessity for credit must be presumed where it appears that the repairs and supplies for which a lien is set up were ordered by the master, and that they were necessary for the ship when lying in port, or to fit her for an intended voyage, unless it is shown that the master had funds, or that the owners had sufficient credit, and that the repairer, furnisher, or lender knew those facts, or one of them, or that such facts and circumstances were known to them as were sufficient to put them on inquiry, and to show that if they had used due diligence they would have ascertained that the master was not authorized to obtain any such relief on the credit of the vessel. The *Lulu*, 10 Wall. 192, 19 L. Ed. 906; The *Kalorama*, 10 Wall. 204, 19 L. Ed. 941; The *Grapeshot*, 9 Wall. 129, 19 L. Ed. 651; The *Kate*, 164 U. S. 458, 468, 41 L. Ed. 512; The *Valencia*, 165 U. S. 264, 268, 41 L. Ed. 710.

**19. Rebuttal of presumption.**—*Insurance Co. v. Baring*, 20 Wall. 159, 163, 22 L. Ed. 250; The *Lulu*, 10 Wall. 192, 197, 19 L. Ed. 906; The *Patapsco*, 13 Wall. 329, 333, 20 L. Ed. 696; The *Kalorama*, 10 Wall. 204, 212, 19 L. Ed. 941; The *Grapeshot*, 9 Wall. 129, 19 L. Ed. 651; The *Kate*, 164 U. S. 458, 468, 41 L. Ed. 512.

**20. Presumption that credit was given to ship.**—The *Kalorama*, 10 Wall. 204, 212, 19 L. Ed. 941; The *Patapsco*, 13 Wall. 329, 333, 20 L. Ed. 696; The *Lulu*, 10 Wall. 192, 19 L. Ed. 906; The *Kate*, 164 U. S. 458, 466, 41 L. Ed. 512; The *Valencia*, 165 U. S. 264, 267, 41 L. Ed. 710; The *Emily*

*Souder*, 17 Wall. 666, 21 L. Ed. 683; *Insurance Co. v. Baring*, 20 Wall. 159, 163, 22 L. Ed. 250; The *General Smith*, 4 Wheat. 438, 4 L. Ed. 609.

If the credit was to the vessel there is a lien, and the burden of displacing it is on the claimant. He must show, affirmatively, that the credit was given to the company to the exclusion of a credit of the vessel. The *Patapsco*, 13 Wall. 329, 334, 20 L. Ed. 696.

Where a supply of coal was necessary to enable a vessel to make her voyage, the inference is that the credit was given to the vessel, unless it can be inferred that the master had funds, or the owners had credit, and that the materialman knew of this, or knew such facts as should have put him on inquiry. The *Patapsco*, 13 Wall. 329, 333, 20 L. Ed. 696; The *Lulu*, 10 Wall. 192, 19 L. Ed. 906.

When the libelant waived his privilege of cash on delivery, and put the coal on board the steamship, the presumption of law would be that he thereby gave credit to the steamship, and not to the owners thereof, inasmuch as the supplies were furnished in a foreign port. The *Patapsco*, 13 Wall. 329, 334, 20 L. Ed. 696.

**Advances** made to the master of a vessel in order to enable her to defray necessary expenses and to continue her voyage, are presumed to have been made on the credit of the vessel, as well as that of the owner. The *Emily Souder*, 17 Wall. 666, 21 L. Ed. 683; *Insurance Co. v. Baring*, 20 Wall. 159, 163, 22 L. Ed. 250; The *General Smith*, 4 Wheat. 438, 4 L. Ed. 609.

The presumption of law is, in the absence of fraud or collusion, that where advances are made to a captain in a foreign port, upon his request, to pay for necessary repairs or supplies to enable his vessel to prosecute her voyage, or to pay harbor dues, or for pilotage, towage, and like services rendered to the vessel, that they are made upon the credit of the vessel as well as upon that of her owners. It is not necessary to the existence of the



(2) *Rebuttal of Presumption*.—The presumption that advances, or repairs and supplies, were furnished on the credit of the vessel can be repelled only by clear and satisfactory proof that the master was in possession of funds applicable to the expenses, or of a credit of his own or of the owners of his vessel, upon which funds could be raised by the exercise of reasonable diligence, and that the possession of such funds or credit was known to the party making the advances, or could readily have been ascertained by proper inquiry.<sup>21</sup>

2. **BURDEN OF PROOF**—a. *Existence of Lien*.—In a proceeding in rem to enforce a specific lien, it is incumbent upon the party to establish the existence of the lien.<sup>22</sup>

b. *Necessity for Repairs and Supplies*.—The burden of proving that the repairs and supplies for which the lien is claimed were necessary rests, of course, on the creditor claiming the lien.<sup>23</sup>

c. *Absence of Necessity for Credit*.—Whenever the necessity for the repairs and supplies is once made out, it is incumbent upon the owners, if they allege that the funds could have been obtained upon their personal credit, to establish that fact by competent proof, and that the materialmen knew the same or were put upon inquiry, as before explained, unless those matters fully appear in the evidence introduced by the other party.<sup>24</sup>

**MARITIME TORTS**.—See the titles ADMIRALTY, vol. 1, p. 143; COLLISION, vol. 3, p. 870.

**MARK**.—As to signing contract by, see the title CONTRACTS, vol. 4, p. 559.

**MARKED OUT**.—See ALLOTTED, vol. 1, p. 259.

hypothecation that there should be in terms any express pledge of the vessel, or any stipulation that the credit shall be given on her account. *The Emily Souder*, 17 Wall. 666, 21 L. Ed. 683.

Advances made in a foreign port to equip a vessel, and to procure for her a cargo to a port of destination, are prima facie presumed to be made on the credit of the vessel. *Insurance Co. v. Baring*, 20 Wall. 159, 163, 22 L. Ed. 250; *The General Smith*, 4 Wheat. 438, 4 L. Ed. 609.

21. **Rebuttal of presumption that credit given to vessel**.—*The Emily Souder*, 17 Wall. 666, 21 L. Ed. 683; *The Patapsco*, 13 Wall. 329, 333, 20 L. Ed. 696; *The Lulu*, 10 Wall. 192, 19 L. Ed. 906; *The Grapeshot*, 9 Wall. 129, 19 L. Ed. 651; *The Kate*, 164 U. S. 458, 467, 41 L. Ed. 512.

22. **Burden of proving existence of lien**.—*The General Smith*, 4 Wheat. 438, 4 L. Ed. 609.

23. **Burden of proof as to necessity for repairs and supplies**.—*The Grapeshot*, 9 Wall. 129, 19 L. Ed. 651; *The Guy*, 9 Wall. 758, 19 L. Ed. 710; *The Kalorama*, 10 Wall. 204, 212, 19 L. Ed. 941.

The repairer or furnisher must prove affirmatively that the ship needed such repairs and supplies, as the authority of the master in such a case is implied from the necessity for the repairs or supplies, the want of funds for that purpose, the inability to procure the same, and the absence of the owner. *The Kalorama*, 10 Wall. 204, 212, 19 L. Ed. 941.

24. **Burden of proof as to absence of necessity for credit**.—*Insurance Co. v. Baring*, 20 Wall. 159, 164, 22 L. Ed. 250; *The Grapeshot*, 9 Wall. 129, 141, 19 L. Ed. 651; *Thomas v. Osborn*, 19 How. 22, 15 L. Ed. 534; *The Lulu*, 10 Wall. 192, 202, 19 L. Ed. 906.

## MARKET.

### CROSS REFERENCES.

See the titles MUNICIPAL CORPORATIONS; ORDINANCES; POLICE POWER.

As to whether jurisdictional amount was sufficient in injunction by occupiers of stalls in a market, see the title APPEAL AND ERROR, vol. 1, p. 869. As to compromise of debts arising from sale of a stall in a market house, see the title COMPROMISE AND SETTLEMENT, vol. 3, p. 997. As to right to jury trial in prosecutions under ordinances regulating markets, see the title JURY, vol. 7, p. 748. As to termination of a lease of a market stall, see the title LANDLORD AND TENANT, vol. 7, p. 827.

**Market-Overt.**—The English doctrine of market-overt has never been recognized in the United States, or received any judicial sanction.<sup>1</sup>

**Regulation of Markets.**—By the law of Louisiana, as in states where the common law prevails, the regulation and control of markets for the sale of provisions, including the places and the distances from each other at which they may be kept, are matters of municipal police, and may be intrusted by the legislature to a city council, to be exercised as in its discretion the public health and convenience may require.<sup>2</sup>

**In the District of Columbia,** the making of regulations with respect to the use of market grounds and the establishment of a tariff of charges with the power to subsequently alter or abolish the same, and the authority to incur a pecuniary liability with respect to the improvement of the market grounds, the erection of market buildings and the operation of markets, were beyond the authority of the governor of the district either with or without the sanction of the board of public works; they were matters within the province of the legislative assembly.<sup>3</sup>

1. **Market-overt.**—See *Ventress v. Smith*, 10 Pet. 161, 9 L. Ed. 382; *Warner v. Martin*, 11 How. 209, 13 L. Ed. 667, where the doctrine of market-overt is discussed.

2. *Natal v. Louisiana*, 139 U. S. 621, 623, 35 L. Ed. 288.

"The ordinance of the city of New Orleans prohibiting the keeping of a private market within six squares of any public market of the city, under penalty of a fine of twenty-five dollars, and of imprisonment for not more than thirty days if the fine is not paid, was within the authority constitutionally conferred upon the city council by the legislature of the state." *Natal v. Louisiana*, 139 U. S. 621, 624, 35 L. Ed. 288.

3. *Washington Market Co. v. District of Columbia*, 172 U. S. 361, 370, 43 L. Ed. 478.

The word "corporation" as used in § 16 of the act of May 20, 1870, incorporating the Washington Market Company, which provides "That the city government of Washington shall have the right to hold and use, under such rules and regulations as the said corporation may prescribe," certain designated property as a market, refers to the city government of Washington; and the power to make and enforce such regulations with regard to said market and the management thereof as in

their judgment the convenience, health and safety of the community may require, was conferred on the government and not on the market company. *Washington Market Co. v. District of Columbia*, 172 U. S. 361, 367, 43 L. Ed. 478.

**Alienation of property—Act of May 20, 1870.**—The act of congress of May 20, 1870, incorporating a market company, authorized it to erect certain buildings for the purposes of a public market on certain United States lands in the city of Washington, and to use and occupy the same for a period of ninety-nine years; in consideration of which, the market company was to pay a certain annual rent. Later, the market company having erected no building, congress authorized the governor and board of public works of the District of Columbia to arrange for the erection of buildings for district offices, and for this purpose to secure certain described property, which description necessarily included a part of the property previously granted to the market company. The market company conveyed and released a part of the real estate embodied in the previous grant, and it was released from payment of certain back rents and a reduction of the amount of the future rent was made. It was held that the power granted to the authorities of the district,

**MARKET VALUE.**—The market value of land at a certain date is what land will sell for in cash, or on such time and terms as will be equivalent to cash and not a value that someone might be willing to buy it for on time at the date named for purely speculative purposes.<sup>1</sup>

by the latter act, to make arrangements to secure the said property also carried with it power on the part of the market company to become parties to it; and authorized the equitable or agreed apportionment of the said rent due the district, in consideration of the conveyance and release by the market company of a part of its property. *District of Columbia v. Washington Market Co.*, 108 U. S. 243, 255, 256, 27 L. Ed. 714.

**Property acquired under act of May 20, 1870 by improvements.**—The approval by the governor of the District of Columbia of the proposal of the Washington Market Company to grade and erect suitable platforms for market purposes on an open space of ground in the city of Washington previously assigned for a designated period to the company, under the act of May 20, 1870, as a public market for cer-

tain articles, was held to create no easement in the land in favor of the market company, and at most there was a mere revocable license to hold and use the grounds. The company recognized the fact that congress might lawfully dispossess it from the use and occupancy of the grounds. *Washington Market Co. v. District of Columbia*, 172 U. S. 361, 370, 43 L. Ed. 478. See the title EASEMENTS, vol. 5, p. 690.

**1. Market value.**—*Kerr v. South Park Comm'rs*, 117 U. S. 379, 387, 29 L. Ed. 924.

As to determination of **market value** in condemnation proceedings, see the title EMINENT DOMAIN, vol. 5, p. 781. As to proof of **market value**, see the title EVIDENCE, vol. 5, p. 1026. See, also, the titles REVENUE LAWS; SALES; VENDOR AND PURCHASER.



# MARRIAGE.

BY DAVID T. CHALMERS.

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See the titles ADULTERY, FORNICATION AND LEWDNESS, vol. 1, p. 195; BASTARDY, vol. 3, p. 204; BIGAMY AND POLYGAMY, vol. 3, p. 225; CONFLICT OF LAWS, vol. 3, p. 1020; DESCENT AND DISTRIBUTION, vol. 5, p. 335; DIVORCE AND ALIMONY, vol. 5, p. 412; EVIDENCE, vol. 5, p. 1004; INFANTS, vol. 6, p. 1012; JUDGMENTS AND DECREES, vol. 7, p. 544; MARRIAGE CONTRACTS AND SETTLEMENTS; MISCEGENATION; PARENT AND CHILD; SEPARATE ESTATE OF MARRIED WOMEN.

As to effect on citizenship of intermarriage with Indians, see the title INDIANS, vol. 6, p. 906. As to declarations of a deceased member of a family to prove marriage, see the title PEDIGREE. As to invalidity of prior marriage in case of bigamy, see the title BIGAMY AND POLYGAMY, vol. 3, p. 228. As to evidence of prior marriage in case of bigamy, see the title BIGAMY AND POLYGAMY, vol. 3, pp. 228, 229. As to marriage as a consideration, see the title CONTRACTS, vol. 4, p. 566. As to subsequent marriage legitimating children,

see the title **BASTARDY**, vol. 3, p. 207. As to effect of annulment of marriage, see the title **DIVORCE AND ALIMONY**, vol. 5, p. 416. As to signature of marriage license by de facto officer, see the title **PUBLIC OFFICERS**. As to binding effect on federal court of decision by state supreme court validating marriage per verba de præsenti, see the title **COURTS**, vol. 4, p. 1116. As to provisions concerning marriage in wills, see the title **WILLS**. As to capacity of slaves to enter into the marriage contract, see the title **SLAVES**. As to whether marriage is a contract under the impairment clause of the federal constitution, see the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 758. As to marriage as grounds for abatement, see the title **ABATEMENT, REVIVAL AND SURVIVAL**, vol. 1, p. 31. As to federal questions in regard to common-law marriage, see the title **APPEAL AND ERROR**, vol. 1, p. 733. As to whether the validity of a foreign divorce presents a federal question, see the title **APPEAL AND ERROR**, vol. 1, p. 730.

### I. Definitions and Distinctions.

**A. Definitions.**—Marriage is a civil contract,<sup>1</sup> which creates a status.<sup>2</sup>

**B. Distinguished from Other Contracts.**—Though marriage possesses some of the elements of contract,<sup>3</sup> yet it is something more than a mere contract, it is a new relation.<sup>4</sup> Other contracts may be modified, restricted or

**1. Marriage a civil contract.**—*Jewell v. Jewell*, 1 How. 219, 233, 11 L. Ed. 108; *Meister v. Moore*, 96 U. S. 76, 78, 24 L. Ed. 826; *Reynolds v. United States*, 98 U. S. 145, 165, 25 L. Ed. 244; *Andrews v. Andrews*, 188 U. S. 14, 30, 47 L. Ed. 366; *Travers v. Reinhardt*, 205 U. S. 423, 438, 51 L. Ed. 865; *Patterson v. Gaines*, 6 How. 550, 587, 12 L. Ed. 553; *Maynard v. Hill*, 125 U. S. 190, 212, 31 L. Ed. 654.

**Marriage is often termed by text writers and in decisions of courts a civil contract**, generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization. *Maynard v. Hill*, 125 U. S. 190, 211, 31 L. Ed. 654, cited in *Andrews v. Andrews*, 188 U. S. 14, 30, 47 L. Ed. 366.

**2. Status.**—In *re Grimley*, 137 U. S. 147, 151, 34 L. Ed. 636. See post, "Distinguished from Other Contracts," I. B.

**Foundation of society.**—Marriage is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress. *Maynard v. Hill*, 125 U. S. 190, 211, 31 L. Ed. 654, cited in *Andrews v. Andrews*, 188 U. S. 14, 31, 47 L. Ed. 366.

**3. Possesses elements of contract.**—*Andrews v. Andrews*, 188 U. S. 14, 30, 47 L. Ed. 366. And see ante, "Definitions," I. A.

**4. Marriage is something more than a mere contract.**—The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. *Maynard v. Hill*, 125 U. S. 190, 211, 31 L. Ed. 654, cited in *Andrews v. Andrews*, 188 U. S. 14, 30, 47 L. Ed. 366. See, also, In *re Grimley*, 137 U. S. 147, 151, 34 L. Ed. 636.

**Mr. Justice Story says of marriage:** "But it appears to me to be something more than a mere contract. It is rather to be deemed an institution of society, founded upon consent and contract of the parties, and in this view it has some peculiarities in its nature, character, operation and extent of obligation, different from what belong to ordinary contracts." *Maynard v. Hill*, 125 U. S. 190, 213, 31 L. Ed. 654.

"At common law, marriage as a status had few elements of contract about it. For instance, no other contract merged the legal existence of the parties into one. Other distinctive elements will readily suggest themselves, which rob it of most of its characteristics as a contract, and leave it simply as a status or institution. As such, it is not so much the result of private agreement as of public ordination. In every enlightened government, it is pre-eminently the basis of civil institutions, and thus an object of the deepest public concern. In this light, marriage is more than a contract. It is not a mere matter of pecuniary consideration. It is a great public institution, giving character to our whole civil polity." *Maynard v. Hill*, 125 U. S. 190, 213, 31 L. Ed. 654.

**Parties have entered into a new relation.**—"When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties and obligations of which rest not upon their agreement, but upon the general law of the state, statutory or common, which defines and prescribes those rights, duties and obligations. They are of law, not of contract. It was of contract that the relation should be established, but, being established, the power of the parties as to its extent or duration is at an end. Their rights under it are determined by the will

enlarged, or entirely released by the consent of the parties; but when the relation of marriage is once formed, the law steps in and holds the parties to various obligations and liabilities;<sup>5</sup> such as mutual faithfulness, a breach of which, however, does not destroy the status or change the relation of the parties to each other.<sup>6</sup> And the contract can be neither canceled nor altered at the will of the parties upon any new consideration.<sup>7</sup> The marriage contract is similar to the contract of service.<sup>8</sup> In short, the marriage contract is one *sui generis*. Its peculiarities are very marked. It supersedes all other contracts between the parties, and with certain exceptions it is inconsistent with the power to make any new ones.<sup>9</sup>

## II. Capacity to Marry.

**A. In General.**—Capacity is an essential element of the marital relation.<sup>10</sup>

**B. Age of Consent.**—Marriage may be entered into by persons under the age of lawful majority.<sup>11</sup>

**At common law the age of consent** for entering into the marriage relation was fourteen in males and twelve in females. This is also the rule in many states.<sup>12</sup>

**C. Persons Already Having Husband or Wife.**—At common law a second marriage, with a previous consort living, was void.<sup>13</sup> But this is not so when the prior marriage is void.<sup>14</sup>

## III. Creation of Marital Relation.

**A. Consent.**—Since marriage is an institution founded upon mutual consent,<sup>15</sup> the consent of the parties is necessary to create the relation.<sup>16</sup>

**B. The Marriage License.**—The fact that an official marriage license was issued carries with it a presumption that all statutory prerequisites thereto had

of the sovereign, as evidenced by law. They can neither be modified nor changed by any agreement of the parties. It is a relation for life, and the parties cannot terminate it at any shorter period by virtue of any contract they may make. The reciprocal rights arising from this relation, so long as it continues, are such as the law determines from time to time, and none other." *Maynard v. Hill*, 125 U. S. 190, 211, 31 L. Ed. 654.

**5. Cannot be changed by consent of the parties.**—*Andrews v. Andrews*, 188 U. S. 14, 31, 47 L. Ed. 366.

**6. Breach of its obligations does not destroy the status.**—In *re Grimley*, 137 U. S. 147, 152, 34 L. Ed. 636.

**7. Cannot be canceled or altered by will of parties.**—*Randall v. Kreiger*, 23 Wall. 137, 147, 23 L. Ed. 124; *Maynard v. Hill*, 125 U. S. 190, 213, 31 L. Ed. 654.

**8. "Service is like marriage** which in the old law, was a species of it. It may be repeated, but substitution is unknown." *American Colortype Co. v. Continental Colortype Co.*, 188 U. S. 104, 107, 47 L. Ed. 404, citing *Arkansas Valley Smelting Co. v. Belden Min. Co.*, 127 U. S. 379, 387, 32 L. Ed. 346.

**9. Marriage contract is sui generis.**—*Randall v. Kreiger*, 23 Wall. 137, 147, 23 L. Ed. 124. See the title **HUSBAND AND WIFE**, vol. 6, p. 716.

**10. Capacity an essential element.**—*Travers v. Reinhardt*, 205 U. S. 423, 438, 51 L. Ed. 865.

**11. *Randall v. Kreiger***, 23 Wall. 137,

147, 23 L. Ed. 124. See post, "Consent," III, A. And see the title **INFANTS**, vol. 6, p. 1012.

**12. Age of consent at common law.**—*Maynard v. Hill*, 125 U. S. 190, 213, 31 L. Ed. 654.

**13. Second marriage at common law.**—*Reynolds v. United States*, 98 U. S. 145, 164, 25 L. Ed. 244. See the titles **BIGAMY AND POLYGAMY**, vol. 3, p. 225; **DIVORCE AND ALIMONY**, vol. 4, p. 412.

A prior marriage which remains undissolved is a legal disability at the common law, which makes a second marriage void *ab initio*. *Gaines v. Hennen*, 24 How. 553, 598, 16 L. Ed. 770. See the title **BIGAMY AND POLYGAMY**, vol. 3, p. 228.

**By the laws of Maryland**, a feme covert, who had been abandoned by her husband, was not permitted to marry a second time, until her husband should have been absent seven years; and not heard of during that time. *Rhea v. Rhener*, 1 Pet. 105, 7 L. Ed. 72. See the title **PRESUMPTIONS AND BURDEN OF PROOF**.

**14. *Patterson v. Gaines***, 6 How. 550, 592, 12 L. Ed. 553.

**15. An institution founded upon mutual consent.**—*Randall v. Kreiger*, 23 Wall. 137, 147, 23 L. Ed. 124.

**16. Consent essential.**—*Travers v. Reinhardt*, 205 U. S. 423, 438, 51 L. Ed. 865; *Randall v. Kreiger*, 23 Wall. 137, 147, 23 L. Ed. 124; *Maynard v. Hill*, 125 U. S.



been complied with. This is the general rule in respect to official action, and one who claims that any such prerequisite did not exist must affirmatively show the fact.<sup>17</sup>

**C. Solemnization of Marriage Rites**—1. **By CIVIL LAW.**—In order to constitute a valid marriage in the Spanish Colonies previous to their cession to this country, all that was necessary was that there should be consent joined with the will to marry.<sup>18</sup> This was the rule in all the Latin countries of Europe.<sup>19</sup>

2. **By COMMON LAW.**—It has been held in some of the states that a contract per verba de præsentis constitutes a valid marriage at common law.<sup>20</sup> Such marriage is made by words in the present tense without attending ceremonies, religious or civil.<sup>21</sup> In other words, no ceremonial is indispensably requisite to the creation of the marriage relation.<sup>22</sup> But the question as to what constitutes a common-law marriage is purely a local one.<sup>23</sup>

3. **By STATUTE**—a. *Subject to State Control.*—Statutes in many states reg-

190, 212, 31 L. Ed. 654. See ante, "Age of Consent," II, B.

17. **Issuance of license presumes compliance with statutory requisites.**—*Nofire v. United States*, 164 U. S. 657, 660, 41 L. Ed. 588.

**Necessity of license.**—See post, "By Common Law," III, C, 2; "Construction of Statutes," III, C, 3, b.

18. *Hallett v. Collins*, 10 How. 174, 13 L. Ed. 376.

**Contract of marriage by civil law.**—An actual contract of marriage, made before a civil magistrate, and followed by cohabitation and acknowledgment, but without the presence of a priest, was valid, according to the laws in force in the Spanish colonies previous to their cession to this country. *Hallett v. Collins*, 10 How. 174, 13 L. Ed. 376.

19. **Marriage sponsalia de presenti.**—"That marriage might be validly contracted by mutual promises alone, or what were called sponsalia de presenti, without the presence or benediction of a priest, was an established principle of civil and canon law antecedent to the Council of Trent." *Hallett v. Collins*, 10 How. 174, 13 L. Ed. 376.

**Decree of the Council of Trent.**—The Council of Trent, in 1563, required that marriage should be celebrated before the parish or other priest, or by license of the ordinary and before two or three witnesses. This decree was adopted by the king of Spain in his European dominions, but not extended to the colonies, in which the rule above mentioned, established by the Partidas, was permitted to remain unchanged. *Hallett v. Collins*, 10 How. 174, 13 L. Ed. 376.

This decree did not affect the civil relations or status of persons marrying without regard to its provisions. *Hallett v. Collins*, 10 How. 174, 13 L. Ed. 376.

20. **Valid at common law.**—*Travers v. Reinhardt*, 205 U. S. 423, 438, 51 L. Ed. 865; *Meister v. Moore*, 96 U. S. 76, 78, 24 L. Ed. 826; *Maryland v. Baldwin*, 112 U. S. 490, 495, 28 L. Ed. 822. See, also, *Jewell*

*v. Jewell*, 1 How. 219, 233, 11 L. Ed. 108. See post, "Construction of Statutes," III, C, 3, b.

"It is laid down by Blackstone that a marriage per verba de præsentis without the intervention of a clergyman is a legitimate marriage. And both Story and Kent say that according to the universal understanding in this country a marriage per verba de præsentis, without the intervention of a clergyman, followed by cohabitation, makes a legitimate marriage." *Travers v. Reinhardt*, 205 U. S. 423, 438, 51 L. Ed. 865.

**In Pennsylvania** marriage may be completed by any words in the present tense without regard to form. *Patterson v. Gaines*, 6 How. 550, 587, 12 L. Ed. 553.

"This court adopts, as an authoritative declaration of the law of Michigan, the ruling of the supreme court of that state in *Hutchins v. Kimmell*, 31 Mich. 126, that, notwithstanding the statutory regulations have not been complied with, a marriage contracted there per verba de præsentis is valid." *Meister v. Moore*, 96 U. S. 76, 24 L. Ed. 826.

**Example.**—Where a man and a woman went through the form of a marriage ceremony though the person officiating was no clergyman and they had no license as required by statute; and they then cohabited as husband and wife for eighteen years and regarded each other as such; and the man recognized the woman as his wife in many transactions; nothing more is needed to show that they mutually agreed to sustain that relation and they are held to have been married per verba de præsentis. *Travers v. Reinhardt*, 205 U. S. 423, 439, 51 L. Ed. 865.

21. **Meaning of "per verba de præsentis."**—*Maryland v. Baldwin*, 112 U. S. 490, 495, 28 L. Ed. 822.

22. **No ceremonial is requisite.**—*Travers v. Reinhardt*, 205 U. S. 423, 438, 51 L. Ed. 865.

23. **Question purely a local one.**—*Keen v. Keen*, 201 U. S. 319, 321, 50 L. Ed. 772. See post, "By Statute," III, C, 3.

ulate the mode of entering into the contract of marriage,<sup>24</sup> and each state regulates marriage within its territories free from the interference of the government.<sup>25</sup> Marriage is so interwoven with the very fabric of society that it cannot be entered into except as authorized by law.<sup>26</sup>

b. *Construction of Statutes*.—A statute may declare that no marriages shall be valid unless they are solemnized in a prescribed manner; but such an enactment is a very different thing from a law requiring all marriages to be entered into in the presence of a magistrate or a clergyman, or that it be preceded by a license, or publication of banns, or be attested by witnesses. Such formal provisions may be construed as merely directory, instead of being treated as destructive of a common-law right to form the marriage relation by words of present assent.<sup>27</sup> They speak of the celebration of its rite rather than its validity.<sup>28</sup> Hence, a marriage valid at common law is valid, notwithstanding the statutes of the state where it is contracted prescribe directions respecting its formation and solemnization, unless they contain express words of nullity.<sup>29</sup>

**D. Person Performing Ceremony**.—If a marriage ceremony be performed by a person habited as a priest, and per verba de presenti, the person performing the ceremony must be presumed to have been a clergyman.<sup>30</sup>

#### IV. Foreign Marriage.

See the title CONFLICT OF LAWS, vol. 3, p. 1072.

#### V. Evidence.

**A. Manner of Proving Marriage**—1. IN CRIMINAL CASES.—See the titles BIGAMY AND POLYGAMY, vol. 3, p. 225; HUSBAND AND WIFE, vol. 6, p. 716.

2. IN CIVIL CASES—a. *In General*.—"Marriage in fact, as distinguished from

24. Statutes regulate marriage in many states.—*Meister v. Moore*, 96 U. S. 76, 78, 24 L. Ed. 826.

Marriage is usually regulated by law, because upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. *Reynolds v. United States*, 98 U. S. 145, 165, 25 L. Ed. 244.

In Maryland, there cannot be a valid marriage without a religious ceremony. *Travers v. Reinhardt*, 205 U. S. 423, 437, 51 L. Ed. 865.

25. Each state regulates marriage free from interference.—*Andrews v. Andrews*, 188 U. S. 14, 32, 47 L. Ed. 366.

Marriage subject to control of legislature.—"Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution." *Maynard v. Hill*, 125 U. S. 190, 205, 31 L. Ed. 654, cited in *Andrews v. Andrews*, 188 U. S. 14, 30, 47 L. Ed. 366.

26. Marriage cannot be entered into except as authorized.—*Andrews v. Andrews*, 188 U. S. 14, 30, 47 L. Ed. 366.

27. *Meister v. Moore*, 96 U. S. 76, 79, 24 L. Ed. 826.

The statutes regulating the creation of the marital relation are held merely directory; because marriage is a thing of common right, because it is the policy of the state to encourage it, and because, as has sometimes been said, any other construction would compel holding illegitimate the offspring of many parents conscious of no violation of law. *Meister v. Moore*, 96 U. S. 76, 81, 24 L. Ed. 826. See ante, "By Common Law," III, C, 2.

28. Statutes speak of its rite rather than validity.—*Meister v. Moore*, 96 U. S. 76, 79, 24 L. Ed. 826.

29. Marriage valid in spite of statutory directions.—*Meister v. Moore*, 96 U. S. 76, 24 L. Ed. 826.

By the English marriage act, registers of marriages are required to be kept in public books, in every parish, and signed by the parties and the minister, and attested by two witnesses. Yet it has been decided that such an entry is not necessary to the validity of the marriage, and that an erroneous entry will not vitiate it. *United States Bank v. Dandridge*, 12 Wheat. 64, 81, 6 L. Ed. 552.

Marriage in District of Columbia not invalid for want of license.—A marriage in the District of Columbia, if celebrated by a clergyman in facie ecclesiæ, is not invalid for want of a marriage license which is required by law. *Blackburn v. Crawfords*, 3 Wall. 175, 18 L. Ed. 186.

30. Person habited as priest presumed to be one.—*Patterson v. Gaines*, 6 How. 550, 12 L. Ed. 553. See the title PRESUMPTIONS AND BURDEN OF PROOF.



a ceremonial marriage, may be proven in various ways. Of course the best evidence of the exchange of marriage consent between the parties would come from those who were personally present when they mutually agreed to take each other as husband and wife, and to assume all the responsibilities of that relation."<sup>31</sup>

b. *Reputation and Cohabitation*—(1) *To Prove Marriage*.—The most usual way of proving marriage, in civil cases, is by general reputation, cohabitation and acknowledgment.<sup>32</sup> This public recognition is necessary as evidence of the existence of marriage,<sup>33</sup> and is binding upon the parties.<sup>34</sup>

(2) *To Disprove Marriage*.—Cohabitation as husband and wife may tend to prove marriage, but noncohabitation has not been accepted as disproving the existence of the marital relation in face of uncontradicted evidence that a marriage in fact had taken place.<sup>35</sup>

c. *By Parties and Persons Present*.—Marriage may be proved by any person who was present and can identify the parties.<sup>36</sup>

d. *By Parties Themselves*.—Either of the married parties, provided they are

31. *Travers v. Reinhardt*, 205 U. S. 423, 436, 51 L. Ed. 865.

32. *General reputation, cohabitation and acknowledgment*.—*Travers v. Reinhardt*, 205 U. S. 423, 436, 437, 441, 51 L. Ed. 865.

"Where parties live together ostensibly as man and wife, demeaning themselves towards each other as such, and are received into society and treated by their friends and relations as having and being entitled to that status, the law will, in favor of morality and decency, presume that they have been legally married." *Traverse v. Reinhardt*, 205 U. S. 423, 437, 51 L. Ed. 865. See, generally, the title HUSBAND AND WIFE, vol. 6, p. 716.

33. *Public policy and protection of the parties require recognition of marriage*.—

Where no religious or civil ceremonies are required, and no record is made to attest the marriage, some public recognition of it is necessary as evidence of its existence. The protection of the parties and their children and considerations of public policy require this public recognition; and it may be made in any way which can be seen and known by men, such as living together as man and wife, treating each other and speaking of each other in the presence of third parties as being in that relation, and declaring the relation in documents, executed by them whilst living together, such as deeds, wills, and other formal instruments. From such recognition the reputation of being married will obtain among friends, associates and acquaintances, which is of itself evidence of a persuasive character. Without it the existence of the marriage will always be a matter of uncertainty; and the charge of the court should direct the jury to its necessity in the absence of statutory regulations on the subject. *Maryland v. Baldwin*, 112 U. S. 490, 495, 28 L. Ed. 822.

34. *Public recognition binding on parties*.—"Whatever the form of ceremony, or even if all ceremony was dispensed with, if the parties agreed presently to take each other for husband and wife, and

from that time lived together professedly in that relation, proof of these facts would be sufficient to constitute proof of a marriage binding upon the parties, and which would subject them and others to legal penalties for a disregard of its obligations." *Meister v. Moore*, 96 U. S. 76, 82, 24 L. Ed. 826.

35. *Noncohabitation does not disprove marriage*.—*Packet Co. v. Clough*, 20 Wall. 528, 539, 22 L. Ed. 406.

36. *May be proved by persons present*.—*Patterson v. Gaines*, 6 How. 550, 588, 12 L. Ed. 553.

*Testimony of one present at testimony sufficient proof*.—*Madame Despau*, the sister of *Zulime*, testified that she was present at the marriage of *Zulime Carriere* and *Clark* in Philadelphia and that the ceremony was performed by a Catholic priest. The only attempt to lessen the force of her testimony were the declarations of persons who knew *Clark* that they did not believe he was ever married, and those of another witness to the effect that *Clark* spoke to him of *Myra* (*Zulime's* offspring) as his natural child. A hundred such witnesses would not be sufficient to impeach the testimony of one witness swearing positively to the fact of the marriage; and besides other witnesses testified that *Clark* had spoken of *Myra* as his legitimate child. *Patterson v. Gaines*, 6 How. 550, 12 L. Ed. 553.

The sister of *Zulime Carriere* testified that she was present at the marriage of *Zulime* and *Daniel Clark* in Philadelphia. In opposition to this testimony a letter written by *Clark* was offered in evidence in which he stated that he was about to become engaged to another woman. The court held that in resolving the issue of marriage or no marriage, the effect of this letter is unimportant when opposed to direct testimony that there was a marriage, and that as a matter of fact from the whole record *Clark* and *Zulime* were married. *Gaines v. New Orleans*, 6 Wall. 642, 707, 18 L. Ed. 950.



not interested in the suit, will be competent to prove the marriage.<sup>37</sup>

e. *Declarations of Officiating Officer*.—See the titles DOCUMENTARY EVIDENCE, vol. 5, p. 460; PEDIGREE.

f. *Newspaper Advertisements*.—A newspaper advertisement announcing separation of married parties is admissible as evidence of marriage.<sup>38</sup>

g. *Ecclesiastical Record*.—A sworn copy of an ecclesiastical record, taken at the proper office and produced by the lawful keeper of the records, may be admitted as evidence of a marriage, the original being produced by the bishop who had charge of the records of the bishopric.<sup>39</sup>

**B. Question of Fact**.—Parties having lived together for years, it is for the jury to decide their relationship from the beginning.<sup>40</sup> It is also the province of the jury to determine the effect on the status of a man and woman living together of a written contract concerning their relation.<sup>41</sup>

## VI. Annulment and Dissolution.

See the title DIVORCE AND ALIMONY, vol. 5, p. 412.

**37. Married parties may prove marriage.**—*Gaines v. Relf*, 12 How. 472, 533, 13 L. Ed. 1071.

**38. Newspaper announcement of separation.**—The acts and declarations of the parties being given in evidence on both sides, on the question of marriage, an advertisement announcing their separation and appearing in the principal commercial newspaper of the place of their residence immediately after their separation, is part of the *res gestæ*, and admissible in evidence. *Jewell v. Jewell*, 1 How. 219, 11 L. Ed. 108. See the title RES GESTÆ.

**39.** *Gaines v. Relf*, 12 How. 472, 13 L. Ed. 1071. See the title DOCUMENTARY EVIDENCE, vol. 5, pp. 443, 461.

**40.** Where a man and a woman lived to-

gether for years as husband and wife, the question is open to the jury upon the evidence, to determine upon what terms and in what character the connection originally began. *Jewell v. Jewell*, 1 How. 219, 233, 11 L. Ed. 108.

**41. Written contract purporting concubinage.**—If a written contract between the parties be offered in evidence, the purport of which is to show that the parties lived together on another basis than marriage and the opposite party either denies the authenticity of the paper or alleges that it was obtained by fraud, the question, whether there was a marriage or not, is open to the jury upon the whole of the evidence. *Jewell v. Jewell*, 1 How. 219, 11 L. Ed. 108.

# MARRIAGE CONTRACTS AND SETTLEMENTS.

BY JOHN CALLAN BROOKS.

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### CROSS REFERENCES.

See the titles BANKRUPTCY, vol. 2, p. 792; BEST AND SECONDARY EVIDENCE, vol. 3, p. 214; CONFLICT OF LAWS, vol. 3, p. 1020; CONTRACTS, vol. 4, p. 552; FRAUD AND DECEIT, vol. 6, p. 394; FRAUDS, STATUTE OF, vol. 6, p. 451; FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 472; GIFTS, vol. 6, p. 564; HUSBAND AND WIFE, vol. 6, p. 716; INTEREST, vol. 7, p. 217; IMPROVEMENTS, vol. 6, p. 896; LACHES, vol. 7, p. 790; LOST INSTRUMENTS AND RECORDS, vol. 7, p. 1064; MARRIAGE, ante, p. 247; SEPARATE ESTATES OF MARRIED WOMEN; TRUSTS AND TRUSTEES.

As to rules applicable to laws of marriage contracts, see the titles BEST AND SECONDARY EVIDENCE, vol. 3, p. 214; LOST INSTRUMENTS AND RECORDS, vol. 7, p. 1064. As to what law governs a deed of settlement, see the title CONFLICT OF LAWS, vol. 3, p. 1060. As to violation of confidential relations generally, see the title FRAUD AND DECEIT, vol. 6, p. 413. As to necessity for promises, when in consideration of marriage, to be in writing, see the title FRAUDS, STATUTE OF, vol. 6, p. 451. As to violation of confidential relations by transfers or alienations made to defraud creditors, see the title FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, pp. 483, 487. As to preference of creditors, see the title FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 495. As to voluntary conveyances to wife, see the title FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 472. As to preference of wife, see the title FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 495. As to conveyances to wife, validity in general and presumption, see the title FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 484. As to conveyances of exempt property, see the title FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 479. As to suit to set aside conveyance of husband and wife, see the title HUSBAND AND WIFE, vol. 6, p. 734. As to validity and contract for separate maintenance of wife, see the title HUSBAND AND WIFE, vol. 6, p. 731. As to gifts

between husband and wife, see the title GIFTS, vol. 6, p. 564. As to the word "interest" in a marriage settlement being equivalent to "estate," see the title INTEREST, vol. 7, p. 217. As to what constitutes issue under marriage articles executed as antenuptial settlements, see ISSUE, vol. 7, p. 525. As to rule applicable to suit not being brought until many years after death of husband, see the title LACHES, vol. 7, p. 790.

### I. Antenuptial Settlements.

**A. Definition.**—Antenuptial settlements are settlements of property upon the wife, or upon her and her children made before and in contemplation of marriage.<sup>1</sup>

**B. Validity and Binding Effect.—As to Creditors.**—See, generally, the title FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 472. Upon principle and authority to make an antenuptial settlement void as a fraud upon creditors, it is necessary that both parties should concur in, or have cognizance of, the intended fraud; if the settler alone intend a fraud, and the other party have no notice of it, but is innocent of it, she is not, and cannot be affected by it.<sup>2</sup> Fraud may be imputed to husband and wife, the parties, either by direct co-operation in the original design at the time of its concoction, or by constructive co-operation from notice of it, and carrying the design upon such notice into operation.<sup>3</sup> The husband and wife, parties to an antenuptial marriage contract, are therefore deemed, in the highest sense, purchasers for a valuable consideration; and so that it is bona fide, and without notice of fraud, brought home to both sides, it becomes unimpeachable by creditors.<sup>4</sup>

**C. Consideration.**—See the title CONTRACTS, vol. 4, p. 566.

**D. Necessity for Writing.**—See the title FRAUDS, STATUTE OF, vol. 6, p. 455.

**E. Construction.**—1. IN GENERAL.—Courts will endeavor, as much as possible, to give effect to marriage agreements according to the understanding of the parties; and where they evidently considered the instrument in the light of a final and complete settlement, not contemplating any future act, it will be so regarded; and in order to effectuate their intent, one part of the instrument even will be taken as a complete settlement of the estate comprised in it, and another part as mere articles.<sup>5</sup>

2. WHERE WIFE IS FREE AGENT.—Where a married woman had power to dispose of the property by appointment or devise, under a marriage settlement, she is presumed to be to some extent a free agent and can convey the whole fee and not merely the annual interest, rents and profits.<sup>6</sup> Where a marriage

1. **Definition.**—Black's Law Dict., p. 75.

2. **Necessity for concurrence in fraud.**—*Magniac v. Thomson*, 7 Pet. 348, 8 L. Ed. 709; *Prewit v. Wilson*, 103 U. S. 22, 24, 26 L. Ed. 360. See the title FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 480.

3. **How fraud may be imputed.**—*Magniac v. Thomson*, 7 Pet. 348, 8 L. Ed. 709.

4. **Purchasers for valuable consideration.**—*Magniac v. Thomson*, 7 Pet. 348, 8 L. Ed. 709.

**Proof of fraud must be clear.**—And an antenuptial settlement, though made with a fraudulent design by the settler, should not be annulled without the clearest proof of the wife's participation in the intended fraud, for upon its annulment there can follow no dissolution of the marriage, which was the consideration of the settlement. *Prewit v. Wilson*, 103 U. S. 22, 25, 26 L. Ed. 363.

As to fraud by violation of confidential relations in general, see the title FRAUD AND DECEIT, vol. 6, p. 413. See, also, FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 483.

5. **Construction generally.**—*Neves v. Scott*, 9 How. 196, 211, 13 L. Ed. 102.

6. **Where wife is free agent.**—Where a married woman has power under marriage settlement to dispose of property settled upon her by the execution of a power of appointment for that purpose, and alleges afterwards that she executed the power under undue marital influence and through fraud practiced upon her, but alleges no specific mode or act by which this undue marital influence was exerted and the facts disclosed in the testimony go far to contradict the allegation, the charge cannot be sustained—every feme covert is presumed under such a settlement to be, to some extent,



settlement provides for the approval of the wife in the investment of funds, she has a controlling agency.<sup>7</sup>

3. **PROPERTY ACQUIRED AFTER MARRIAGE.**—Property acquired by either party after the marriage must follow the same direction which is given by the settlement to property held before the marriage, if there is a clause to that effect in the same.<sup>8</sup>

**F. Enforcement**—1. **ARTICLES CREATING EXECUTORY TRUSTS**—a. *Former Rule.*—The rule formerly, with regard to the enforcement of marriage articles which created executory trusts, was this; namely, that chancery would interfere only in favor of one of the parties to the instrument or the issue, or one claiming through them; and not in favor of remote heirs or strangers, though included within the scope of the provisions of the articles. They were regarded as volunteers.<sup>9</sup>

a free agent. *Ladd v. Ladd*, 8 How. 10, 12 L. Ed. 967.

Where the marriage settlement recited that the woman was possessed of a considerable real and personal estate, which it was agreed should be settled to her sole and separate use with power to dispose of the same by appointment or devise, and then directed that the trustee should permit her to have, receive, take and enjoy all the interest, rents and profits of the property to her use, or to that of such persons as she might from time to time appoint during the coverture or to such persons as she by her last will and testament might devise or will the same to, and in default of such appointment or devise, the estate and premises aforesaid to go to those who might be entitled thereto by legal distribution—this deed enabled her to convey the whole fee under the power and not merely the annual interest, rents, and profits. *Ladd v. Ladd*, 8 How. 10, 12 L. Ed. 967.

**Sufficient execution of power.**—Where the marriage settlement gave her the power of appointment to the use of such persons as she might from time to time appoint, during the coverture by any writing or writings under her hand and seal, attested by three credible witnesses, and she executed a deed which recited that the parties had thereunto set their hands and seals, and which the witnesses attested as having been sealed and delivered, this was a sufficient execution of the power, although the witnesses did not attest the fact of her signing it. This would be proved aliunde. *Ladd v. Ladd*, 8 How. 10, 12 L. Ed. 967. See, generally, the title **POWERS**.

7. **Where wife has controlling agency.**—A marriage settlement provided, that the trustees, after the death of the husband, should stand possessed of a bond, executed to them by the husband, of the sum of \$37,038 to be received by them, upon trust to place out the same, when it should come into their hands, at interest, on freehold securities, or invest it, or any part of it, in the purchase of stock of the United States of North America, or bank stock there, with the approbation of the wife; and to call in

and replace the same, and reinvest the same, and the produce thereof, from time to time, upon or in such securities or stock, with the approbation of the wife. "It is not an unreasonable interpretation to say that the wife, who survived the husband, was to have a controlling agency, within the limitation prescribed by the contract; she has not an arbitrary and unlimited discretion. The investment is restricted to three objects, freehold securities, United States stock, or bank stock; and the trustees are not authorized to make any other investment; the trustees are bound to make the investment in any one of the funds mentioned, which the wife might request or direct." *English v. Foxall*, 2 Pet. 595, 7 L. Ed. 531.

The husband, by his will, confirmed the marriage settlement, and he further declared that if the sum of \$37,038, secured to be paid to the trustees, should at any time be found insufficient to raise and bring into the hands of the trustees the clear annual sum of \$2,222.22, the annuity secured to be paid to his wife by the settlement, then the trustees of his will should from time to time transfer to themselves, as trustees of the settlement, out of the residuum of his estate, such sum or sums of money as might from time to time be found necessary to make up any deficiency there might happen to be between the current amount of the interest and produce of the principal sum, and the amount of the annuity; so that, in no event, less than \$2,222.22 should be raised annually for his wife, or for her benefit, in the United States. The personal estate of the husband, exclusive of the sum placed in the hands of the trustees of the annuity, was so invested as to produce six per centum per annum, and the direction of the wife to keep invested in six per cent stock of the United States the \$37,038, produced a deficiency in the annuity, which she claimed to have made up from the residuary estate. The wife had a right to claim this deficiency to be so made up. *English v. Foxall*, 2 Pet. 595, 7 L. Ed. 531.

8. **Property acquired after marriage.**—*Neves v. Scott*, 9 How. 196, 13 L. Ed. 102.

9. **Former rule.**—*Neves v. Scott*, 9

b. *Modern Rule*.—But this rule has in modern times been much relaxed, and may now be stated thus; that if, from the circumstances under which the marriage articles were entered into by the parties, or as collected from the face of the instrument itself, it appears to have been intended that the collateral relatives, in a given event, should take the estate, and a proper limitation to that effect is contained in them, a court of equity will enforce the trust for their benefit. And equal effect will be given to it in equity, when made only between the parties themselves; each one will be regarded, so far as may be necessary to effectuate their intent, as holding their several estates as trustees for the uses of the settlement.<sup>10</sup>

2. *PAROL AGREEMENT*.—In order to enforce a parol agreement made by husband prior to marriage, the proof must clearly establish the agreement.<sup>11</sup>

**G. Recordation**.—An antenuptial contract, whether recorded or not, is binding upon the parties. If recorded within the time prescribed by statute, or if reacknowledged and recorded afterwards, notice would thereby have been given to all persons of its effect.<sup>12</sup>

**H. Conflict of Laws**.—See the title *CONFLICT OF LAWS*, vol. 3, p. 1060.

## II. Postnuptial Settlements.

**A. Definition**.—Settlements made after marriage are called postnuptial settlements.<sup>13</sup>

**B. Validity and Binding Effect**.—As to **Creditors Generally**.—In order to defeat a settlement by a husband upon his wife, it must be intended to defraud existing creditors, or creditors whose rights are expected shortly to supervene, or those whose rights may and do supervene.<sup>14</sup>

How. 196, 13 L. Ed. 102, cited in *Neves v. Scott*, 13 How. 268, 14 L. Ed. 140.

10. *Neves v. Scott*, 9 How. 196, 13 L. Ed. 102.

The following articles show an intention by the parties to include the collateral relatives: "Articles of agreement made and entered into this 17th day of February, in the year 1810, between John Neves and Catharine Jewell, widow and relict of the late Thomas Jewell (deceased), all of the state and county aforesaid, are as follows, viz: Whereas a marriage is shortly to be had and solemnized between the said John Neves and the said Catharine Jewell, widow, as aforesaid, are as follows, to wit; that all the property, both real and personal, which is now, or may hereafter become, the right of the said John and Catharine, shall remain in common between them, the said husband and wife, during their natural lives, and should the said Catharine become the longest liver, the property to continue hers so long as she shall live, and at her death the estate to be divided between the heirs of the said Catharine, and the heirs of the said John, share and share alike, agreeable to the distribution laws of this state made and provided. And, on the other hand, should the said John become the longest liver, the property to remain in the manner and form as above." Moreover, these articles are an executed trust, not contemplating any future act, but intended as a final and complete settlement. *Neves v. Scott*, 9 How. 196, 197, 13 L. Ed. 102; *Walker v. Walker*, 9 Wall. 743, 753, 19 L. Ed. 814;

*Adams v. Adams*, 21 Wall. 185, 196, 22 L. Ed. 504.

11. *Parol agreement*.—Where a husband, prior to marriage, induced in the mind of his intended wife expectations in regard to real property which, after marriage he failed to meet, but in respect to which property he did not enter—and perhaps, intentionally refrained from entering—into a distinct and binding agreement, cannot justify the court in finding upon the meagre evidence in this cause, that there was an agreement upon his part in consideration of the marriage and the settlement upon her either of the property in controversy or the property purchased with the proceeds of its sale; such proof fails to show such an agreement as can be made the basis of a decree in her behalf. *Nickerson v. Nickerson*, 127 U. S. 668, 677, 32 L. Ed. 314.

12. *Recordation*.—*DeLane v. Moore*, 14 How. 253, 14 L. Ed. 409.

**Law in New Jersey**.—Marriage articles or settlements are not required by the laws of New Jersey to be recorded, but only conveyances of real estate; and as to conveyances of real estate, the omission to record them avoids them only as to purchasers and creditors, leaving them in full force between the parties. *Magniac v. Thomson*, 7 Pet. 348, 8 L. Ed. 709. See the title *RECORDING ACTS*.

13. *Definition*.—*Black's Law Dict.*, p. 757.

14. *Smith v. Vodges*, 92 U. S. 183, 23 L. Ed. 481, citing *Sexton v. Wheaton*, 8

**Relaxation of Ancient Rule.**—The ancient rule, that a voluntary post-nuptial settlement could be avoided, if there was some indebtedness existing, has been relaxed, and the rule generally adopted in this country at the present time, will uphold it, if it be reasonable, not disproportionate to the husband's means, taking into view his debts and situation and clear of any intent, actual or constructive, to defraud creditors.<sup>15</sup>

Wheat. 229, 5 L. Ed. 603; Schreyer v. Scott, 134 U. S. 405, 410, 33 L. Ed. 955; Humes v. Scruggs, 94 U. S. 22, 24 L. Ed. 51; Mattingly v. Nye, 8 Wall. 370, 19 L. Ed. 380; Jones v. Clifton, 101 U. S. 225, 25 L. Ed. 908; Clark v. Killian, 103 U. S. 766, 26 L. Ed. 607. See the title FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6. p. 472.

15. Kehr v. Smith, 20 Wall. 31, 35, 22 L. Ed. 313.

**Illustrative case.**—A voluntary settlement of \$7,000 cannot be sustained against creditors where the person owns \$9,306, and has all sorts of property the same being not cash, not more than \$16,132. It must be taken to be in bad faith towards existing creditors, as, clearly, it was out of all proportion to the means of the husband, considering his state and condition, and seriously impairs his ability to respond to the demands of his creditors. Kehr v. Smith, 20 Wall. 31, 36, 22 L. Ed. 313.

**Indebtedness only presumptive proof of fraud.**—The indebtedness of a husband at the time of his execution of a conveyance by way of settling property in trust for the sole and separate use of his wife and children is only a presumptive proof of fraud which may be explained and rebutted and this being the established doctrine in Georgia, where the property in question is situate, such a conveyance was upheld against existing creditors where the debtor reserved property greater in value than two and a half times the amount of his debts, and where the transaction rested upon a basis of good faith and was free from the taint of any dishonest purpose. Lloyd v. Fulton, 91 U. S. 479, 23 L. Ed. 363.

**Right to settle property.**—"It is no longer a disputed question that a husband may settle a portion of his property upon his wife, if he does not thereby impair the claims of existing creditors, and the settlement is not intended as a cover to future schemes of fraud. The settlement may be made either by the purchase of property and taking a deed thereof in her name, or by its transfer to trustees for her benefit. And his direct conveyance to her, when the fact that it is intended as such settlement, is declared in the instrument or otherwise clearly established, will be sustained in equity against the claims of creditors. The technical reasons of the common law growing out of the unity of husband and wife, which preclude a conveyance between them upon a valuable considera-

tion, will not in such a case prevail in equity and defeat his purpose. Such is the purport of our decision in Jones v. Clifton, 101 U. S. 225, 25 L. Ed. 908." Moore v. Page, 111 U. S. 117, 118, 28 L. Ed. 373. See, also, Jones v. Clifton, 101 U. S. 225, 227, 25 L. Ed. 908.

While property thus conveyed as a settlement upon the wife may be held as her separate estate, beyond the control of her husband, it is of the utmost importance to prevent others from being misled into giving credit to him upon the property, that it should not be mingled up and confounded with that which he retains, or be left under his control and management without evidence or notice by record that it belongs to her. Where it is so mingled, or such notice is not given, his conveyance will be open to suspicion that it was in fact designed as a cover to schemes of fraud. Moore v. Page, 111 U. S. 117, 119, 28 L. Ed. 373.

As said in Jones v. Clifton, 101 U. S. 225, 227, 25 L. Ed. 908: "The right of a husband to settle a portion of his property upon his wife, and thus provide against the vicissitudes of fortune, when this can be done without impairing existing claims of creditors, is indisputable. Its exercise is upheld by the courts as tending not only to the future comfort and support of the wife, but also, through her, to the support and education of any children of the marriage. It arises, as said by Chief Justice Marshall, in Sexton v. Wheaton, 8 Wheat. 229, 5 L. Ed. 603, as a consequence of that absolute power which a man possesses over his own property, by which he can make any disposition of it which does not interfere with the existing rights of others." And in Moore v. Page, 111 U. S. 117, 28 L. Ed. 373, the court said: "It is no longer a disputed question that a husband may settle a portion of his property upon his wife if he does not thereby impair the claims of existing creditors, and the settlement is not intended as a cover to future schemes of fraud. The settlement may be made either by the purchase of property and taking a deed thereof in her name, or by its transfer to trustees for her benefit." Bean v. Patterson, 122 U. S. 496, 499, 30 L. Ed. 1126; Moore v. Page, 111 U. S. 117, 118, 28 L. Ed. 373.

The circumstance that the original deed did not give an accurate description of the land intended to be conveyed ought not to defeat the original settlement upon a wife, inasmuch as the description could leave no one in serious doubt that the



**As to Subsequent Creditors.**—A voluntary postnuptial settlement, made by a man who is not indebted at the time, upon his wife, is valid against subsequent creditors.<sup>16</sup>

**C. Consideration.**—It is now well settled that a postnuptial contract made upon sufficient consideration and wholly or partly executed, will be sustained in equity.<sup>17</sup>

land intended to be conveyed was that now in dispute. *Wallace v. Penfield*, 106 U. S. 260, 263, 27 L. Ed. 147.

Where a person made a settlement upon his wife and children, owing at that time a large sum of money, for which he was soon afterwards sued, and became insolvent, these circumstances, with other similar ones, are sufficient to set aside the deed as being fraudulent within the statute. *Parish v. Murphree*, 13 How. 92, 14 L. Ed. 65.

The facts in this case "are incompatible with the assumption that the debtor's assets were more than double his liabilities. His aggregate of property must have been made of exaggerated values, and too low an estimate was made of his eastern debts. After the settlement and, as it would seem, before it was known to his eastern creditors, his purchases of merchandise were large, and his business at home was greatly extended. Several stores were established by him in partnership with his brother. After having abstracted from his means fifty-four thousand dollars, this enlargement of his business shows a disposition to carry on a hazardous enterprise, at the risk of his creditors. In less than three years after the settlement, judgments were obtained against the partnership for between twenty-five and thirty thousand dollars; no inconsiderable part of which had been contracted and was due at the time of the settlement. These facts prove that after the voluntary conveyance he was unable to meet his engagements. Nothing can be more deceptive than to show a state of solvency by an exhibit on paper of unsalable property when the debts are payable in cash. Such property when sold will not, generally, bring one-fifth of its estimated value. And such seems to have been the result in the case before us." *Parish v. Murphree*, 13 How. 92, 99, 14 L. Ed. 65.

But to avoid the settlement, insolvency need not be shown nor presumed. It is enough to know that when the settlement was made, the grantor was engaged in merchandising principally on credit; his means consisted chiefly of a broken assortment of goods, debts due for merchandise scattered over the country in small amounts, wild lands of little value, a few negroes, and a very limited amount of improved real estate, the value of which was greatly overestimated. On such a basis, no prudent man with an honest purpose and a due regard to the rights of his creditors, could have made

the settlement. *Parish v. Murphree*, 13 How. 92, 100, 14 L. Ed. 65.

"A conveyance under such circumstances, we think, would be void against creditors, at common law; and we are not aware that any sound construction of the statute has been given which would not avoid it." *Parish v. Murphree*, 13 How. 92, 100, 14 L. Ed. 65; *Sexton v. Wheaton*, 8 Wheat. 229, 5 L. Ed. 603; *Hinde v. Longworth*, 11 Wheat. 199, 6 L. Ed. 454.

"Even a voluntary conveyance from husband to wife is good as against subsequent creditors; unless it was made with the intent to defraud such subsequent creditors; or there was secrecy in the transaction by which knowledge of it was withheld from such creditors, who dealt with the grantor upon the faith of his owning the property transferred; or the transfer was made with a view of entering into some new and hazardous business, the risk of which the grantor intended should be cast upon the parties having dealings with him in the new business." *Schreyer v. Scott*, 134 U. S. 405, 410, 33 L. Ed. 955. See, also, *Wallace v. Penfield*, 106 U. S. 260, 262, 27 L. Ed. 147; *Horbach v. Hill*, 112 U. S. 144, 149, 28 L. Ed. 670.

The statute of 13 Eliz., ch. 5, which is in force in the District of Columbia, does not affect, in favor of subsequent creditors, a voluntary settlement made by a man, not indebted at the time, for his wife and children unless fraud was intended when the settlement was made. *Sexton v. Wheaton*, 8 Wheat. 229, 5 L. Ed. 603; S. C., 1 American Leading Cases 1, approved and affirmed. *Mattingly v. Nye*, 8 Wall. 370, 19 L. Ed. 380.

**Necessity for creditors to complain.**—The settlement of lands by a man upon his wife cannot be assailed, where there are no creditors to complain of such disposition. *Clark v. Killian*, 103 U. S. 766, 769, 26 L. Ed. 607.

**Conveyance by bankrupt.**—In order to determine whether a marriage settlement made by a bankrupt, upon his wife, was fraudulent, the facts and circumstances must be taken into consideration. *Clark v. Beecher*, 154 U. S. 631, 24 L. Ed. 705. See the title *BANKRUPTCY*, vol. 2, p. 792.

**16. Subsequent creditors.**—*Sexton v. Wheaton*, 8 Wheat. 229, 5 L. Ed. 603; *Mattingly v. Nye*, 8 Wall. 370, 19 L. Ed. 380.

**17. Kesner v. Trigg**, 98 U. S. 50, 54, 25 L. Ed. 83.

**D. Recordation.**—A marriage settlement, conveying the wife's land and slaves to trustees, by a deed, to which the husband was a party, although not recorded, protects the property from the creditors of the husband.<sup>18</sup>

**MARRIED.**—See the title **CITIZENSHIP**, vol. 3, p. 800.

**MARRIED WOMEN.**—See the title **HUSBAND AND WIFE**, vol. 6, p. 716, and references there given.

**MARSHAL.**—As to marshals' sales, see the title **SHERIFFS', CONSTABLES' AND MARSHALS' SALES**. As to United States marshals generally, see the title **UNITED STATES MARSHALS**, and references given.

As to promise after marriage being without consideration, see the title **FRAUDS, STATUTE OF**, vol. 6, p. 451.

<sup>18.</sup> *Pierce v. Turner*, 5 Cranch, 154, 3 L. Ed. 64.

# MARSHALING ASSETS AND SECURITIES.

BY FRANK MOORE.

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## CROSS REFERENCES.

See the titles BANKRUPTCY, vol. 2, p. 913; INSOLVENCY, vol. 7, p. 1; JUDICIAL SALES, vol. 7, p. 704; MORTGAGES AND DEEDS OF TRUST; PARTNERSHIP.

As to charging annuities on the land, see the title ANNUITY, vol. 1, p. 329.



### I. Compelling Election between Securities.

**A. Statement of General Rule.**—The rule as to marshaling assets is that if one party has a lien on or interest in two funds for his debt, and another party has a lien on or interest in one only of the funds for another debt, the latter has a right in equity to compel the former to resort to the other fund, in the first instance, for satisfaction, if that course is necessary for the satisfaction of the claims of both parties,<sup>1</sup> provided always this course does not trench upon the rights or operate to the prejudice of the creditor entitled to the double fund.<sup>2</sup>

**B. Conditions Precedent to Enforcement of Doctrine.**—A court of equity will not entertain the question of marshaling assets, unless both funds are within the jurisdiction and control of the court.<sup>3</sup>

**C. Marshaling in Admiralty.**—Since no one but an owner is entitled to payment out of the registry unless he has a lien upon the fund therein, a creditor without lien cannot invoke the aid of marshaling in admiralty. The court can marshal the fund only between lien holders and owners.<sup>4</sup>

**D. Pleading and Practice**—1. METHODS OF ENFORCING RIGHT—*a. By Subrogation.*—Upon the familiar principle of marshaling assets by means of subrogation, when a party having a right to resort to two funds, to the detriment of another, entitled to be paid out of but one, has been satisfied out of the latter, the fund thus exonerated will in equity be subjected to the payment of

1. **Statement of general rule as to marshaling.**—*Savings Bank v. Creswell*, 100 U. S. 630, 641, 25 L. Ed. 713; *Scruggs v. Memphis, etc., R. Co.*, 108 U. S. 368, 27 L. Ed. 756.

**Two funds consisting of principal and interest of decree.**—Where there are two funds in the hands of the court, namely, the principal and interest of a decree, and one of the parties has a lien on the interest alone, but the demand of the other party is payable out of either principal or interest, a court of equity will marshal the assets, and direct the payment of the former's lien out of the interest. *Scruggs v. Memphis, etc., R. Co.*, 108 U. S. 368, 27 L. Ed. 756.

**Where personalty is appropriated to pay legacies charged on the land.**—Where legacies were chargeable on the land, but the executor of the will acting wrongfully appropriates the general personal estate to his own use to reimburse himself the amount which he had expended in paying or purchasing the legacies, and thus charges them upon the general assets in violation of the intention of the will and the rights of the parties who by law were entitled to share in that estate, the rule of marshaling will be applied in equity to make up the deficiency thus created in the personal estate. *Hawkins v. Blake*, 108 U. S. 422, 27 L. Ed. 775.

**Marshaling in aid of simple contract creditors.**—At common law where a specialty creditor who could resort to both the real and personal estate of a debtor satisfied his claim out of the personalty, the simple contract creditors who are thus deprived of their funds were substituted to the remedy of the specialty creditor against the real estate.

*Tucker v. Oxley*, 5 Cranch 34, 3 L. Ed. 29.

2. **Rights of paramount creditor not to be infringed.**—"It is true that, in equity, a creditor having a lien upon two funds may be required to exhaust one of them in aid of creditors who can only resort to the other, but this will not be done when it trenches on the rights or operates to the prejudice of the party entitled to the double fund. *Story Eq. Jur.* (13th Ed.), § 633; *In re Bates*, 118 Illinois 524. And it is well established that in marshaling assets, as respects creditors, no part of his security can be taken from a secured creditor until he is completely satisfied. *Leading Cases in Equity*, White & Tudor, Vol. II, Part 1, 4th Amer. Ed., pp. 258, 322." *Merrill v. National Bank*, 173 U. S. 131, 138, 43 L. Ed. 640.

In short, the secured creditor is not to be cut off from his right in the common fund because he has taken security which his co-creditors have not. Of course, he cannot go beyond payment, and surplus assets or so much of his dividends as are unnecessary to pay him must be applied to the benefit of the other creditors. And while the unsecured creditors are entitled to be substituted as far as possible to the rights of secured creditors, the latter are entitled to retain their securities until the indebtedness due them is extinguished. *Merrill v. National Bank*, 173 U. S. 131, 141, 43 L. Ed. 640.

3. **Both funds must be within control of court.**—*Lewis v. United States*, 92 U. S. 618, 623, 23 L. Ed. 513, citing *Adam's Eq.*, 6 Am. Ed., 548, note.

4. **No marshaling in admiralty in favor of creditor without lien.**—*The Edith*, 94 U. S. 518, 24 L. Ed. 167. See the title ADMIRALTY, vol. 1, p. 180.

the postponed claim.<sup>5</sup>

b. *By Injunction.*—At common law where a specialty creditor who could resort to both the real and personal estate of a debtor exhausted the personal estate in the satisfaction of his claim, simple contract creditors thus injured by his election were substituted in equity to the remedy of the specialty creditor against the real estate. But the senior creditor will not be restrained by injunction from proceeding against the doubly charged security, though the junior creditor would thereby be unreasonably delayed or inconvenienced, or prevented from obtaining full payment of his debt.<sup>6</sup>

2. **JURISDICTION.**—The rule that possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power, applies to suits to marshal assets.<sup>7</sup>

## II. Inverse Order of Alienation.

**A. Statement of General Rule.**—Where real estate bound by a judgment or a mortgage has been alienated in separate parcels to various persons at different times, such parcels should be subjected to the satisfaction of the lien in the inverse order of their alienation.<sup>8</sup>

**B. Lands in Hands of Debtor.**—It is important to observe, however, that where land is subject to a mortgage, and a part of it is sold to different purchasers at different times, the first purchaser has a right to suppose that the part of the mortgaged property which he leaves with the mortgagor will in his hands be first subjected to the payment of the mortgage he has made.<sup>9</sup> But the

5. **Subrogation as means of enforcing marshaling.**—*Hawkins v. Blake*, 108 U. S. 422, 435, 27 L. Ed. 775. See the title SUBROGATION.

6. **Senior creditor will not be enjoined from resorting to doubly charged fund.**—*Tucker v. Oxley*, 5 Cranch 34, 43, 3 L. Ed. 29. See the title INJUNCTIONS, vol. 6, p. 1022.

7. **Jurisdiction in suits to marshal assets.**—*Farmers' Loan, etc., Co. v. Lake St. Elevated R. Co.*, 177 U. S. 51, 44 L. Ed. 667. See the title JURISDICTION, vol. 7, p. 738.

8. **Land subject to lien successively conveyed, liable in inverse order of alienation.**—*Savings Bank v. Creswell*, 100 U. S. 630, 25 L. Ed. 713, distinguishing *Orvis v. Powell*, 98 U. S. 176, 25 L. Ed. 238; *Hughes v. Edwards*, 9 Wheat. 489, 490, 6 L. Ed. 142, and disapproving 2 Story Eq., § 1233b.

In Illinois, the rule has been established by the supreme court of that state, in *Iglehart v. Crane* (42 Ill. 261), that the parcels first sold should be last subjected to the satisfaction of the mortgage. *Orvis v. Powell*, 98 U. S. 176, 25 L. Ed. 238.

The rule as stated by Chancellor Kent expressly approved.—That principle was stated by Chancellor Kent, with his usual force and clearness, in 1821, in *Clowes v. Dickenson*, 5 Johns. (N. Y.) Ch. 235, which has become the leading case on the subject in this country. After referring to the case of Sir William Herbert, he says: "This case settles the question as between the vendor and purchaser, or

the heirs of the vendor and the purchaser; and if there be several purchasers in succession, at different times, I apprehend in that case also there is no equality and no contribution as between these purchasers. Thus, for instance, if there be a judgment against a person owning at the time three acres of land, and he sells one acre to A., the two remaining acres are first chargeable in equity with the payment of the judgment debt, as we have already seen, whether the land be in the hands of the debtor himself or of his heirs. If he sells another acre to B., the remaining acre is then chargeable in the first instance with the debt as against B., as well as against A., and if it should prove insufficient, then the acre sold to B. ought to supply the deficiency in preference to the acre sold to A.; because, when B. purchased, he took his land chargeable with the debt in the hands of the debtor, in preference to the land already sold to A. In this respect we may say of him as it is said of the heir, he sits in the seat of his grantor, and must take it with all its equitable burdens; it cannot be in the power of the debtor, by the act of assigning or selling his remaining land to throw the burden of the judgment or a ratable part of it back upon A." The doctrine and the reason upon which it is founded cannot be better stated than in this extract from the opinion. *Savings Bank v. Creswell*, 100 U. S. 630, 642, 25 L. Ed. 713.

9. **Lands in hands of debtor subjected first.**—*Savings Bank v. Creswell*, 100 U. S. 630, 25 L. Ed. 713.



principle goes further, and holds that when a second purchaser from the mortgagor buys either all or a part of the incumbered property which remains, he cannot place himself in a better position than his grantor, and revive the burden on the first purchaser's land, from which it had been wholly or partially relieved by its primary pressure on the land left by him in the hands of the mortgagor.<sup>10</sup>

**C. Rule of Decision in Federal Courts.**—Where the principle has become a rule of property in a state, it will be followed by the United States courts sitting in that state.<sup>11</sup>

### III. Marshaling in Administration.

**A. Order of Liability of Assets**—1. **PERSONAL ESTATE PRIMARY FUND**—*a. In General.*—The rule in most of the states is<sup>12</sup> that the personal estate of a testator shall, in all cases, be primarily applied to the discharge of his personal debts or general legacies, unless he, by express words or manifest intention, exempts it.<sup>13</sup> And if payment be made from the real estate, it should be reimbursed by a sale of the personalty.<sup>14</sup> The reason for this rule is that the contract is primarily a personal contract, and therefore the land is bound only in aid of the personal obligation, to fulfill that personal contract.<sup>15</sup> But the rule has its exceptions and qualifications.<sup>16</sup> For example, where the testator's in-

10. *Savings Bank v. Creswell*, 100 U. S. 630, 641, 25 L. Ed. 713.

11. **Federal courts follow state courts.**—*Orvis v. Powell*, 98 U. S. 176, 25 L. Ed. 238. See the title **COURTS**, vol. 4, p. 1049.

Where lands have been mortgaged, and parcels thereof subsequently sold at different times to different purchasers, the order in which such parcels shall be subjected to the satisfaction of the mortgage is, where the rule is established by a statute or by the decisions of the courts of the state where the lands lie, a rule of property binding on the courts of the United States sitting in that state. *Orvis v. Powell*, 98 U. S. 176, 25 L. Ed. 238.

12. **Personal estate is in Georgia the primary fund for the payment of debts.**—*McLearn v. Wallace*, 10 Pet. 625, 9 L. Ed. 559.

13. **Personalty primary fund for payment of debts and legacies.**—*Fenwick v. Chapman*, 9 Pet. 461, 471, 9 L. Ed. 193; *Lewis v. Darling*, 16 How. 1, 14 L. Ed. 819.

In the case of an intestacy, the rule of law is clear, that simple contract debts, bonds, mortgages, and specialties of every sort, must be paid by the administrators out of the personal estate, this being the natural fund for debts, though the younger children should be thereby left destitute. *Ruston v. Ruston*, 2 Dall. 243, 244, 1 L. Ed. 365.

14. *McLearn v. Wallace*, 10 Pet. 625, 640, 9 L. Ed. 559.

15. **Reason of rule.**—In the case of *Waring v. Ward*, 7 Ves. 334, Lord Eldon says, "the principle upon which the personal estate is first liable, in general cases, is, that the contract primarily is a personal contract; the personal estate receiving the benefit; and being primarily a personal contract, the land is bound

only in aid of the personal obligation, to fulfill that personal contract." It has long been settled, therefore, that upon a loan of money, the party meaning to mortgage, in aid of the bond, covenant or simple contract debt, if there is neither bond nor covenant, his personal estate, if he dies, must pay the debt, for the benefit of the heir. But suppose, a second descent cast; and the question arises between the personal estate of the son, and his real estate, descended to the grandson; then the personal estate of the son shall not pay it, as it never was the personal contract of the son. And this is the well-established rule on this subject. If the contract be personal, although a mortgage be given, the mortgage is considered in aid of the personal contract; and on the decease of the mortgagor, his personal estate will be considered the primary fund, because the contract was personal; but if the estate descend to the grandson of the mortgagor, then the charge would be upon the land, as the debt was not the personal debt of the immediate ancestor. And so, if the contract was in regard to the realty, the debt is a charge on the land. It is in this way that a court of chancery, by looking at the origin of the debt, is enabled to fix the rule between distributees. *McLearn v. Wallace*, 10 Pet. 625, 644, 9 L. Ed. 559.

16. **Exceptions to rule that personalty is primary fund.**—*Lewis v. Darling*, 16 How. 1, 11, 14 L. Ed. 819.

Where administrator commits a *devastavit*.—Although by the laws which prevail in the District of Columbia, the personal estate of a deceased person should be resorted to for the payment of debts before applying to the realty; yet, where the administrator was found guilty of a *devastavit*, and the personal property



tention clearly appears that a legacy shall be paid at all events, the real estate is made liable on a deficiency of personal assets. So where without any assistance from the will, the nature of the thing to be done may clearly show the intention to charge the real estate with a debt; as, where the thing to be done cannot be partially performed by the executor, without defeating the instruction which directs it, and the thing itself.<sup>17</sup> So, also, where there is a will, the testator can substitute other funds in the place of the personal estate.<sup>18</sup> And the testator may exempt a part of it, by making it a particular legacy; or the whole of it, either by express words, or plain manifest intention, or by giving it as a specific legacy.<sup>19</sup>

**In England**, the rule which requires the personal property to be first applied in the payment of debts, is deviated from, where the justice of the case and the rights of parties interested, require it.<sup>20</sup>

**By statute in most jurisdictions**, the personal representative is authorized to sell real estate where there is a deficiency in the personalty.<sup>21</sup>

*b. Power of Legislature to Make Lands the Primary Fund.*—No objection is perceived to the power of the legislature to subject the lands of a deceased person to the payment of his debts, to the exclusion of the personal property. The legislature regulates descents, and the conveyance of real estate; to define the rights of debtor and creditor is their common duty; the whole range of remedies lies within their province.<sup>22</sup>

**2. LANDS DEVISED FOR PAYMENT OF DEBTS.**—Lands devised for the payment of debts, or which have become chargeable by implication, constitute a fund for the payment of debts.<sup>23</sup>

**3. LEGAL AND EQUITABLE ASSETS.**—"The legal assets, under the Virginia statute, are required to be first applied in the payment of debts, according to their different degrees. This is in conformity to the principle of the common law, and applies as well to debts secured by mortgage as to others."<sup>24</sup> And the fact that the debt in controversy was secured by a lien, does in no respect alter

was chiefly left in the hands of the surety, who was also the person charged with being a fraudulent grantee of the intestate, the general rule is not applicable. *McLaughlin v. Bank*, 7 How. 220, 12 L. Ed. 675. See the title EXECUTORS AND ADMINISTRATORS, vol. 6, p. 166.

**17.** *United States Bank v. Beverly*, 1 How. 134, 149, 11 L. Ed. 75, citing *Fenwick v. Chapman*, 9 Pet. 461, 466, 9 L. Ed. 193.

**18.** *Testator may substitute other funds.*—*Ruston v. Ruston*, 2 Dall. 243, 244, 1 L. Ed. 365.

**19.** *Fenwick v. Chapman*, 9 Pet. 461, 471, 9 L. Ed. 193.

"The general rule is that the personal estate of a testator shall, in all cases, be primarily applied in the discharge of his personal debts or general legacies, unless he, by express words or manifest intention, exempt it. *Bac. Abr.*, tit. *Executor and Administrator*, L. 2. The testator may exempt a part of it, by making it a particular legacy; or the whole of it, either by express words, or plain manifest intention, or by giving it as a specific legacy." *Fenwick v. Chapman*, 9 Pet. 461, 470, 9 L. Ed. 193.

**20.** *Rule in England as to personalty being primary fund.*—*McLearn v. Wallace*, 10 Pet. 625, 643, 9 L. Ed. 559.

**21. Statutory rule in most jurisdictions.**—"The statute of the territory provided that the real estate of a decedent might be sold to satisfy the just debts which he owed, when the personal property of the estate was insufficient to pay the same." *Comstock v. Crawford*, 3 Wall. 396, 404, 18 L. Ed. 34.

**By the laws of Rhode Island, as well as of all the New England states**, the real estate of intestates stands chargeable with the payment of their debts, upon a deficiency of assets. *Wilkinson v. Leland*, 2 Pet. 627, 7 L. Ed. 542.

**Proof of insufficiency of personal assets necessary.**—Under the Maryland statute providing for sale of decedent's lands, in case of personalty being insufficient to pay debts, a decree for sale of the lands without proof of insufficiency of personalty was held to be erroneous. *United States Bank v. Ritchie*, 8 Pet. 128, 144, 8 L. Ed. 890.

**22. State may, by statute, make lands the primary fund.**—*Watkins v. Holman*, 16 Pet. 25, 10 L. Ed. 873.

**23. Lands devised for payment of debts.**—*United States Bank v. Beverly*, 1 How. 134, 149, 11 L. Ed. 75.

**24. Legal assets subjected before equitable.**—*Page v. Patton*, 5 Pet. 304, 309, 8 L. Ed. 134.

the principle.<sup>25</sup>

**B. Charge of Debts and Legacies**—1. **CHARGE OF DEBTS**—a. *Effect of Statutes*.—Although, as between the devisee and the creditors, no additional liability is imposed by the charge by reason of statutes which have changed the common law by providing that a decedent's lands now descending to his heirs or passing to his devisees shall be subject to the payment of his debts, yet the statutes do not prevent the debtor from providing in his will which portion of his estate shall be primarily, and which secondarily liable; so where a testator charges debts upon particular portions of his land, thus manifesting an intention to burden the part so charged in favor of other portions of his estate, his direction will be regarded and effectuated by the courts.<sup>26</sup>

b. *Intention of Testator*.—An intention on the part of the testator to charge the real estate for the payment of debts may be manifested without express words; such intention may be implied from other circumstances in the will. Therefore, where without any assistance from the will, the nature of the thing to be done may clearly show an intention to charge the real estate with the debt, as, where the thing to be done cannot be partially performed by the executor without defeating the instruction which directs it, and the thing itself, the real estate is made liable on a deficiency of personal assets.<sup>27</sup>

**25. Rule where debt is secured by a lien**.—Page v. Patton, 5 Pet. 304, 309, 8 L. Ed. 134.

**Illustrative cases**.—Page was indebted, at the time of his decease, to Patton, £3,000, and upwards, which was covered by a deed of trust, on Mansfield, one of Page's estates; the executors of Page refusing to act, Patton, in 1803, took out administration with the will annexed, and gave sureties for the performance of his duties; Patton made sales of the personal estate, for cash, and on a credit of twelve months, and received various sums of money from the same; he made disbursements in payment of debts, and expenses for the support and education of the children of Page, and in advance to the legatees; he kept his administration accounts in a book provided for the purpose, entering his receipts and disbursements for the estate, but not bringing his own debt and interest into the account. In 1810, he put the items of his account into the hands of counsel, and requested him to introduce the deed of trust, "as he might think proper;" and an account as administrator was made out, in which the principal and interest of Patton's debt was entered as the first item; afterwards, in the same year, by order of court, the real estate was sold, and Patton received the proceeds of the same. Held, that the sum due under the deed of trust to Patton should be charged on the funds arising from the sale of the real estate; and that having omitted to retain from the proceeds of the personal estate, the sum due to him by Page, Patton could not afterwards charge the same against the legal assets, being the fund produced by the personal estate. Page v. Patton, 5 Pet. 304, 8 L. Ed. 134.

**26. Charge of land in exoneration of other property unaffected by statutes.**—

Potter v. Gardner, 12 Wheat. 498, 6 L. Ed. 706.

"It may be admitted, that, as between the devisee and the creditor, no charge is superadded by the will; but the relation of the devisees to each other is materially affected by it. A testator cannot, by his will, withdraw from his creditors any property which the law subjects to their claims, but he may provide a particular fund for his debts, and if the creditors resort to a different fund, those to whom the property so taken by them was given are entitled to compensation out of the fund provided for debts. Examples of this principle abound in the books. Personal property is universally liable for debts. If the particular fund provided by the testator for that object be of that description, and a specific thing, bequeathed to another, be taken in execution by a creditor, it has never been doubted that the legatee whose property has been taken may resort to the trust fund for compensation. The principle is too well settled to be now a subject for discussion." Potter v. Gardner, 12 Wheat. 498, 499, 501, 6 L. Ed. 706.

**27. Intention of testator governs**.—United States Bank v. Beverly, 1 How. 134, 11 L. Ed. 75.

**Manumission of slaves**.—By the statute of Maryland, of 1796, ch. 67, § 13, manumissions of slaves, by will and testament, could be made to take effect at the death of the testator; the testator could devise or charge his real estate with the payment of debts, to make the manumission effective, and not in prejudice of creditors. Fenwick v. Chapman, 9 Pet. 461, 9 L. Ed. 193. See the title **SLAVERY AND INVOLUNTARY SERVITUDE**.

**When a testator manumits his slaves**, by will and testament, and it clearly appears to have been his intention that the manumission shall take place at all



**Choice of Terms.**—The word “estate” is sufficiently comprehensive to embrace property of every description, and will charge lands with debts, if used with other words which indicate an intention to charge them; but if used alone, without such intent, they will not have such operation.<sup>28</sup>

c. *Devise and Bequest “after Payment of Debts.”*—The words in a will, “after my debts and funeral charges are paid, I devise and bequeath as follows,” amount to a charge upon the real estate for the payment of debts.<sup>29</sup>

d. *Disposition of Personalty to Other Purposes than Payment of Debts.*—A disposition by a testator of his personal property to purposes other than the payment of his debts, with the assent of creditors, is in itself a charge on the real estate, subjecting it to the payment of the debts of the estate, although no such charge is created by the words of the will.<sup>30</sup>

e. *Personal Liability of Devisee.*—When land is devised to a son, provided he pay to the executors a sum of money, at fixed periods, this is a charge on the land; and if the devisee enter, he becomes personally liable for the same.<sup>31</sup>

f. *Liability of Lands after Alienation.*—Where land charged with the payment of debts is sold, a court of equity may interpose to subject the unpaid purchase money to the payment of the debts charged on the land.<sup>32</sup> Though a bona fide purchaser, who pays the purchase money to a person authorized to sell, is not bound to look to its application, whether in the case of lands charged in the hands of an heir or devisee with the payment of debts, or lands devised to a trustee for the payment of debts.<sup>33</sup> But if the money be misapplied by the

events, the manifest intention, without express words to charge the real estate, will charge the real estate for the payment of debts if there be not personal assets enough, without the manumitted slaves, to pay the debts of the testator. In such a case, the creditors of the testator must look to the real estate for the payment of debts, which remain unpaid, after the personal estate, exclusive of the manumitted slaves, has been exhausted; and they may pursue their claims in equity, or according to the statutes of Maryland, subjecting real estate to the payment of debts. *Fenwick v. Chapman*, 9 Pet. 461, 9 L. Ed. 193.

28. **Construction of word “estate.”**—*Archer v. Deneale*, 1 Pet. 585, 7 L. Ed. 272.

A testator, residing and owning real and personal estate in the county of Alexandria, District of Columbia, by his will, gave “all his estate, real and personal, to his wife, during her life, for the use and purpose of raising and educating his children,” each child, at the age of twenty-one, to be entitled to an equal portion of his estate, real and personal; subject, each, to a deduction of one-third for the maintenance of his wife; he recommended his wife to sell the negroes for a term of years, and directed “an appraisement” only of “his estate” should be made, that no sale of the furniture should be made; and then stated, that he was indebted to “no one, and proposes to continue so,” that he was surety for his brother, for which he held a deed of trust on his property, sufficient he hoped, to pay the same, and directed, that his “estate shall not be sold to pay these debts, until the property so divided

shall be sold,” when his “estate must be charged with any deficiency, and directed, that his executors should not give security, as his own debts did not require it.” This will does not charge the real estate of the testator with his debts. *Archer v. Deneale*, 1 Pet. 585, 7 L. Ed. 272.

29. **Devise or bequest “after my debts are paid.”**—*Fenwick v. Chapman*, 9 Pet. 461, 9 L. Ed. 193.

A devise, “I give and devise to my beloved son, E. W. G., two-third parts of that my Ferry farm, so called,” etc., “to him, the said E. W. G. and to his heirs and assigns for ever, he, my said son, E. W. G., paying all my just debts out of said estate; and I do hereby order, and it is my will, that my son, E. W. G. shall pay all my just debts, out of the estate therein given to him as aforesaid,” creates a charge upon the estate, in the hands of the devisee. *Potter v. Gardner*, 12 Wheat. 498, 499, 6 L. Ed. 706.

30. **Disposition of personalty to purposes other than payment of debts.**—*United States Bank v. Beverly*, 1 How. 134, 11 L. Ed. 75.

31. **Personal liability of devisee.**—*Ruston v. Ruston*, 2 Dall. 243, 1 L. Ed. 365.

32. **Liability of lands after alienation.**—*Potter v. Gardner*, 12 Wheat. 498, 6 L. Ed. 706.

33. **Duty of purchaser to see to application of purchase money.**—*Potter v. Gardner*, 12 Wheat. 498, 499, 6 L. Ed. 706. See the title TRUSTS AND TRUSTEES.

There is no distinction between lands charged in the hands of an heir, or devisee, with the payment of debts, and lands devised to a trustee for the pay-



devisee or trustee, with the co-operation of the purchaser, he remains liable to the creditors for the sum so misapplied.<sup>34</sup>

g. *Equity Jurisdiction*.—The creditor may be carried into a court of equity, or voluntarily resort to it to obtain his debt, either from the lands or the personality, when the testator leaves it doubtful from what fund his debts are to be paid.<sup>35</sup>

h. *Parties*.—On a bill filed by an executor against a devisee of lands charged with the payment of debts, for an account of the trust fund, etc., the creditors are not indispensable parties to the suit; the fund may be brought into court, and distributed, under its direction, according to the rights of those who may apply for it.<sup>36</sup>

2. *CHARGE OF LEGACIES*<sup>37</sup>— a. *In General*.—A testator may devise lands, with a view to legacies, and make them a charge on the land, or on the person of the devisee, or on both; and whether a particular legacy be in either predicament, must depend upon the language of the will. In the large class of cases which have been decided on the subject, and which has principally arisen from questions respecting the quantity of the estate taken by the devisee, the ground assumed has been, that the will must speak expressly, or by fair implication, that the testator intends the legacies to be a charge on the land. When, therefore, the testator orders legacies to be paid out of his lands, or where, subject to legacies, or after payment of legacies, he devises his lands, courts have held the land charged with the legacies, upon the manifest intention of the testator.<sup>38</sup>

b. *Intention of Testator*.—Where the testator's intention clearly appears that a legacy shall be paid at all events, the real estate is made liable on a deficiency of personal assets.<sup>39</sup>

c. *Charge by Implication*.—There is no doubt that a charge on lands may be created by implication, as well as by an express clause in a will. But then the implication must be clear upon the words.<sup>40</sup>

d. *Charge of Pecuniary Legacies*.—To make a pecuniary legacy a charge upon lands devised, there must be express words, or a plain implication from the words of the will.<sup>41</sup>

e. *Effect of Insufficiency of Original Fund*.—It is not a sound interpretation of a will to construe charges, which ordinarily belong to the personality, to be charges on the realty, simply because the original fund is insufficient. The charge must be created by the words of the will.<sup>42</sup>

f. *Nature and Extent of Relief*.—Where it appears, by the admissions and proofs, that the defendant has substantially under his control a large property

ment of debts. They admit, that, in either case, the purchaser who pays the purchase money to the person authorized to sell, is not bound to look to its application. *Potter v. Gardner*, 12 Wheat. 498, 499, 502, 6 L. Ed. 706.

34. *Potter v. Gardner*, 12 Wheat. 498, 499, 6 L. Ed. 706.

35. *Equity jurisdiction*.—United States Bank v. Beverly, 1 How. 134, 149, 11 L. Ed. 75.

36. *Parties to suit to subject lands to payment of debts*.—*Potter v. Gardner*, 12 Wheat. 498, 499, 6 L. Ed. 706. See, generally, the title PARTIES.

37. See, generally, the title WILLS.

38. *Charge of legacies*.—*Wright v. Page*, 10 Wheat. 204, 226, 6 L. Ed. 303.

*Direction in will held to charge person of devisee only*.—A direction in a will that the specific devisee "do pay Hannah and Abigail the sum of fifty pounds each, when they come of age" creates a merely personal charge, because it is not said

or implied anywhere in the will that these legacies shall be a charge on the land. *Wright v. Page*, 10 Wheat. 204, 6 L. Ed. 303.

39. *When intention of testator is to pay legacy at all events*.—United States Bank v. Beverly, 1 How. 134, 11 L. Ed. 75, citing *Fenwick v. Chapman*, 9 Pet. 461, 466, 9 L. Ed. 193.

40. *Charge on lands may be created by implication*.—*Wright v. Page*, 10 Wheat. 204, 229, 6 L. Ed. 303.

*Construction of words "all the rest."*—It was held in *Wright v. Page* that a charge of pecuniary legacies upon lands devised could not be inferred from the words "all the rest." *Wright v. Page*, 10 Wheat. 204, 6 L. Ed. 303.

41. *Charging pecuniary legacies on land*.—*Wright v. Page*, 10 Wheat. 204, 6 L. Ed. 303.

42. *Insufficiency of personality will not create a charge*.—*Wright v. Page*, 10 Wheat. 204, 229, 6 L. Ed. 303.

of the testator which he intended to charge with the payment of the legacy in question, the complainant is entitled to relief although the land lies beyond the limits of the state in which the suit is brought.<sup>43</sup> Likewise, when a devise of land is accepted, a portion of which is subject to a charge, the whole is liable in case of deficiency.<sup>44</sup>

g. *Residuary Clause*.—The rule is, that where a testator gives several legacies, and then, without creating an express trust to pay them, makes a general residuary disposition of the whole estate, blending the realty and personalty together in one fund, the real estate will be charged with the legacies, for in such a case the "residue" can only mean what remains after satisfying the previous gifts.<sup>45</sup> Such is the settled law both in England and in the United States, though cases do not often occur for its application.<sup>46</sup> Nor does this conflict at all with that principle of equity jurisprudence declaring that, generally, the personal estate of the testator is the first fund for the payment of debts and legacies. The rule has its exceptions, and this is one of them.<sup>47</sup>

h. *Effect of Charge on Estate Charged*.—The clearly established doctrine on this subject is, that if the charge be merely on the land, and not on the person of the devisee, then the devisee, upon a general devise, takes an estate for life only. The reason is obvious. If the charge be merely on the estate, then the devisee (to whom the testator is always presumed to intend a benefit) can sustain no loss or detriment, in case the estate is construed but a life estate, since the estate is taken subject to the incumbrance. But if the charge be personal on the devisee, then if his estate be but for life, it may determine before he is reimbursed for his payments, and thus he may sustain a serious loss.<sup>48</sup>

i. *Pleading*.—Where the will, by construction, shows an intention to charge the real estate with the payment of a legacy, it is not necessary to aver in the bill a deficiency of personal assets.<sup>49</sup>

**C. CONTRIBUTION AND EXONERATION**—1. **CONTRIBUTION BETWEEN DEVISEES**.—Where a testator dies leaving a will by which he devises different tracts of land to different persons capable of taking by devise, and the entire real estate is incumbered by a mortgage, or other lien, which, after the will takes effect, has been paid by sale of one of the tracts of land, a court of equity will require a contribution from the devisees, not affected by the sale, so as to make the lien a charge upon all the land.<sup>50</sup>

2. **EXONERATION OF ENCUMBERED ESTATES**—a. *Exoneration of Lands Devise Subject to a Mortgage*.—Where lands are devised subject to a mortgage created by the decedent, the personal estate is generally the primary fund for

43. **Lands beyond jurisdiction of court may be subjected**.—*Lewis v. Darling*, 16 How. 1, 14 L. Ed. 819.

44. **Effect of acceptance of devise partly charged**.—*Ruston v. Ruston*, 2 Dall. 243, 1 L. Ed. 365.

45. **Effect of blending realty and personalty in residuary clause**.—*Lewis v. Darling*, 16 How. 1, 10, 14 L. Ed. 819, citing *Hill on Trustees*, 508.

The real estate will be charged with the payment of legacies where a testator gives several legacies, and then, without creating an express trust to pay them, makes a general residuary disposition of the whole estate, blending the realty and personalty together in one fund. This is an exception to the general rule that the personal estate is the first fund for the payment of debts and legacies. *Lewis v. Darling*, 16 How. 1, 14 L. Ed. 819.

Where a testator having no personal

property bequeaths several pecuniary legacies to different persons, and "all the rest and residue of his estate, real and personal" he gives to his son, whom he appoints as executor, it was held that these pecuniary legacies were a charge upon the testator's estate. *Nicholas v. Postlethwaite*, 2 Dall. 131, 1 L. Ed. 319.

46. *Lewis v. Darling*, 16 How. 1, 10, 14 L. Ed. 819.

47. **This is an exception to the rule that personalty is primary fund**.—*Lewis v. Darling*, 16 How. 1, 11, 14 L. Ed. 819.

48. **Effect of charge on estate charged**.—*Wright v. Page*, 10 Wheat. 204, 231, 6 L. Ed. 303. See the title **ESTATES**, vol. 5, p. 904.

49. **Averment of deficiency of personal assets unnecessary**.—*Lewis v. Darling*, 16 How. 1, 14 L. Ed. 819.

50. **Contribution between devisees**.—*McLearn v. Wallace*, 10 Pet. 625, 9 L. Ed. 559.



the payment of the incumbrance and must exonerate the land devised.<sup>51</sup> And the devise of the residuary part of the personal estate should give way to the devise of the real estate, subjected to the mortgage, and be applied, so far as it will go, in discharge of the mortgage; for the devisee of the real estate must take it cum onere, that is, subject to the mortgage, unless the residue of the personal estate will be sufficient to discharge it.<sup>52</sup> But specific and pecuniary legacies are payable out of the personal estate in preference to a mortgage debt.<sup>53</sup> On the other hand, where lands are devised with a mortgage incumbrance on them created by some person other than the testator, all the lands belonging to the mortgagor must contribute ratably according to their value to pay off and discharge the debt, interest and cost.<sup>54</sup>

b. *Exoneration of Lands Descended Subject to a Mortgage.*—The rule that the personal estate must be applied to discharge a mortgage or other incumbrance on lands descended or devised subject thereto, has no application where the incumbrance was not created by the decedent, as where he acquired the land subject to the incumbrance; in such case the heir or devisee will have no right to have the lien discharged out of the personal estate, but the land will be considered the primary fund for its payment, and the heir or devisee will take cum onere, unless a contrary intention plainly appears.<sup>55</sup> And this principle is not changed by the sale of the property. The funds realized from the sale in equity partake of the same character, and are subject to the same rule as the property which they represent. It is, therefore, a matter of no importance, whether the debt has been paid out of the personal or real fund; nor indeed whether it has been paid at all.<sup>56</sup>

**The test is** that if the debt of the decedent grows out of a contract in regard to realty, it becomes a charge upon the decedent's real estate, but if the debt was created by personal contract, then the personalty is to be considered the primary fund.<sup>57</sup>

**51. Exoneration of lands devised subject to a mortgage.**—*Ruston v. Ruston*, 2 Dall. 243, 1 L. Ed. 365; *Morehouse v. Phelps*, 21 How. 294, 304, 16 L. Ed. 140.

**52. Rights of residuary legatee.**—*Ruston v. Ruston*, 2 Dall. 243, 246, 1 L. Ed. 365.

**53. Specific and pecuniary legacies.**—*Ruston v. Ruston*, 2 Dall. 243, 1 L. Ed. 365.

**54. Lands devised incumbered by some person other than the testator.**—*Morris v. McConaughy*, 2 Dall. 189, 1 L. Ed. 343.

**55. Exception to rule that personalty must exonerate encumbered lands.**—*McLearn v. Wallace*, 10 Pet. 625, 9 L. Ed. 559.

"In 3 Johns. Ch. 252, it is laid down, as between the representatives of the real and personal estate, that the land is the primary fund to pay off a mortgage. And in 2 Bro. C. C. 57, Lord Kenyon, as master of the rolls, laid down the same rule; that where an estate descends, or comes to one, subject to a mortgage, although the mortgage be afterwards assigned, and the party enter into a covenant to pay the money borrowed, yet that shall not bind his personal estate. There is no doctrine better established, than that the purchase of land, subject to a mortgage debt, does not make the debt personal; and on the question being raised, such debt has been uniformly charged on the land. And this principle is not changed, where additional

security has been given." Approved in *McLearn v. Wallace*, 10 Pet. 625, 643, 9 L. Ed. 559.

**Effect of assignment of mortgage.**—Where an estate descends, or comes to one, subject to a mortgage, although the mortgage be afterwards assigned, and the party enter into a covenant to pay the money borrowed, yet that shall not bind his personal estate. *McLearn v. Wallace*, 10 Pet. 625, 643, 9 L. Ed. 559.

**56. Effect of sale of property primarily liable.**—*McLearn v. Wallace*, 10 Pet. 625, 9 L. Ed. 559.

**57. Test as to whether realty or personalty is bound.**—*McLearn v. Wallace*, 10 Pet. 625, 9 L. Ed. 559.

"In the case of *Waring v. Ward*, 7 Ves. 334, Lord Eldon says, 'the principle upon which the personal estate is first liable, in general cases, is, that the contract primarily is a personal contract; the personal estate receiving the benefit; and being primarily a personal contract, the land is bound only in aid of the personal obligation, to fulfill that personal contract.' It has long been settled, therefore, that upon a loan of money, the party meaning to mortgage, in aid of the bond, covenant or simple contract debt, if there is neither bond nor covenant, his personal estate, if he dies, must pay the debt, for the benefit of the heir. But suppose, a second descent cast; and the question arises between the personal estate of the



**When Realty and Personalty Will Contribute Ratably.**—Where both real and personal estate is charged by the testator's son as his executor for the payment of a judgment against the father for the balance of the purchase money, both funds must be applied to its payment in proportion to their respective amounts. And where property both real and personal has been converted into money, the proportionate part of each may be applied to this payment without difficulty.<sup>58</sup>

son, and his real estate, descended to the grandson; then the personal estate of the son shall not pay it, as it never was the personal contract of the son. And this is the well-established rule on this subject. If the contract be personal, although a mortgage be given, the mortgage is considered in aid of the personal contract; and on the decease of the mortgagor his personal estate will be considered the primary fund, because the contract was personal; but if the estate descend to the grandson of the mortgagor, than the charge would be upon the land, as the debt was not the personal debt of the immediate ancestor. And so, if the contract was in regard to the realty, the debt is a charge on the land. It is in this way that a court of chancery, by looking at the origin of the debt, is enabled to fix the rule between distributees." *McLearn v. Wallace*, 10 Pet. 625, 644, 9 L. Ed. 559.

**58. When realty and personalty must contribute ratably.**—*McLearn v. Wallace*, 10 Pet. 625, 9 L. Ed. 559.

**Illustrative cases.**—A tract of land in the state of Georgia was purchased by A. McLearn, on which he established a rice plantation, put slaves upon it, paid part of the purchase money, gave a judgment for the balance, and died, leaving a son, James H. McLearn, his devisee; who, to obtain possession of the estate, mortgaged the land and slaves for the balance of judgment; a judgment, under the laws

of Georgia, binds personal as well as real property. The son died, part of the debt being unsatisfied, leaving as his nearest of kin, aliens; and also more remote kindred, who were citizens of the United States. The real estate was sold to satisfy, and did satisfy, the mortgage; the personal estate was sold by the executor. The aliens, who were nearest of kin, claimed the proceeds of the personal estate; the kindred of the deceased, who were more remote, but who were citizens of the United States, claimed that the personal estate should have been appropriated to pay the mortgage; and that not having been so appropriated, they were entitled to the money arising from its sale, to reimburse them for the value of the real estate taken by the mortgagor, the aliens nearest of kin not being entitled, by the law of Georgia, to take real estate by descent. The court held, that as both the real and personal estate had been charged with the mortgage debt, both funds must be applied in proportion to their respective amounts, to its payment; any debt, not covered by the mortgage, to be paid out of the personal estate; the nearest of kin to take the residue of the proceeds of the personal estate, and the remoter kin, citizens of the United States, to take the residue of the proceeds of the real estate, and the real estate unsold. *McLearn v. Wallace*, 10 Pet. 625, 9 L. Ed. 559.

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BY DAVID T. CHALMERS.

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### CROSS REFERENCES.

See the titles ARMY AND NAVY, vol. 1, p. 494; ARREST, vol. 1, p. 541; BLOCKADE, vol. 3, p. 364; COURTS, vol. 4, p. 861; MILITARY LAW; MILITIA; RIOT; STATES; WAR.

### I. Definition and Distinctions.

**A. Definition.**—"Martial law is the law of military necessity in the actual presence of war."<sup>1</sup>

**B. Distinctions**—1. **DISTINGUISHED FROM MILITARY LAW.**—Martial law is to be distinguished from military law, which is used in peace and war and is found in acts of congress prescribing rules and articles of war, or otherwise providing for the government of the national forces.<sup>2</sup>

2. **DISTINGUISHED FROM MILITARY GOVERNMENT.**—Martial law is also to be distinguished from military government, which is exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated as belligerents.<sup>3</sup>

### II. Declaration and Exercise.

**A. Declaration.**—Martial law is called into action by congress, or temporarily, when the action of congress cannot be invited, and in the case of justifying or excusing peril, by the president, in times of insurrection or invasion, or of civil or foreign war, within districts or localities, where ordinary law no longer adequately secures public safety and private rights.<sup>4</sup> And a state itself may determine whether a crisis demands the creation of martial law.<sup>5</sup>

**B. Exercise**—1. **BY WHOM ADMINISTERED.**—Martial law is administered

1. **Definition.**—United States *v.* Diekelman, 92 U. S. 520, 526, 23 L. Ed. 742. See post, "When Exercised," II, B, 2; "Place," II, B, 3.

2. **Distinguished from military law.**—Ex parte Milligan, 4 Wall. 2, 142, 18 L. Ed. 281. See the title MILITARY LAW.

3. **Distinguished from military govern-**

**ment.**—Ex parte Milligan, 4 Wall. 2, 142, 18 L. Ed. 281. See the title WAR.

4. **Declaration.**—Ex parte Milligan, 4 Wall. 2, 142, 18 L. Ed. 281.

5. "If the government of Rhode Island (during the insurrection of 1841-42) deemed the armed opposition so formidable, and so ramified throughout the state, as to

by the general of the army, and is in fact his will. Of necessity it is arbitrary; but it must be obeyed.<sup>6</sup>

2. **WHEN EXERCISED**.—*a. In General.*—Martial law is to be exercised in times of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the national government, when the public danger requires its exercise.<sup>7</sup>

*b. Necessity.*—Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real; such as effectually closes the courts and deposes the civil administration.<sup>8</sup>

3. **PLACE.**—Martial law is confined to the locality of actual war.<sup>9</sup> Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction.<sup>10</sup>

### III. Effect.

**A. Power to Arrest under Martial Law.**—After martial law is declared, an officer may lawfully arrest any one whom he has reasonable grounds to believe is engaged in the insurrection, or order a house to be forcibly entered. But no more force can be used than is necessary to accomplish the object.<sup>11</sup>

require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority." *Luther v. Borden*, 7 How. 1, 45, 12 L. Ed. 581.

6. **Administered by general of army.**—*United States v. Diekelman*, 92 U. S. 520, 526, 23 L. Ed. 742.

7. **In public danger.**—*Ex parte Milligan*, 4 Wall. 2, 142, 18 L. Ed. 281. See ante, "Definition," I, A; post, "Place," II, B, 3; "Duration," IV.

"If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course." *Ex parte Milligan*, 4 Wall. 2, 127, 18 L. Ed. 281.

8. **Necessity must be actual and present.**—*Ex parte Milligan*, 4 Wall. 2, 127, 18 L. Ed. 281.

9. **Place.**—*Ex parte Milligan*, 4 Wall. 2, 127, 18 L. Ed. 281. See ante, "Definition," I, A; "When Exercised," II, B, 2. See the title WAR.

10. **Cannot exist when courts are open.**—*Ex parte Milligan*, 4 Wall. 2, 127, 18 L. Ed. 281. See, generally, the title COURTS, vol. 4, p. 861.

**Exercise wrongful where there is no danger.**—It is claimed that by martial law in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be

restrained, except by his superior officer or the president of the United States. If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules. The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the constitution, and effectually renders the "military independent of and superior to the civil power"—the attempt to do which by the King of Great Britain was deemed by our fathers such an offense, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish. *Ex parte Milligan*, 4 Wall. 2, 124, 18 L. Ed. 281.

Because, during the late rebellion martial law could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered. And so in the case of a foreign invasion, martial rule may become a necessity in one state, when, in another, it would be "mere lawless violence." *Ex parte Milligan*, 4 Wall. 2, 127, 18 L. Ed. 281.

11. **Officer may arrest insurrectionist.**—*Luther v. Borden*, 7 How. 1, 2, 12 L.



**B. Effect on Alien.**—When an alien voluntarily enters a place under martial law, he subjects himself to that law.<sup>12</sup>

#### IV. Duration.

As necessity creates the rule of martial law, so it limits its duration; for if this government is continued after the courts are reinstated, it is a gross usurpation of power.<sup>13</sup>

**MASONIC LODGES.**—See the title **BENEFICIAL AND BENEVOLENT ASSOCIATIONS**, vol. 3, p. 211.

**MASSAGE.**—See the title **ARGUMENT OF COUNSEL**, vol. 2, p. 491.

Ed. 581. See the titles **ARMY AND NAVY**, vol. 2, p. 522; **ARREST**, vol. 2, p. 542.

The case of *Luther v. Borden*, grew out of the attempt in Rhode Island in 1841-42 to supersede the old colonial government by a revolutionary proceeding. The old government resisted this; and as the rebellion was formidable, called out the militia to subdue it, and passed an act declaring martial law. Borden, in the military service of the old government, broke open the house of Luther, who supported the new, in order to arrest him. Luther brought suit against Borden; and the question was, whether, under the constitution and laws of the state, Borden was justified. This court held that a state "may use its military power to put down

an armed insurrection too strong to be controlled by the civil authority;" and as Borden acted under military orders of the charter government, which had been recognized by the political power of the country, and was upheld by the state judiciary, he was justified in breaking into and entering Luther's house. *Luther v. Borden*, 7 How. 1, 46, 12 L. Ed. 581, cited in *Ex parte Milligan*, 4 Wall. 2, 129, 18 L. Ed. 281.

**12. Effect on alien.**—*United States v. Diekelman*, 92 U. S. 520, 526, 23 L. Ed. 742. See, generally, the titles **ALIENS**, vol. 1, p. 210; **BLOCKADE**, vol. 3, p. 379.

**13. Duration.**—*Ex parte Milligan*, 4 Wall. 2, 127, 18 L. Ed. 281. See ante, "When Exercised," II, B, 2.

# MASTER AND SERVANT.

BY ERNEST P. STEINHAEUER.

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titles MASTERS OF VESSELS; PILOTS. As to a bill to compel employee to convey title to letters of patent, see the title PATENTS. As to presumption of license of right to employer to use invention of servant, see the title PATENTS. As to constitutionality of an act requiring the redemption in cash of store orders given to employees as wages, see the title POLICE POWER. As to constitutionality of a statute requiring railroads to employ only engineers able to discriminate color signals, see the title RAILROADS. As to construction of a release given by employee to his master, see the title RELEASE. As to removal of cause of joint action against master and servant, see the title REMOVAL OF CAUSES. As to compensation of a seaman for services rendered, see the title SEAMEN. As to liability of owner of vessel for torts of servant, see the title SHIPS AND SHIPPING. As to contract for services between a state and a party, see the title STATES.

### I. When Relation Exists.

**A. In General.**—The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be done, as well as the result to be accomplished, but how it shall be done.<sup>1</sup>

**B. Hirer of Hack.**—A person who hires a public hack and gives the driver directions as to the place to which he wishes to be conveyed, but exercises no other control over the conduct of the driver, is not responsible for his acts or negligence, or prevented from recovering against a railroad company for injuries suffered from a collision of its train with the hack, caused by the negligence of both the managers of the train and of the driver.<sup>2</sup>

**C. Termination.**—See post, "Termination," II, C.

### II. Contract of Hiring.

**A. Wages of Servant**—1. CONTINUING TO WORK AFTER INCREASED COMPENSATION REFUSED.—One who has contracted to work for a fixed compensa-

**1. In general.**—*Railroad Co. v. Hanning*, 15 Wall. 649, 656, 21 L. Ed. 220; *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 523, 33 L. Ed. 440. See, also, *Little v. Hackett*, 116 U. S. 366, 29 L. Ed. 652.

The relation of master and servant exists between a sewing machine company and one who, in consideration of certain commissions to be paid him, agrees to give his whole time and services to the selling of machines for the company, the company reserving to itself the right of prescribing and regulating not only what business he shall do, but the manner in which he shall do it. And where such person injures a third person in the course of his employment, the company is liable. *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 522, 33 L. Ed. 440.

A railroad company made an agreement with a person under which such person was to occupy a house on the line of the road and furnish board to its employees. She was not paid by the road but was to keep all profits she made, the railroad assisting her in collecting the money for board by withholding the salaries of its employees. It was held that the relation of the parties was not that of master and servant, but landlord and tenant. *Doyle v. Union Pac. R. Co.*, 147 U. S. 413, 422, 37 L. Ed. 223.

"The servants of an independent contractor are not the servants of the con-

tractee." *Guy v. Donald*, 203 U. S. 399, 406, 51 L. Ed. 245.

A. contracted to cut, furnish, and deliver in Washington City, at specified rates, granite to the United States, at such times as it might require, and to furnish such number of men as it might deem necessary to the proper prosecution of the work. The full cost of their labor, increased by fifteen per cent, was also to be paid to him by the United States. For every day that he was in default he was to forfeit and pay \$100. Held, that there was no privity between the United States and the men employed by him in the execution of his contract. *United States v. Driscoll*, 96 U. S. 421, 24 L. Ed. 847. See, generally, the title INDEPENDENT CONTRACTORS, vol. 6, p. 904.

**Indiana.**—To be an employee within the meaning of § 5286 of the Revised Statutes of Indiana one "must have been a servant, bound in some degree at least to the duties of a servant, and not," as "a mere contractor, bound only to produce or cause to be produced a certain result—a result of labor, to be sure—but free to dispose of his own time and personal efforts according to his pleasure, without responsibility to the other party." *Vane v. Newcombe*, 132 U. S. 220, 234, 33 L. Ed. 310.

**2. Hirer of hack.**—*Little v. Hackett*, 116 U. S. 366, 29 L. Ed. 652, criticising and

tion, and who continues to work after his demand for a higher compensation has been refused, cannot recover any greater compensation than that which he had originally agreed to.<sup>3</sup>

2. **PROMISES OF INCREASE BY THIRD PERSON.**—Where one has contracted to work for another for an unlimited time and at a fixed salary, any promises that his salary will be raised, made by a third person to the one employed without the consent of the employer, are worthless.<sup>4</sup>

3. **ACTION FOR WAGES.**—**Assumpsit.**—An early case held that if services were rendered merely in expectation of a legacy, without any contract, express or implied, but relying implicitly on the testator's generosity, the action of assumpsit could not be maintained.<sup>5</sup>

**B. Breach of Contract.**—The breach of a contract for personal service has not been recognized in this country as involving a liability to criminal punishment, except in the cases of soldiers, sailors and possibly some others, nor would public opinion tolerate a statute to that effect.<sup>6</sup>

**C. Termination**—1. **DISCHARGE OF SERVANT.**—An employer may rescind a contract made with his employee for services, when the employee renders himself mentally incapable of performing his duties by the use of narcotics.<sup>7</sup>

2. **NOTICE OF TERMINATION.**—Where by the terms of a contract of service a party is bound to give thirty days' notice of an intention to terminate it, and, having given the notice, afterwards waives it, he may in fact renew the notice, though the form of his communication purport to insist on the notice which he has waived; and at the expiration of the required time the second document will operate as a notice.<sup>8</sup>

3. **PROVINCE OF COURT AND JURY.**—In a suit for injuries to an employee, it is for the jury to say, from the circumstances of the case, whether the service had or had not ceased at the time of the accident.<sup>9</sup>

disapproving *Thosogood v. Bryan*, 8 C. B. 114.

3. **Continuing to work after increased compensation refused.**—*Nutt v. Minor*, 14 How. 464, 14 L. Ed. 500.

A letter written by a clerk to his employer stating that unless his compensation was increased he would quit work, which demand was refused by the employer, is not evidence of a new promise to pay higher salary, the clerk continuing to work after the refusal. *Nutt v. Minor*, 14 How. 464, 14 L. Ed. 500.

Where the marshal of the District of Columbia engaged the services of a clerk for a stipulated sum per annum, and the service continued without any new agreement, and the jury were instructed that they might imply a new agreement to pay the clerk at a different rate, this instruction was erroneous. There was nothing in the evidence from which the jury could imply such new agreement. *Nutt v. Minor*, 14 How. 464, 14 L. Ed. 500.

Where one sued another for services rendered under an express agreement, and the court was requested to instruct "that plaintiff was not entitled to recover unless it appeared that a new agreement was made between plaintiff and defendant," the court refused to give such instructions, but modified the same by inserting the words "express or implied" between the words "agreement" and "was made." It was held that the instructions ought to have been given without the ad-

dition of the words "express or implied" as inserted by the circuit court. *Nutt v. Minor*, 14 How. 464, 14 L. Ed. 500.

4. *Nutt v. Minor*, 14 How. 464, 14 L. Ed. 500.

5. **Action for wages.**—*Little v. Dawson*, 4 Dall. 111, 1 L. Ed. 763. See the title ASSUMPSIT, vol. 2, pp. 650, 651.

6. **Breach of contract.**—*Robertson v. Baldwin*, 165 U. S. 275, 281, 41 L. Ed. 715.

7. **Discharge of servant.**—*Lyon v. Pollard*, 20 Wall. 403, 406, 22 L. Ed. 361.

8. **Notice of termination.**—*Lyon v. Pollard*, 20 Wall. 403, 22 L. Ed. 361.

Though where, under a contract of hiring services, a party is bound to give a certain number of days' notice to terminate it, it is not terminated until the full term of days has elapsed, yet where an action has been brought for damages for a dismissal without the proper notice, a notice of termination may be given, though the full number of days has not expired when an actual dismissal took place; this to show that the plaintiff had a right now to serve but a portion of the thirty days. *Lyon v. Pollard*, 20 Wall. 403, 22 L. Ed. 361.

9. **Province of court and jury.**—*Packet Co. v. McCue*, 17 Wall. 508, 514, 21 L. Ed. 705. See post, "Province of Court and Jury," III, F, 3.

A man standing on a wharf was hired by the mate of a boat desiring to sail soon, and which was short of hands, to

### III. Liability of Master to Servant for Personal Injuries.

**A. In General.**—It is the obligation of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master.<sup>10</sup> The positive duty does not go to the extent of a guarantee of safety by the master,<sup>11</sup> but it does require that reasonable precautions be taken by him to secure safety.<sup>12</sup>

**B. Necessity for Existence of Relation of Master and Servant.**—See ante, "When Relation Exists," I.

**C. Duties Owed by Master and Servant**—1. **PERSONAL CHARACTER OF DUTIES.**—The duties which a master owes to a servant he personally owes,<sup>13</sup>

assist in lading some goods, which were near the wharf, he not having been in the service of the boat generally though he had been occasionally employed in this sort of work. He assisted in lading the goods, an employment which continued about two hours and a half. He was then told to go to "the office," which was on the boat, and get paid. He did so, and then set off to go ashore. While crossing the gang plank, in going ashore, the boat hands pulled the plank recklessly in and from under his feet, and he was thrown against the dock, injured, and died from the injuries. On a suit under a statute, by his administratrix, for the injuries done to him—the declaration alleging that he had been paid and discharged, and that after this, and when he was no longer in any way a servant of the owners of the boat, he was injured—the defense was that he had remained in the service of the boat till he got completely ashore, and that the injuries having been done to him by his fellow servants, the owners of the boat (the common master of all the servants) were not liable. There was no dispute as to the facts, unless the question as to when the relationship of master and servant ceased was a fact. This question the court left to the jury. Held, that there was in this no error. *Packet Co. v. McCue*, 17 Wall. 508, 21 L. Ed. 705.

**10. Master's liability in general.**—Hough v. Railway Co., 100 U. S. 213, 217, 25 L. Ed. 612.

"If the negligence of the company had a share in causing the injury to the deceased, the company was liable, notwithstanding the negligence of a fellow servant contributed to the happening of the accident. *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700, 27 L. Ed. 266." *Gila Valley, etc., R. Co. v. Lyon*, 203 U. S. 465, 473, 51 L. Ed. 276.

**11. Master not an insurer.**—*Baltimore, etc., R. Co. v. Baugh*, 149 U. S. 368, 386, 37 L. Ed. 772; *Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349, 37 L. Ed. 1107; *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612; *Washington, etc., R. Co. v. McDade*, 135 U. S. 554, 570, 34 L. Ed. 235; *Union Pac. R. Co. v. O'Brien*, 161 U. S. 451, 457, 40 L. Ed. 766; *Patton v.*

*Texas, etc., R. Co.*, 179 U. S. 658, 664, 45 L. Ed. 361; *Southern Pac. Co. v. Seley*, 152 U. S. 145, 154, 38 L. Ed. 391; *Northern Pac. R. Co. v. Dixon*, 194 U. S. 338, 346, 48 L. Ed. 1006. See, also, *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 29 L. Ed. 755; *Texas, etc., R. Co. v. Cox*, 145 U. S. 593, 36 L. Ed. 829; *Union Pac. R. Co. v. Daniels*, 152 U. S. 684, 38 L. Ed. 597; *Texas, etc., R. Co. v. Barrett*, 166 U. S. 617, 619, 41 L. Ed. 1136; *Railroad Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506; *Baltimore, etc., R. Co. v. Mackey*, 157 U. S. 72, 87, 39 L. Ed. 624; *Texas, etc., R. Co. v. Archibald*, 170 U. S. 665, 42 L. Ed. 1188.

"The master does not guarantee the safety of place or of machinery. His obligation is only to use reasonable care and diligence to secure such safety." *Northern Pac. R. Co. v. Dixon*, 194 U. S. 338, 346, 48 L. Ed. 1006.

"If they are not insurers of the lives and limbs of their employees, they do impliedly engage that they will not expose them to the hazard of losing their lives, or suffering great bodily harm, when it is neither reasonable nor necessary to do so." *Railroad Co. v. Fort*, 17 Wall. 553, 559, 21 L. Ed. 739.

**12. Reasonable care required.**—*Baltimore, etc., R. Co. v. Baugh*, 149 U. S. 368, 386, 37 L. Ed. 772; *Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349, 359, 37 L. Ed. 1107; *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612; *Patton v. Texas, etc., R. Co.*, 179 U. S. 658, 664, 45 L. Ed. 361; *Washington, etc., R. Co. v. McDade*, 135 U. S. 554, 570, 34 L. Ed. 235; *Union Pac. R. Co. v. O'Brien*, 161 U. S. 451, 40 L. Ed. 766; *Northern Pac. R. Co. v. Dixon*, 194 U. S. 338, 48 L. Ed. 1006; *Railroad Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506. See, also, *Texas, etc., R. Co. v. Cox*, 145 U. S. 593, 36 L. Ed. 829; *Union Pac. R. Co. v. Daniels*, 152 U. S. 684, 38 L. Ed. 597; *Texas, etc., R. Co. v. Barrett*, 166 U. S. 617, 619, 41 L. Ed. 1136; *Baltimore, etc., R. Co. v. Mackey*, 157 U. S. 72, 87, 39 L. Ed. 624; *Texas, etc., R. Co. v. Archibald*, 170 U. S. 665, 669, 42 L. Ed. 1188. See post, "Degree of Care Required," III, C, 3, g.

**13. Personal character of duties.**—*Northern Pac. R. Co. v. Peterson*, 163 U.



and he cannot transfer them.<sup>14</sup> If, instead of personally performing his obligations to his servant the master engages another to do them for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such.<sup>15</sup> The question turns rather on the character of the act than on the relations of the employees to each other.<sup>16</sup>

2. **RIGHT OF SERVANT TO RELY ON PERFORMANCE OF DUTIES.**—The employee is not obliged to pass judgment upon the employer's methods of transacting his business,<sup>17</sup> but may assume that the master has used due care to provide a reasonably safe place for the doing by him of the work for which he has been employed,<sup>18</sup> and that reasonable care has been used in furnishing the appliances necessary for its operation.<sup>19</sup> This rule is subject to the exception that where a defect is known to the employee, or is so plainly observable that he may be presumed to know of it, and continues in the master's employ without objection, he is taken to have made his election to continue in the employ of the master, notwithstanding the defect, and in such case cannot recover.<sup>20</sup>

3. **DUTIES STATED AND APPLIED**—a. *Duty to Provide Safe Place to Work*—

(1) *Statement of Rule.*—A master owes the duty to provide a servant with a

S. 346, 40 L. Ed. 994. See the title **FELLOW SERVANTS**, vol. 6, p. 248.

If the master be neglectful in any of his duties towards his employees it is a neglect of a duty which he personally owes to his employees, and if the employee suffer damage on account thereof, the master is liable. *Northern Pac. R. Co. v. Peterson*, 162 U. S. 346, 353, 40 L. Ed. 994.

14. **Cannot be transferred.**—No duty required of a master for the safety and protection of his servants can be transferred, so as to exonerate him from liability. *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 647, 29 L. Ed. 755.

15. See the title **FELLOW SERVANTS**, vol. 6, p. 248, et seq., 267.

16. **Liability depends on character of act.**—See the title **FELLOW SERVANTS**, vol. 6, p. 248.

17. **Employee not required to judge master's business methods.**—*Choctaw, etc., R. Co. v. McDade*, 191 U. S. 64, 68, 48 L. Ed. 96.

The employee has the right to rest on the assumption that appliances furnished are free from defects discoverable by proper inspection, and is not submitted to the danger of using appliances containing such defects because of his knowledge of the general methods adopted by the employer in carrying on his business, or because by ordinary care he might have known of the methods, and inferred therefrom that danger of unsafe appliances might arise. The employee is not compelled to pass judgment on the employer's methods of business or to conclude as to their adequacy. *Texas, etc., R. Co. v. Archibald*, 170 U. S. 665, 672, 42 L. Ed. 1188.

18. **Right to assume safe place.**—*Texas, etc., R. Co. v. Swearingen*, 196 U. S. 51, 62, 49 L. Ed. 382; *Texas, etc., R. Co. v.*

*Archibald*, 170 U. S. 665, 672, 42 L. Ed. 1188.

Where one has been employed in a railroad yard only one day before the accident occurred, and it does not appear that certain defects in the brakes or cars were brought to his notice, though there was some evidence that statements as to their defective condition were made in his presence and hearing; and he testifies that he saw no defect in either of them, and was not apprised of any; and the defect in the brakes was not patent to the eye, but could be known only from an attempt to set them, or by information from others, he has a right to assume, without such information, that they are in a condition in which it was safe to mount the cars to set them, when ordered by the yardmaster. *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 655, 29 L. Ed. 755.

19. **Right to assume safe machinery and appliances.**—*Choctaw, etc., R. Co. v. McDade*, 191 U. S. 64, 68, 48 L. Ed. 96; *Texas, etc., R. Co. v. Archibald*, 170 U. S. 665, 672, 42 L. Ed. 1188.

20. **Qualification of rule.**—*Choctaw, etc., R. Co. v. McDade*, 191 U. S. 64, 68, 48 L. Ed. 96; *Texas, etc., R. Co. v. Archibald*, 170 U. S. 665, 672, 42 L. Ed. 1188.

There are cases in which, if the employee knows of the risk and danger attendant upon it, he may be held to have taken the hazard by accepting or continuing in the employment; but this does not apply to an engineer who was entitled to rely upon the company as having properly constructed the road, and to presume that it had made proper inquiry in respect of latent defects, if there were any in the construction, for such was its duty, and he cannot be held to knowledge of the danger lurking in a narrow seam in the mountain side by whose

reasonably safe place to work in,<sup>21</sup> having reference to the character of the employment in which the servant is engaged.<sup>22</sup> And the risk the servant assumes of the negligence of a fellow servant does not exempt from that duty.<sup>23</sup>

(2) *Application of Rule*—(a) *Buildings*.—The obligation of master to provide reasonably safe places and structures for his servants to work upon does not impose upon him the duty, as towards them, of keeping a building, which they are employed in erecting, in a safe condition at every moment of their work, so far as its safety depends upon the due performance of that work by them and their fellows.<sup>24</sup>

(b) *Railroads*—aa. *In General*.—It is the duty of a railroad to use due care to provide a reasonably safe place for the use of workmen in its employ.<sup>25</sup> This duty is a continuing one and must be exercised whenever circumstances demand it.<sup>26</sup>

inequalities its sinuousities were hidden. *Union Pac. R. Co. v. O'Brien*, 161 U. S. 451, 458, 40 L. Ed. 766.

**21. Statement of rule.**—*Northern Pac. R. Co. v. Peterson*, 162 U. S. 346, 353, 40 L. Ed. 994; *Baltimore, etc., R. Co. v. Baugh*, 149 U. S. 368, 386, 37 L. Ed. 772; *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 29 L. Ed. 755; *Deserant v. Cerillos Coal R. Co.*, 178 U. S. 409, 420, 44 L. Ed. 1127; *Choctaw, etc., R. Co. v. McDade*, 191 U. S. 64, 48 L. Ed. 96; *Patton v. Texas, etc., R. Co.*, 179 U. S. 658, 45 L. Ed. 361; *Union Pac. R. Co. v. O'Brien*, 161 U. S. 451, 457, 40 L. Ed. 766; *Santa Fe Pac. R. Co. v. Holmes*, 202 U. S. 438, 50 L. Ed. 1094; *Baltimore, etc., R. Co. v. Mackey*, 157 U. S. 72, 87, 39 L. Ed. 624; *Texas, etc., R. Co. v. Archibald*, 170 U. S. 665, 669, 42 L. Ed. 1188. See the title FELLOW SERVANTS, vol. 6, p. 248.

A master employing a servant impliedly engages with him that the place at which he is to work shall be reasonably safe. It is the master who is to provide the place and when he employs one to enter into his service he impliedly says to him that there is no other danger in the place than such as is obvious and necessary. *Baltimore, etc., R. Co. v. Baugh*, 149 U. S. 368, 386, 37 L. Ed. 772.

Plaintiff, a railroad switchman, was ordered to couple together two cars, one of which was loaded in an unusual and dangerous manner, the timbers projecting out so far at the ends that no room was left to couple with safety though the plaintiff was unaware of this fact. He was severely injured by the projecting timber and brought an action against the company. The court held that the following instructions are not erroneous; if the car was negligently loaded with the sticks of timber extending too far beyond the end of the car and if the plaintiff could not in the exercise of proper diligence have perceived the projecting timber in time to escape, then he was entitled to recover. *Northern Pac. R. Co. v. Everett*, 152 U. S. 107, 112, 38 L. Ed. 373.

**22.** *Northern Pac. R. Co. v. Peterson*, 162 U. S. 346, 353, 40 L. Ed. 994.

Of course some places of work are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits the master who provides a place, owes a positive duty to his employee in respect thereto. *Baltimore, etc., R. Co. v. Baugh*, 149 U. S. 368, 386, 37 L. Ed. 772.

**23. Not absolved by fellow servant rule.**—See the title FELLOW SERVANTS, vol. 6, p. 248.

"It is undoubtedly the master's duty to furnish safe appliances and safe working places, and if the neglect of this duty concurs with that of the negligence of a fellow servant, the master has been held to be liable." *Deserant v. Cerillos Coal R. Co.*, 178 U. S. 409, 420, 44 L. Ed. 1127.

**24. Buildings.**—*Armour v. Hahn*, 111 U. S. 313, 318, 28 L. Ed. 440.

Where a carpenter is employed in erecting a building, and is hurt as the result of stepping on a projecting timber, which tips over and causes him to fall, he cannot recover from the owner for his injuries. *Armour v. Hahn*, 111 U. S. 313, 28 L. Ed. 440. See the title FELLOW SERVANTS, vol. 6, p. 252.

**25. General duty of railroads.**—*Union Pac. R. Co. v. O'Brien*, 161 U. S. 451, 40 L. Ed. 766; *Choctaw, etc., R. Co. v. McDade*, 191 U. S. 64, 67, 48 L. Ed. 96.

It is the duty of a railroad company in employing persons to run over its road to exercise reasonable care and diligence to make and maintain it fit and safe for use, and where a defect is the result of faulty construction which the employer knew or must be charged with knowing, it is liable to the employee, if the latter use due care on his part, for injuries resulting therefrom. *Union Pac. R. Co. v. O'Brien*, 161 U. S. 451, 458, 40 L. Ed. 766.

**26. Duty a continuing one.**—*Santa Fe Pac. R. Co. v. Holmes*, 202 U. S. 438, 444, 50 L. Ed. 1094.

A telegraph operator had sent out his orders to regulate the running of two trains approaching each other on the same track. The court held that he had not sufficiently fulfilled the duty of the company to furnish a safe place and safe appliances to its employees, where he



bb. *Roadbed, Track and Other Structures*.—A railroad company is bound to exercise the care which the exigency reasonably demands in furnishing proper roadbed, track and other structures, including sufficient culverts for the escape of water collected, and accumulated by its embankments and excavations.<sup>27</sup>

(c) *Mines*.—The act of congress of March 3, 1891, provides that the owners of every coal mine at a depth of 100 feet or more shall provide an adequate amount of ventilation so as to expel noxious or poisonous gases. But aside from the statute it is the master's duty to furnish safe appliances and working places and if the neglect of this duty concurs with that of the negligence of a fellow servant, the master is liable.<sup>28</sup>

learnt of a disobedience of orders by one of the engineers which he knew would result in a collision and failed to issue new orders to prevent it. *Santa Fe Pac. R. Co. v. Holmes*, 202 U. S. 438, 444, 50 L. Ed. 1094.

A railroad employee was injured by a head on collision between two trains caused by one of them running six minutes ahead of schedule time. Since the train dispatcher knew that it was running two minutes ahead of time at a station a few miles from the accident and failed to issue any orders to either train, the court held that the company was liable for damages. *Santa Fe Pac. R. Co. v. Holmes*, 202 U. S. 438, 443, 50 L. Ed. 1094.

**27. Roadbed, track, and other structures.**—*Union Pac. R. Co. v. O'Brien*, 161 U. S. 451, 457, 40 L. Ed. 766; *Choctaw, etc., R. Co. v. McDade*, 191 U. S. 64, 67, 48 L. Ed. 96. See, also, *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612; *Texas, etc., R. Co. v. Cox*, 145 U. S. 593, 36 L. Ed. 829; *Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349, 359, 37 L. Ed. 1107; *Union Pac. R. Co. v. Daniels*, 152 U. S. 684, 38 L. Ed. 597.

**Switch.**—Where there is a ground switch in a railroad yard, which is of a form in common use and is quite as fit for its place and purpose as an upright switch would be, and can be efficiently worked by standing opposite the lock, midway between the tracks, by using reasonable care; one who, in order to work it, stands at the handle, which is next to the adjacent track, cannot support an action against the company for faulty construction and arrangement of the switch, where he is struck by an engine moving on the adjacent track; because the evidence fails to show negligence on the part of the railroad company. *Randall v. Baltimore, etc., R. Co.*, 109 U. S. 478, 482, 483, 27 L. Ed. 1003.

**Water spout.**—In *Choctaw, etc., R. Co. v. McDade*, 191 U. S. 64, 48 L. Ed. 96, a spout by which a brakeman on top of a car was killed might readily have been so constructed and hung as to be safe. As it was maintained, it was a constant menace to the lives and limbs of employees whose duties required them, by night and day, to pass the structure. Held, to be a case where the dangerous structure was not justified by the necessity of

the situation, and its maintenance under the circumstances was negligence upon the part of the railroad company.

**Scales near track.**—Prima facie, the location of scales where the tracks were only the standard distance apart, and where a space of less than two feet was left for the movements of a switchman between the side of a freight car and the scale box, encumbered, as he would be in the night time, with a lantern employed for the purpose of signalling, did not uncontestedly establish the performance by the defendant company of the duty imposed upon it to use due care to provide a reasonably safe place for the use of the switchmen in its employ. And so far from the proof making it certain that the necessity of the situation required the erection of the structure, as existing, there was proof that the railway company owned unoccupied ground, intended for other tracks, justifying the inference that the distance between tracks might have been increased, or that the scales might have been removed to a safer location. *Texas, etc., R. Co. v. Swearingen*, 196 U. S. 51, 61, 49 L. Ed. 382.

Knowledge of the increased hazard resulting from the dangerous proximity of a scale box to the north rail of the track could not be imputed to the plaintiff simply because he was aware of the existence and general location of the scale box. *Texas, etc., R. Co. v. Swearingen*, 196 U. S. 51, 63, 49 L. Ed. 382.

**Frog.**—Where a railroad company has once properly blocked a frog, it incurs no liability to its employees by reason of the subsequent displacement of the blocking, unless such displacement has continued for such a length of time as to impute notice to it. *Union Pac. R. Co. v. James*, 163 U. S. 485, 488, 41 L. Ed. 236.

But where plaintiff claims that the reason for his injury is the negligent leaving unblocked of a frog and if the jury find that the track as originally constructed at this place was as it was found to be at the time of the accident, a case is presented of the absolute omission of a railroad company to discharge its duty of providing a safe place for the movement of its trains and the work of its employees. *Union Pac. R. Co. v. James*, 163 U. S. 485, 488, 41 L. Ed. 236.

**28. Mines.**—*Deserant v. Cerillos Coal R. Co.*, 178 U. S. 409, 420, 44 L. Ed. 1127.



b. *Duty to Provide Safe Machinery and Appliances*—(1) *Statement of Rule*.—While employers are not bound to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employees,<sup>29</sup> they are bound to use all reasonable care and prudence<sup>30</sup> for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter.<sup>31</sup> If the employer or master fails in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery which was, or ought to have been, known to him, and was

See the title MINES AND MINERALS.

**Concurrent causes—Negligence of master and negligence of fellow servant.**—See the title FELLOW SERVANTS, vol. 6, p. 266.

29. **Statement of rule.**—*Patton v. Texas*, etc., R. Co., 179 U. S. 658, 664, 45 L. Ed. 361; *Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349, 359, 37 L. Ed. 1107; *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612; *Southern Pac. Co. v. Seley*, 152 U. S. 145, 38 L. Ed. 391; *Texas*, etc., R. Co. v. Barrett, 166 U. S. 617, 619, 41 L. Ed. 1136. See ante, "In General," III, A.

Neither individuals nor corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employees. *Washington*, etc., R. Co. v. McDade, 135 U. S. 554, 570, 34 L. Ed. 235.

30. *Washington*, etc., R. Co. v. McDade, 135 U. S. 554, 570, 34 L. Ed. 235; *Patton v. Texas*, etc., R. Co., 179 U. S. 658, 664, 45 L. Ed. 361; *Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349, 359, 37 L. Ed. 1107; *Hough v. Railway Co.*, 100 U. S. 213, 220, 25 L. Ed. 612; *Union Pac. R. Co. v. O'Brien*, 161 U. S. 451, 40 L. Ed. 766; *Choctaw*, etc., R. Co. v. McDade, 191 U. S. 64, 48 L. Ed. 96; *Texas*, etc., R. Co. v. Archibald, 170 U. S. 665, 42 L. Ed. 1188; *Texas*, etc., R. Co. v. Barrett, 166 U. S. 617, 619, 41 L. Ed. 1136. See ante, "In General," III, A; post, "Degree of Care Required," III, C, 3, g.

The master is bound to observe all the care which prudence and the exigencies of the situation require, in providing the servant with machinery or other instrumentalities adequately safe for use by the latter. *Hough v. Railway Co.*, 100 U. S. 213, 217, 25 L. Ed. 612.

In a personal injury suit, in two or three places in the course of his charge to the jury, the court said that an employer was liable for injuries to his employee where he had neglected his duty to furnish machinery in a reasonably safe condition and a reasonably safe place for the employee to work, and did not add that the employer fulfilled his obligations if he observed reasonable care in furnishing such safe place, machinery, etc. It was held that this charge was erroneous; but that it clearly appeared that these remarks were merely detached and incidental and that the jury were not misled by them since the right directions

were given to them in the body of the instructions. *Choctaw*, etc., R. Co. v. Tennessee, 191 U. S. 326, 331, 333, 48 L. Ed. 201.

31. *Washington*, etc., R. Co. v. McDade, 135 U. S. 554, 570, 34 L. Ed. 235; *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612; *Patton v. Texas*, etc., R. Co., 179 U. S. 658, 664, 45 L. Ed. 361; *Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349, 359, 37 L. Ed. 1107; *Union Pac. R. Co. v. O'Brien*, 161 U. S. 451, 457, 40 L. Ed. 766; *Choctaw*, etc., R. Co. v. McDade, 191 U. S. 64, 48 L. Ed. 96; *Texas*, etc., R. Co. v. Archibald, 170 U. S. 665, 672, 42 L. Ed. 1188; *Texas*, etc., R. Co. v. Barrett, 166 U. S. 617, 619, 41 L. Ed. 1136; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 647, 29 L. Ed. 755; *Northern Pac. R. Co. v. Peterson*, 162 U. S. 346, 353, 40 L. Ed. 994; *Union Pac. R. Co. v. Daniels*, 152 U. S. 684, 38 L. Ed. 597; *Northern Pac. R. Co. v. Babcock*, 154 U. S. 190, 200, 38 L. Ed. 958; *Chicago*, etc., R. Co. v. Ross, 112 U. S. 377, 28 L. Ed. 787.

There is an implied obligation of the master, under his contract with those whom he employs, to use due care in supplying and maintaining suitable instrumentalities for the performance of the work or duty which he requires of them, and he is liable for damages occasioned by a neglect or omission to fulfill this obligation, whether it arises from his own want of care or that of his agents to whom he entrusts the duty. *Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349, 360, 37 L. Ed. 1107.

A master employing a servant impliedly engages with him that the tools or machinery with which he is to work or by which he is to be surrounded shall be reasonably safe. It is the master who is to provide the tools or machinery, and when he employs one to enter into his service he impliedly says to him that there is no other danger in the tools or machinery than such as is obvious and necessary. Of course some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself which is a matter of necessity and cannot be obviated. *Baltimore*, etc., R. Co. v. Baugh, 149 U. S. 368, 386, 37 L. Ed. 772.

"The absolute obligation of an employer to see that due care is used to provide safe appliances for his workmen is not extended to all the passing risks

unknown to the employee or servant.<sup>32</sup> But if the employee knew of the defect in the machinery from which the injury happened, and yet remained in the service and continued to use the machinery without giving any notice thereof to the employer, he must be deemed to have assumed the risk of any danger reasonably to be apprehended from such use, and is entitled to no recovery.<sup>33</sup>

(2) *Duty to Provide Best and Latest Appliances.*—Employers are not bound to supply the best and safest or newest of appliances for the purpose of securing the safety of those who are employed.<sup>34</sup> But in all occupations which are attended with great and unusual danger there must be used all appliances readily attainable known to science for the prevention of accidents, and the neglect to provide such attainable appliances will be regarded as proof of culpable negligence. If an occupation attended with danger can be prosecuted by proper precautions without fatal results, such precautions must be taken by the promoters of the pursuit or employers of laborers thereon. Liability for injuries following a disregard of such precautions will otherwise be incurred.<sup>35</sup>

(3) *Application of Rule to Railroads.*—(a) *In General.*—A railroad is under obligation to provide and maintain, in suitable condition, the machinery and apparatus to be used by its employees—an obligation the more important, and the degree of diligence in its performance the greater, in proportion to the dangers which may be encountered.<sup>36</sup> The same considerations which render a carrier responsible for the safe transportation of passengers and property should also impose upon him an equal responsibility to his employees so far as their safety depends upon the character and condition of the machinery and appliances used

which arise from short-lived causes." Northern Pac. R. Co. v. Dixon, 194 U. S. 338, 347, 48 L. Ed. 1006.

It is implied in the contract between master and servant that the master shall supply the physical means and agencies for the conduct of his business. It is also implied, and public policy requires, that in selecting such means he shall not be wanting in proper care. His negligence in that regard is not a hazard usually or necessarily attendant upon the business. Nor is it one which the servant, in legal contemplation, is presumed to risk, for the obvious reason that the servant who is to use the instrumentalities provided by the master has, ordinarily, no connection with their purchase in the first instance, or with their preservation or maintenance in suitable condition after they have been supplied by the master. Hough v. Railway Co., 100 U. S. 213, 217, 25 L. Ed. 612.

An engine and tender while crossing a trestle struck a horse and were derailed, the fireman being severely injured. The court held that the proximate cause of the injury was the absence of the brakes on the engine. Choctaw, etc., R. Co. v. Holloway, 191 U. S. 334, 339, 48 L. Ed. 207.

32. Washington, etc., R. Co. v. McDade, 135 U. S. 554, 570, 34 L. Ed. 235; Patton v. Texas, etc., R. Co., 179 U. S. 658, 661, 45 L. Ed. 361.

33. Washington, etc., R. Co. v. McDade, 135 U. S. 554, 570, 34 L. Ed. 235; Patton v. Texas, etc., R. Co., 179 U. S. 658, 664, 45 L. Ed. 361; Texas, etc., R. Co.

v. Archibald, 170 U. S. 665, 672, 42 L. Ed. 1188. See post, "Assumption of Risks by Servant," III, D.

34. *Duty to provide best and latest appliances.*—Washington, etc., R. Co. v. McDade, 135 U. S. 554, 570, 34 L. Ed. 235; Texas, etc., R. Co. v. Barrett, 166 U. S. 617, 619, 41 L. Ed. 1136; Southern Pac. Co. v. Seley, 152 U. S. 145, 154, 38 L. Ed. 391.

35. Mather v. Rillston, 156 U. S. 391, 399, 39 L. Ed. 464.

36. *In general.*—Hough v. Railway Co., 100 U. S. 213, 218, 25 L. Ed. 612; Washington, etc., R. Co. v. McDade, 135 U. S. 554, 569, 34 L. Ed. 235. See, also, Northern Pac. R. Co. v. Herbert, 116 U. S. 642, 29 L. Ed. 755.

"The general rule undoubtedly is that a railroad company is bound to provide suitable and safe materials and structures in the construction of its road and appurtenances, and if from a defective construction thereof an injury happen to one of its servants, the company is liable for the injury sustained." Union Pac. R. Co. v. O'Brien, 161 U. S. 451, 457, 40 L. Ed. 766.

Where the employee is not guilty of contributory negligence, no irresponsibility should be admitted for an injury to him caused by the defective condition of the machinery and instruments with which he is required to work, except it could not have been known or guarded against by proper care and vigilance on the part of his employer. Northern Pac. R. Co. v. Herbert, 116 U. S. 642, 652, 29 L. Ed. 755.

in the transportation.<sup>37</sup>

(b) *Cars*—aa. *In General*.—It is the duty of a railway company to use reasonable care to see that the cars employed on its road are in good order and fit for the purposes for which they are intended, and its employees have a right to rely upon this being the case.<sup>38</sup>

**Foreign Cars.**—This duty of a railroad as regards the cars owned by it exists also as to cars of other railroads received by it, sometimes designated as foreign cars.<sup>39</sup>

bb. *Couplings*.—**Act of 1893.**—A federal statute makes it unlawful for any common carrier to haul or permit to be hauled or used on its line any car used in interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.<sup>40</sup>

c. *Duty to Provide Sufficient Force of Competent Servants.*—See the title FELLOW SERVANTS, vol. 6, p. 253.

**37. Responsibility of carrier.**—Northern Pac. R. Co. v. Herbert, 116 U. S. 642, 652, 29 L. Ed. 755.

To guard against the misapplication of these principles, the corporation is not to be held as guaranteeing or warranting the absolute safety under all circumstances, or the perfection in all of its parts, of the machinery or apparatus which may be provided for the use of the employees. Its duty is discharged when, but only when, its agents whose business it is to supply such instrumentalities exercise due care, as well as in their purchase originally, as in keeping and maintaining them in such condition. *Hough v. Railway Co.*, 100 U. S. 213, 218, 25 L. Ed. 612; *Washington, etc., R. Co. v. McDade*, 135 U. S. 554, 569, 34 L. Ed. 235. See, also, *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 29 L. Ed. 755.

**38.** *Texas, etc., R. Co. v. Archibald*, 170 U. S. 665, 669, 42 L. Ed. 1188; *Baltimore, etc., R. Co. v. Mackey*, 157 U. S. 72, 91, 39 L. Ed. 624.

**39. Foreign cars.**—*Baltimore, etc., R. Co. v. Mackey*, 157 U. S. 72, 89, 39 L. Ed. 624.

It would be most unreasonable and cruel to declare, that, while the faithful workman may obtain compensation from a company for defective arrangement of its own cars, he would be without redress against the same company if the damaged car that occasioned the injury happened to belong to another company. *Baltimore, etc., R. Co. v. Mackey*, 157 U. S. 72, 89, 39 L. Ed. 624.

**40. Couplings.**—Act of March 2, 1893, ch. 196, 27 Stat. L. 531.

A brakeman was stooping down between two cars in order to couple them, such cars not being provided with automatic couplers as required by the act of congress of March 2, 1893. He raised his head a little too high and was killed. It was held that under § 8 of that statute the possibility of such a minute miscalculation under such circumstances was inevitably and clearly attached to the risk which he did not assume and that hence

he was not guilty of contributory negligence. *Schlemmer v. Buffalo, etc., R. Co.*, 205 U. S. 1, 14, 51 L. Ed. 681.

**Construction of act.**—Statutes in derogation of the common law are to be construed strictly, but they are also to be construed sensibly, and with a view to the object aimed at by the legislature, hence the act of congress of March 2, 1893, providing for automatic couplers on all cars used in interstate commerce should not be construed so as to defeat the very purpose for which it was passed. *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 17, 49 L. Ed. 363.

The act of March 2, 1893, requiring all cars used in interstate traffic to be equipped with "couplers coupling automatically by impact, without the necessity of men going between the ends of the cars," requires cars which will both "couple and uncouple" automatically without the necessity of men going between the ends of the cars. *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 49 L. Ed. 363.

**What cars embraced by act.**—The act of congress of March 2, 1893 provided that it should be unlawful for a railroad to use any car engaged in interstate commerce unless it was provided with automatic couplers. It was held that the word "car" was used in its generic sense; and tested by context, subject matter, and object, "any car" meant all kinds of cars running on the rails, including locomotives. *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 16, 49 L. Ed. 363.

**Same—Shovel cars.**—The act of congress of March 2, 1893, § 2, declared that all cars used in interstate commerce should be provided with automatic couplers. It is held that this provision applies to shovel cars as well as other kinds of cars. *Schlemmer v. Buffalo, etc., R. Co.*, 205 U. S. 1, 9, 51 L. Ed. 681.

**Same—Dining cars.**—Where a dining car continually in use between points in different states, is waiting at a station to be picked up by its train, it is engaged in interstate commerce, and is subject to the



d. *Duty in Regard to Inspection and Repair*—(1) *In General*.—It is the master's duty to keep in repair and order the materials, machinery or other means, by which the services are performed.<sup>41</sup>

(2) *Railroads*—(a) *Cars*.—It is the duty of a railroad to use reasonable care to see that the cars used on its road are in good order and fit for the purposes for which they are intended, and the employers have a right to rely upon this being the case.<sup>42</sup> The sufficiency of the number of inspectors and their competency furnishes no defense.<sup>43</sup> It is not, however, required to adopt extraordinary tests for discovering defects in machinery, which are not approved, practicable and customary; but it fulfills its duty in this regard if it adopts such tests as are ordinarily in use by prudently conducted roads engaged in like business and surrounded by like circumstances.<sup>44</sup>

(b) *Foreign Cars*.—A railroad company is under a legal duty not to expose its employees to dangers arising from unsafe or unsuitable appliances in foreign cars as may be discovered by reasonable inspection before such cars are admitted into its train.<sup>45</sup>

provisions of the act of March 2, 1893, providing for automatic couplers on all cars used in interstate commerce. *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 21, 49 L. Ed. 363.

**Where couplers are of different type.**—The act of congress of March 2, 1893, provided that all cars used in interstate commerce should be furnished with automatic couplers which would couple by impact and render it unnecessary for men to go between the cars. The engine and dining car between which plaintiff was hurt were furnished with automatic couplers, but such couplers were of different types and would not couple by impact. It was held that such cars did not satisfy the provisions of the statute. *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 16, 49 L. Ed. 363.

**41. In general.**—*Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 29 L. Ed. 755; *Chicago, etc., R. Co. v. Ross*, 112 U. S. 377, 28 L. Ed. 787. See, also, *Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349, 37 L. Ed. 1107; *Texas, etc., R. Co. v. Barrett*, 166 U. S. 617, 619, 41 L. Ed. 1136. See the title FELLOW SERVANTS, vol. 6, p. 250.

**Illustrative case.**—If a boiler on a locomotive which exploded and injured an employee was defective and unfit for use, and defendant's servants whose duty it was to repair such machinery, knew or by reasonable care might have known of such defects in said machinery, then such neglect upon the part of its servants is imputable to the defendant and if the boiler exploded by reason of such defects and injured the plaintiff, the defendant would be responsible for the injuries inflicted upon plaintiff, if plaintiff in no way, by his own neglect, contributed to his injuries. *Texas, etc., R. Co. v. Barrett*, 166 U. S. 617, 619, 41 L. Ed. 1136.

**42. Cars.**—*Texas, etc., R. Co. v. Archibald*, 170 U. S. 665, 669, 42 L. Ed. 1188; *Baltimore, etc., R. Co. v. Mackey*, 157 U. S. 72, 91, 39 L. Ed. 624. See, also, *Texas, etc., R. Co. v. Barrett*, 166 U. S. 617, 619,

41 L. Ed. 1136. See the title FELLOW SERVANTS, vol. 6, p. 250.

If no one is appointed by a railroad company to look after the condition of the cars, and see that the machinery and appliances used to move, and to stop them, are kept in repair and in good working order, its liability for injuries is clear. Its negligence in such case is in the highest degree culpable. If, however, one is appointed by it charged with that duty, and the injuries result from his negligence in its performance, the company is liable. He is, so far as that duty is concerned, the representative of the company; his negligence is its negligence, and imposes a liability upon it, unless it is relieved therefrom by statute. It is not so relieved by the Dakota civil code, § 1130. *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 652, 29 L. Ed. 755.

**43.** In a suit against a railroad company for injuries caused by a failure on the part of the company to properly inspect its cars the sufficiency of the number of inspectors and their competency furnishes no defense. *Union Pac. R. Co. v. Daniels*, 152 U. S. 684, 38 L. Ed. 597.

**44.** *Texas, etc., R. Co. v. Barrett*, 166 U. S. 617, 618, 41 L. Ed. 1136.

**45. Foreign cars.**—*Baltimore, etc., R. Co. v. Mackey*, 157 U. S. 72, 91, 39 L. Ed. 624.

A railroad company is bound to inspect the cars of another company used upon its road, just as it would inspect its own cars; it owes this duty as master, and is responsible for the consequences of such defects as would be disclosed or discovered by ordinary inspection; and when cars come in from another road which have defects, visible or discernible by ordinary examination, it must either remedy such defects or refuse to take them. *Baltimore, etc., R. Co. v. Mackey*, 157 U. S. 72, 91, 39 L. Ed. 624.

This duty of examining foreign cars must obviously be performed before such cars are placed in trains upon the defendant's road or furnished to its employees

e. *Duty to Make and Publish Rules to Promote Servant's Safety*.—It has been held in many states that the master owes the duty of adopting and promulgating safe and proper rules for the conduct of his business, including the government of the machinery and the running of trains on a railroad track.<sup>46</sup>

f. *Duty to Warn or Instruct Servant*.—If persons engaged in dangerous occupations are not informed of the accompanying dangers by the promoters thereof, or by the employers of laborers thereon, and such laborers remain in ignorance of the dangers and suffer in consequence, the employers will be chargeable for the injuries sustained.<sup>47</sup>

**Experienced Employees**.—Where an engine is moving slowly through a railroad yard, the company is not compelled to send a man in front of the cars to give experienced employees notice of its approach, and it is no negligence where such an employee is run down by such engine.<sup>48</sup>

g. *Degree of Care Required*.—Before an employer should be held responsible in damages it should appear that in some way, by the exercise of reasonable care and prudence, he could have avoided the injury. He cannot be personally present everywhere and at all times, and in the nature of things cannot guard against every temporary act of negligence by one of his employees.<sup>49</sup> Ordinary care implies the exercise of reasonable diligence, and reasonable diligence implies, as between the employer and employee, such watchfulness, caution, and foresight as, under all the circumstances of the particular service, careful, prudent men ought to exercise;<sup>50</sup> the greater the risk which attends the work to be done and the machinery to be used, the more imperative is the obligation resting upon him. Reasonable care becomes, then, a demand of higher supremacy, and yet in all cases it is a question of the reasonableness of the care—reasonableness depending upon the danger attending the place or the

for transportation. When so furnished, the employees whose duty it is to manage the trains have a right to assume that, so far as ordinary care can accomplish it, the cars are equipped with safe and suitable appliances for the discharge of their duty, and that they are not to be exposed to risk or danger through the negligence of their employer. *Baltimore, etc., R. Co. v. Mackey*, 157 U. S. 72, 91, 39 L. Ed. 624.

**46. Duty to make and publish rules to promote servant's safety**.—*Northern Pac. R. Co. v. Peterson*, 162 U. S. 346, 353, 40 L. Ed. 994. See the title FELLOW SERVANTS, vol. 6, p. 252.

**47. Duty to warn or instruct servant**.—*Mather v. Rillston*, 156 U. S. 391, 399, 39 L. Ed. 464.

**48. Experienced employees**.—*Aerkfetz v. Humphreys*, 145 U. S. 418, 420, 36 L. Ed. 758.

Where one is an experienced employee of a railroad company, the measure of the railroad's duty to warn him, is not such as to a passenger or stranger. *Aerkfetz v. Humphreys*, 145 U. S. 418, 419, 36 L. Ed. 758.

**49. Degree of care required**.—*Northern Pac. R. Co. v. Dixon*, 194 U. S. 338, 346, 48 L. Ed. 1006. See ante, "In General," III, A.

The master is not the insurer of the safety of its engines but is required to exercise only ordinary care to keep such engines in good repair, and if he has used such ordinary care he is not liable for any injury resulting to the servant

from a defect therein not discoverable by such ordinary care. *Texas, etc., R. Co. v. Barrett*, 166 U. S. 617, 618, 41 L. Ed. 1136.

**50. Wabash R. Co. v. McDaniels**, 107 U. S. 454, 460, 27 L. Ed. 605.

"By ordinary care is meant such as a prudent man would use under the same circumstances." *Texas, etc., R. Co. v. Barrett*, 166 U. S. 617, 619, 41 L. Ed. 1136.

A brakeman was jostled off the ice-covered top of a freight car by a sudden bumping of the cars together in coupling, and was severely injured. The question whether the defendant railway company is liable for the injury depends not on whether the freight train was handled in the usual and ordinary way but whether it was handled with ordinary care. *Texas, etc., R. Co. v. Behymer*, 189 U. S. 468, 470, 47 L. Ed. 905.

Where the jury are instructed that the employees of a railroad corporation have a right to expect that the corporation will, as far as possible, provide for their protection in moving its trains sufficient machinery in good order and condition, and that it will exercise reasonable care and caution not to use cars in its trains having defective brakes, and it is objected that the words "as far as possible" impose too great a duty upon the railroad, the objection is not well founded, for further on in the instruction the court informs them that their company must exercise "reasonable care and caution," and



machinery;<sup>51</sup> for example, occupations, however important, which cannot be conducted without necessary danger to life, body, or limb should not be prosecuted at all without all reasonable precautions afforded by science against such dangers. The necessary danger attending them should operate as a prohibition to their pursuit without such safeguards.<sup>52</sup>

**D. Assumption of Risks by Servant**—1. **DISTINGUISHED FROM CONTRIBUTORY NEGLIGENCE**.—The question of assumption of risk is quite apart from that of contributory negligence.<sup>53</sup> The practical difference of the two ideas is in the degree of their proximity to the particular harm. The preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by the assumption of risk. The act more immediately leading to a specific accident is called negligence. The difference between the two is one of degree rather than of kind.<sup>54</sup>

2. **ASSUMPTION OF RISKS BY INFANT**.—See the title **FELLOW SERVANTS**, vol. 6, p. 267.

3. **WHAT RISKS ARE ASSUMED BY SERVANT**—a. *Risks Ordinarily Incident to Service*—(1) *In General*.—Where a servant engages for the performance of specified services, he takes upon himself the ordinary risks incident thereto;<sup>55</sup>

thus means that "as far as possible," exercising reasonable care and caution. *Baltimore, etc., R. Co. v. Mackey*, 157 U. S. 72, 84, 39 L. Ed. 624.

There is no occasion to charge that a railroad company is only bound to exercise reasonable care to supply a reasonably safe engine where the uncontradicted facts show that it had not furnished such an one, and there was no evidence that it had exercised ordinary or reasonable care to furnish it, but on the contrary there was evidence to show that it had not. *Choctaw, etc., R. Co. v. Holmway*, 191 U. S. 334, 339, 48 L. Ed. 207.

51. *Patton v. Texas, etc., R. Co.*, 179 U. S. 658, 663, 45 L. Ed. 361.

52. *Mather v. Rillston*, 156 U. S. 391, 399, 39 L. Ed. 464.

If no one is appointed by a railroad company to look after the condition of the cars, and see that the machinery and appliances used to move, and to stop them, are kept in repair and in good working order, its liability for injuries is clear. Its negligence in such case is in the highest degree culpable. *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 652, 29 L. Ed. 777.

53. **Distinguished from constituting negligence**.—*Choctaw, etc., R. Co. v. McDade*, 191 U. S. 64, 68, 48 L. Ed. 96.

54. "Assumption of risk in this broad sense obviously shades into negligence as commonly understood. Negligence consists in conduct which common experience or the special knowledge of the actor shows to be so likely to produce the result complained of, under the circumstances known to the actor, that he is held answerable for that result, although it was not certain, intended, or foreseen. He is held to assume the risk upon the same ground. *Choctaw, etc., R. Co. v. McDade*, 191 U. S. 64, 68, 48 L. Ed. 96. Apart from the notion of contract, rather shadowy as applied to this broad form of

the latter conception, the practical difference of the two ideas is in the degree of their proximity to the particular harm. The preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by the assumption of the risk. The act more immediately leading to a specific accident is called negligence. But the difference between the two is one of degree rather than of kind; and when a statute exonerates a servant from the former, if at the same time it leaves the defense of contributory negligence still open to the master, a matter upon which we express no opinion, then, unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name. Especially is this true in Pennsylvania, where some cases, at least, seem to have treated assumption of risk and negligence as convertible terms." *Schlemmer v. Buffalo, etc., R. Co.*, 205 U. S. 1, 12, 51 L. Ed. 681.

55. **Risks ordinarily incident to service**.—*Chicago, etc., R. Co. v. Ross*, 112 U. S. 377, 382, 28 L. Ed. 787; *Tuttle v. Detroit, etc., Railway*, 122 U. S. 189, 195, 30 L. Ed. 1114; *Texas, etc., R. Co. v. Archibald*, 170 U. S. 685, 673, 42 L. Ed. 1188.

An early, if not the earliest, application of the phrase "assumption of risk" was the establishment of the exception to the liability of a master for the negligence of his servant when the person injured was a fellow servant of the negligent man. But, at the present time, the motion is not confined to risks of such negligence. It is extended to dangerous conditions, as of machinery, premises and the like, which the injured party understood and appreciated when he submitted his person to them. In this class of cases the risk is said to be assumed because a person who freely and voluntarily encounters it has only himself to thank if harm comes, on a general principle of our law.



and the employer may rely on this fact.<sup>56</sup> As a consequence, if the servant suffers by exposure to them, he cannot recover compensation from his employer.<sup>57</sup>

(2) *Reason for Rule.*—The reason most generally assigned for this rule is, that the servant, when he engages in the employment, does so in view of all the incidental hazards, and that he and his employer, when making their negotiations, fixing the terms and agreeing upon the compensation that shall be paid to him, must have contemplated these as having an important bearing upon their stipulations.<sup>58</sup> There is also another reason often assigned for this exemption—that of a supposed public policy. It is assumed that the exemption operates as a stimulant to diligence and caution on the part of the servant for his own safety as well as that of his master. Much potency is ascribed to this assumed fact by reference to those cases where diligence and caution on the part of servants constitute the chief protection against accidents. But it may be doubted whether the exemption has the effect thus claimed for it.<sup>59</sup>

b. *Defective Machinery or Appliances.*—It is implied in a servant's contract that his employer will make adequate provision that no danger shall ensue to him; therefore, the servant does not undertake to incur the risks from defective machinery or other instruments with which he is to work.<sup>60</sup>

c. *Want of Sufficient and Skillful Colaborers.*—A servant does not undertake to incur the risks arising from the want of sufficient and skillful colaborers. His contract implies that in regard to these matters his employer will

*Schlemmer v. Buffalo, etc., R. Co.*, 205 U. S. 1, 12, 51 L. Ed. 681.

An employee not placed by the employer in a position of undisclosed danger, but a mature man, doing the ordinary work which he had engaged to do, and whose risks in this respect were obvious to any one, assumes the risk of an accident incidental to such employment, and no negligence can be imputed to the employer. *Kohn v. McNulta*, 147 U. S. 238, 241, 37 L. Ed. 150.

A stewardess on a steamship takes upon herself the natural and ordinary risks incident to the performance of her duty. *Quebec Steamship Co. v. Merchant*, 133 U. S. 375, 379, 33 L. Ed. 656.

A brakeman in a railroad yard assumes the risk of coupling cars belonging to a foreign road which have bumpers larger than those of his own road, and a railroad company is guilty of no negligence in receiving into its yards, and passing over its line, cars, freight or passenger, different from those it itself owns and uses. *Kohn v. McNulta*, 147 U. S. 238, 240, 37 L. Ed. 150.

The top of a freight car being covered with ice and such fact being known to the train crew, a brakeman standing thereon is not held to assume the risk of falling off when the car is jostled violently by being brought to a sudden stop. *Texas, etc., R. Co. v. Behymer*, 189 U. S. 468, 470, 47 L. Ed. 905.

56. *Employer may rely on assumption of risk.*—*Texas, etc., R. Co. v. Archibald*, 170 U. S. 665, 672, 42 L. Ed. 1188.

*Implied contracts.*—It is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for

compensation. *Hough v. Railway Co.* 100 U. S. 213, 217, 25 L. Ed. 612.

57. *Cannot recover.*—*Chicago, etc., R. Co. v. Ross*, 112 U. S. 377, 382, 28 L. Ed. 787; *Tuttle v. Detroit, etc., Railway*, 122 U. S. 189, 195, 30 L. Ed. 1114.

58. *Reason for rule.*—*Tuttle v. Detroit, etc., Railway*, 122 U. S. 189, 195, 30 L. Ed. 1114; *Chicago, etc., R. Co. v. Ross*, 112 U. S. 377, 382, 28 L. Ed. 787; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 647, 29 L. Ed. 755. See, also, *Schlemmer v. Buffalo, etc., R. Co.*, 205 U. S. 1, 12, 51 L. Ed. 681.

The obvious reason for this exemption is, that he has, or in law is supposed to have, them in contemplation when he engages in the service, and that his compensation is arranged accordingly. He cannot, in reason, complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid. *Chicago, etc., R. Co. v. Ross*, 112 U. S. 377, 382, 28 L. Ed. 787.

59. *Chicago, etc., R. Co. v. Ross*, 112 U. S. 377, 382, 28 L. Ed. 787.

In speaking of this reason, Field, J., said: "We have never known parties more willing to subject themselves to dangers of life or limb because, if losing the one, or suffering in the other, damages could be recovered by their representatives or themselves for the loss or injury. The dread of personal injury has always proved sufficient to bring into exercise the vigilance and activity of the servant." *Chicago, etc., R. Co. v. Ross*, 112 U. S. 377, 382, 28 L. Ed. 787.

60. *Defective machinery or appliances.*—*Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 648, 29 L. Ed. 755. See ante, "Duty to Provide Safe Machinery and Appliances," III, C, 3, b.

make adequate provision that no danger shall ensue to him.<sup>61</sup>

d. *Open and Obvious Defects and Dangers.*—A servant entering into employment which is hazardous assumes the risks which are apparent to ordinary observation, and, when he accepts or continues in the service with knowledge of the character of structures from which injury may be apprehended, he also assumes the hazards incident to the situation.<sup>62</sup>

e. *Risks Outside of Scope of Employment.*—See the title FELLOW SERVANTS, vol. 6, p. 267.

f. *Risks Arising from Master's Negligence.*—The servant does not assume the risk of the master's negligence.<sup>63</sup> It is indispensable to the employer's exemption from liability to his servant for the consequences of risks thus incurred, that he should himself be free from negligence. He must furnish the servant the means and appliances which the service requires for its efficient and safe performance, unless otherwise stipulated; and if he fail in that respect, and an

61. *Want of sufficient and skillful co-laborers.*—Northern Pac. R. Co. v. Herbert, 116 U. S. 642, 648, 29 L. Ed. 755. See, generally, the title FELLOW SERVANTS, vol. 6, p. 245.

62. *Open and obvious defects and dangers.*—Texas, etc., R. Co. v. Archibald, 170 U. S. 665, 673, 42 L. Ed. 1188. See, also, Hough v. Railway Co., 100 U. S. 213, 224, 25 L. Ed. 612; District of Columbia v. McElligott, 117 U. S. 621, 631, 29 L. Ed. 946; Goodlett v. Louisville, etc., Railroad, 122 U. S. 391, 411, 30 L. Ed. 1230; Northern Pac. R. Co. v. Herbert, 116 U. S. 642, 29 L. Ed. 755; Kane v. Northern Cent. R. Co., 128 U. S. 91, 96, 32 L. Ed. 339.

The right of the employee to rely on the execution of his duties by the master is subject to the exception that where a defect is known to the employee, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus in the face of knowledge and without objection, without assuming the hazard incident to such a situation. Choctaw, etc., R. Co. v. McDade, 191 U. S. 64, 68, 48 L. Ed. 96.

Where the evidence shows that the plaintiff had been in the employ of the defendant for several years as brakeman and as conductor of freight trains; that his duty brought him frequently into the yard to make up his trains; that he necessarily knew of the form of frog there in use; and it is not shown that he ever complained to his employers of the character of frogs used by them; he is assumed to have entered and continued in the employ of the defendant with full knowledge of the dangers asserted to arise out of the use of unblocked frogs. Southern Pac. Co. v. Seley, 152 U. S. 145, 154, 155, 38 L. Ed. 391.

"A laborer upon a railroad track, either in switching trains or repairing the track, is constantly exposed to the danger of passing trains, and bound to look out for them; any negligence in the management of such trains is a risk which may or should be contemplated by him in entering upon the service of the com-

pany." Northern Pac. R. Co. v. Hambly, 154 U. S. 349, 357, 38 L. Ed. 1009.

A railroad yard, where trains are made up, necessarily has a great number of tracks and switches close to one another, and any one who enters the service of a railroad corporation, in any work connected with the making up or moving of trains, assumes the risks of that condition of things; and this is so although it is night, and he has not been in the yard before, where his lantern affords the means of perceiving the arrangement of the switch and the position of the adjacent tracks. Randall v. Baltimore, etc., R. Co., 109 U. S. 478, 483, 27 L. Ed. 1003.

Public policy does not require the courts to lay down any rule of law to restrict a railroad company as to the curves it shall use in its freight depots and yards, where the safety of passengers and the public is not involved; much less that it should be left to the varying and uncertain opinions of juries to determine such engineering questions, and the brakemen and others employed to work in such situations must decide for themselves whether they will encounter the hazards incidental thereto; and if they decide to do so, they must be content to assume the risks. Tuttle v. Detroit, etc., Railway, 122 U. S. 189, 194, 30 L. Ed. 1114.

Where the work of construction and repair of a railroad must be done in the intervals between the running of regular trains, this latter fact being known to an employee who is employed to do construction work with a construction train, he must be held to have assumed the risk of doing it at the times at which it had to be done, and if he is hurt by reason of haste having to be made, he cannot recover from the railroad company, in the absence of negligence on its part. Coyne v. Union Pac. R. Co., 133 U. S. 370, 373, 33 L. Ed. 651.

63. *Risks arising from master's negligence.*—Hough v. Railway Co., 100 U. S. 213, 25 L. Ed. 612; Wabash R. Co. v. McDaniels, 107 U. S. 454, 27 L. Ed. 605;



injury result, he is as liable to the servant as he would be to a stranger. In other words, whilst claiming such exemption he must not himself be guilty of contributory negligence.<sup>64</sup>

*g. Negligence of Fellow Servant.*—See the title FELLOW SERVANTS, vol. 6, p. 245.

4. REMAINING IN SERVICE UPON PROMISE TO REMOVE DANGER.—If the servant, having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances removes all ground for the argument that the servant by continuing the employment engages to assume the risks.<sup>65</sup>

**E. Contributory Negligence of Servant**—1. EFFECT OF CONTRIBUTORY NEGLIGENCE.—It is for those who enter into an employment of danger to exercise all that care and caution which the perils of the business in each case demand.<sup>66</sup>

2. WHAT CONSTITUTES CONTRIBUTORY NEGLIGENCE—*a. Knowledge of Defects and Dangers.*—An employee is guilty of contributory negligence, which will defeat his right to recover for injuries sustained in the course of his employment, where such injuries substantially resulted from dangers so obvious and threatening that a reasonably prudent man, under similar circumstances, would have avoided them if in his power to do so. He will be deemed, in such case, to have assumed the risks involved in such needless exposure of himself

Northern Pac. R. Co. v. Herbert, 116 U. S. 642, 29 L. Ed. 755; Northern Pac. R. Co. v. Babcock, 154 U. S. 190, 38 L. Ed. 958; Choctaw, etc., R. Co. v. McDade, 191 U. S. 64, 67, 48 L. Ed. 96; Union Pac. R. Co. v. O'Brien, 161 U. S. 451, 457, 40 L. Ed. 766.

64. Chicago, etc., R. Co. v. Ross, 112 U. S. 377, 383, 28 L. Ed. 787. See, also, Choctaw, etc., R. Co. v. McDade, 191 U. S. 64, 68, 48 L. Ed. 96.

65. Hough v. Railway Co., 100 U. S. 213, 225, 25 L. Ed. 612.

If the servant of a railroad company who has knowledge of defects in machinery gives notice thereof to the proper officer, and is promised that they shall be remedied, his subsequent use of it, in the well-grounded belief that it will be put in proper condition within a reasonable time, does not necessarily, or as matter of law, make him guilty of contributory negligence. It is a question for the jury, whether, in relying upon such promise, and using the machinery after he knew its defective or insufficient condition, he was in the exercise of due care. The burden of proof in such a case, is upon the company to show contributory negligence. Hough v. Railway Co., 100 U. S. 213, 214, 25 L. Ed. 612.

"If the engineer, after discovering or recognizing the defective condition of the cow catcher or pilot, had continued to use the engine, without giving notice thereof to the proper officers of the company, he would undoubtedly have been guilty of such contributory negligence as to bar a recovery, so far as such defect was found to have the efficient cause of the death. He would be held, in that case, to have himself risked

the dangers which might result from the use of the engine in such defective condition. But 'there can be no doubt that, where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby, within such a period of time after the promise as it would be reasonable to allow for its performance, and, as we think, for any injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept.' Shearman & Redf. Negligence, § 96." Hough v. Railway Co., 100 U. S. 213, 224, 25 L. Ed. 612.

Where the attention of the shop foreman and the master mechanic was called to a defective pilot on an engine by the engineer, and such engineer was then absent for two weeks and immediately on his return at midnight was ordered to take the engine out, the roundhouse being so full of steam that he could not examine the pilot, his going out with the engine was no assumption by him of the risk of defective machinery. Northern Pac. R. Co. v. Babcock, 154 U. S. 190, 200, 38 L. Ed. 958.

66. Contributory negligence of servant.—Southern Pac. Co. v. Seley, 152 U. S. 145, 153, 38 L. Ed. 391.

The liability of a master is conditioned upon the exercise of reasonable and proper care and caution on the part of the employee. Railroad Co. v. Jones, 95 U. S. 439, 443, 24 L. Ed. 506.

The servant of a railroad is bound to exercise care to avoid injuries to himself. If he knows, or might know by ordinary attention, the defective condition of certain brakes and cars when he mounts the cars, and thus exposes himself to



to danger.<sup>67</sup> It is the duty of an employee working in the face of an obvious risk, to exercise due care in protecting himself from injury, notwithstanding any promise or assurance made by his employer to obviate or remedy the cause of the risk.<sup>68</sup> But in determining whether an employee has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might reasonably be expected, regard must always be had to the exigencies of his position, indeed, to all the circumstances of the particular occasion.<sup>69</sup>

b. *Failure to Discover and Remedy Defects.*—A man is bound to use his eyes and if by their use he can see that the machinery of his engine is defective, he is bound by that fact even though in truth he has not observed it; but he is not bound to make a careful examination of every particle of the engine on which he is fireman in order to charge the defendant company with negligence or to exonerate himself from the charge of contributory negligence.<sup>70</sup> Nor can negligence be attributed to an employee on the ground that he was ignorant of the defective condition of a brake, which it was his duty to examine but where he had no opportunity to make the examination.<sup>71</sup>

c. *Failure to Take Precautions against Known Dangers.*—There can be no recovery by a servant against his master for an injury caused by the failure of the servant, while in a position of danger or using defective appliances, to take

danger—in other words, if he does use his senses as men generally use theirs to keep from harm—he cannot complain of the injury which he suffered. *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 655, 29 L. Ed. 755.

If the employee himself has been wanting in such reasonable care and prudence as would have prevented the happening of the accident, he is guilty of contributory negligence, and the employer is thereby absolved from responsibility for the injury, although it was occasioned by the defect of the machinery, through the negligence of the employer. *Washington, etc., R. Co. v. McDade*, 135 U. S. 554, 570, 34 L. Ed. 235.

67. *Kane v. Northern Cent. R. Co.*, 128 U. S. 91, 94, 32 L. Ed. 339. See, also, *Hough v. Railway Co.*, 100 U. S. 213, 224, 25 L. Ed. 612; *District of Columbia v. McElligott*, 117 U. S. 621, 29 L. Ed. 946; *Goodlett v. Louisville, etc., Railroad*, 122 U. S. 391, 411, 30 L. Ed. 1230; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 29 L. Ed. 755.

68. *District of Columbia v. McElligott*, 117 U. S. 621, 29 L. Ed. 946.

Where a laborer brings an action to recover damages for an injury received while at work on a gravel bank, it is error to instruct the jury that, in determining whether the plaintiff was guilty of contributory negligence, they need only determine whether he continued at work for a longer time than was reasonably necessary to enable the employer to fulfill his promise to have some one watch the bank. If he remained at work in the face of such imminent danger as would be likely to cause injury at any moment, he would be guilty of such contributory negligence as would defeat his action for damages. *District of Columbia v. McElligott*, 117 U. S. 621, 633, 29 L. Ed. 946.

69. *Kane v. Northern Cent. R. Co.*, 128 U. S. 91, 94, 32 L. Ed. 339.

It cannot be said that a brakeman is guilty of contributory negligence in staying upon a train after observing that a step was missing from one of the cars over which he might pass while discharging his duties. An employee upon a railroad train, likely to meet other trains, owes it to the public, as well as to his employer, not to abandon his post unnecessarily. Besides, the danger arising from such a defective car is not so imminent as to subject him to the charge of recklessness in remaining at his post under the conductor's assurance that the car should be removed from the train when it reached the coal yard or junction, if, upon examining his manifests, he found that it did not contain perishable freight. *Hough v. Railway Co.*, 100 U. S. 213, 224, 25 L. Ed. 612; *District of Columbia v. McElligott*, 117 U. S. 621, 631, 29 L. Ed. 946; *Kane v. Northern Cent. R. Co.*, 128 U. S. 91, 94, 32 L. Ed. 339.

"While a proper regard for his own personal safety, and his duty to his employer, required that he should bear in mind, while passing over cars to his station, that one of them was defective in its appointments, it was also his duty to reach his post at the earliest practicable moment, for not only might the safety of the moving train have depended upon the brakemen being at their post, but the engineer was entitled to know, as the train moved off, by signals from the brakemen, if necessary, that none of the cars constituting the train had become detached." *Kane v. Northern Cent. R. Co.*, 128 U. S. 91, 95, 32 L. Ed. 339.

70. *Choctaw, etc., R. Co. v. Holloway*, 191 U. S. 334, 338, 48 L. Ed. 207.

71. *Baltimore, etc., R. Co. v. Mackey*, 157 U. S. 72, 85, 39 L. Ed. 624.

a precaution for his own safety, which is both obvious and well known to him.<sup>72</sup>

d. *Voluntary Assumption of Position of Danger*.—A servant cannot recover of the master damages for a personal injury inflicted on him in consequence of his voluntary exposure of himself in a position of danger not in the line of his duty.<sup>73</sup>

e. *Failure to Refuse to Work with Incompetent Employee*.—See post, "Province of Court and Jury," III, F, 3.

F. **Actions for Injuries**—1. EVIDENCE—a. *Presumption and Burden of Proof*—(1) *Presumption of Negligence*.—The fact of accident carries with it

72. **Failure to take precautions against known dangers**.—Where a car repairer went under a car which was standing on the track with a train in front of it, and knowing that a caboose was to be attached to the rear, without putting out a flag or other signal warning of his being under the car in order to protect himself from the peril which was obvious and of which he must have been aware, and as the caboose backed down, it was both seen and heard by him, with ample time for him to get out, the fatal injury which he received was the result of his own inexcusable negligence; and this negligence cannot be excused by the fact that he relied on a warning that the caboose was coming, which he expected would be given by another car repairer who remained on the side of the track. *Southern Pac. Co. v. Pool*, 160 U. S. 438, 444, 445, 40 L. Ed. 485.

A brakeman cannot recover from the receiver of a railroad company for an injury to his arm caused by coupling cars with unusually long bumpers, such cars belonging to a different road from the one he was working on, where he had been engaged in the work of coupling cars in the defendant's yards for over two months before the accident and was familiar with the tracks and conditions of the yard and experienced in the business and had seen and coupled cars like the ones that caused the accident more than once and the danger from the long bumpers was apparent. *Kohn v. McNulta*, 147 U. S. 238, 241, 37 L. Ed. 150.

A pitman of an electric railway company while connecting a current to the bottom of the car before the conductor had removed the trolley from the overhead wire, touched an uninsulated part of the wire and was killed. It was unnecessary for him to have touched this uninsulated part. Granting that the conductor was negligent, the action of the deceased in touching the uninsulated ends of the wires exonerates the defendant. *Looney v. Metropolitan R. Co.*, 200 U. S. 480, 485, 486, 50 L. Ed. 564.

Plaintiff, a track repairer who had been long employed in a railroad yard and was familiar with the moving of cars backward and forward by the switch engine, placed himself with his face away from the direction from which cars were to be expected and continued his work without even turning to look, though for

a quarter of a mile there was no obstruction and he could have observed approaching cars. Under these circumstances he was struck and injured by a slowly moving engine. Upon an action for damages against the railroad the court held that he was guilty of such contributory negligence as would preclude his recovery. *Aerkfetz v. Humphreys*, 145 U. S. 418, 420, 36 L. Ed. 758.

The person in direct charge of a yard engine used for switching cars has a right to act on the belief that the various employees in the yard, familiar with the continuously recurring movement of the cars, will take reasonable precaution against their approach. *Aerkfetz v. Humphreys*, 145 U. S. 418, 420, 36 L. Ed. 758.

In *Goodlett v. Louisville, etc., Railroad*, 122 U. S. 391, 411, 30 L. Ed. 1230, it was held that the lower court did not commit error in instructing the jury to find for the defendant, where the evidence made a case of utter recklessness upon the part of a deceased, who was a section boss of the defendant, charged with the duty of keeping its road in repair between certain points, so that trains could pass over it in safety, and where he was guilty of the grossest negligence in running his hand car into a deep cut where he was injured, without having sent any one ahead to watch for, and warn an oncoming passenger train, by which he was injured and which he knew was approaching, or would soon reach that point on the road, and where but for his negligence in that respect he would not have been injured.

73. **Voluntary assumption of position of danger**.—Where the roof of a mine is shattered and an employee, with full knowledge of the danger, participates in removing a post from under it, to make way for a stronger support, and then before the new post is put in sits down under the shattered roof and is mortally injured by its fall, there can be no recovery from his master, as his negligence is the direct cause of his death. *Bunt v. Sierra Butte Gold Min. Co.*, 138 U. S. 483, 485, 34 L. Ed. 1031.

In *Tuttle v. Detroit, etc., Railway*, 122 U. S. 189, 30 L. Ed. 1114, an employee was ordered to couple some cars standing on a curve, which was so sharp that the draw heads missed and crushed the employee who was attempting to couple from the inside of the draw bar. The



no presumption of negligence on the part of the employer.<sup>74</sup>

(2) *Burden of Proof*.—It is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence;<sup>75</sup> and it is not sufficient for the employee to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen

cars on the outside part of the curve did not come together, and if he had worked from that side he would not have been injured. Held, that he wantonly assumed the risk of remaining upon the inside of the draw bar, when he should have gone on the other side, and that the railroad was not responsible for his injury because of the sharp curve.

An employee is guilty of contributory negligence who improperly rides on the pilot or bumper of a locomotive, forming part of a construction train of employer, at time of collision with loaded cars standing on tracks, and where persons on the cars attached to the train were not hurt. *Griggs v. Houston*, 104 U. S. 553, 26 L. Ed. 840.

A. was one of a party of men employed by a railroad company in constructing and repairing its roadway. They were usually conveyed by the company to and from the place where their services were required, and a box car was assigned to their use. Although on several occasions forbidden to do so, and warned of the danger, A., on returning from work one evening, rode on the pilot or bumper of the locomotive, when the train, in passing through a tunnel, collided with cars standing on the track, and he was injured. There was ample room for him in the box car. All in it were unhurt. Held: 1. That, as A. would not have been injured had he used ordinary care and caution, he is not entitled to recover against the company. 2. That the knowledge, assent, or direction of the agents of the company as to what he did at the time in question is immaterial. The company, although bound to a high degree of care, did not insure his safety. *Railroad Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506.

Plaintiff, a workman on a gravel train, was sitting in a dangerous place on one of the flat cars, though he had been warned by the train master to sit in the caboose. His legs were hanging over in a position in which he could easily be jostled off and when a string of cars backed down at considerable speed to couple with the one he was on, he paid no attention to shouts of warning though such shouts were heard by others in the vicinity. He was thrown off and injured by the shock of the cars striking together and sued the railroad, but the court held that he was guilty of contributory negligence and could not recover. *St. Louis, etc., R. Co. v. Schumacher*, 152 U. S. 77, 38 L. Ed. 361.

The plaintiff, a fireman, knew that his

engine was to be taken to the round-house and repaired before he was called upon to perform any duties upon it, but for his own convenience before such repair he went on the engine and attempted to discharge his duties of cleaning, etc. Since he preferred not to wait for such inspection and repair, but to take the chances as to the condition of the engine, he ought not to hold the company responsible for a defect causing his injury which would undoubtedly have been disclosed by the inspection and then repaired. *Patton v. Texas, etc., R. Co.*, 179 U. S. 658, 663, 45 L. Ed. 361.

**74. Presumption of negligence.**—*Patton v. Texas, etc., R. Co.*, 179 U. S. 658, 663, 45 L. Ed. 361.

"While in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against him, for there is prima facie a breach of his contract to carry safely, *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. Ed. 115; *Railroad Co. v. Pollard*, 22 Wall. 341, 22 L. Ed. 877; *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435, 443, 35 L. Ed. 458, a different rule obtains as to an employee. The fact or accident carries with it no presumption of negligence on the part of the employer." *Patton v. Texas, etc., R. Co.*, 179 U. S. 658, 663, 45 L. Ed. 361. See the title *CARRIERS*, vol. 3, p. 556.

The mere fact that an injury is received by a servant in consequence of an explosion of an engine, will not entitle him to a recovery, but he must, besides the fact of the explosion, show that it resulted from the failure of the master to exercise ordinary care either in selecting such engine or in keeping it in reasonable safe repair. *Texas, etc., R. Co. v. Barrett*, 166 U. S. 617, 618, 41 L. Ed. 1136.

A pitman was killed while connecting a current to the bottom of an electric car. Unless he had touched an uninsulated part of the wires, no shock would have been received unless there was a leak in the insulation arising from defective construction or wear and tear in use. But a defect cannot be inferred from the mere fact of an injury. There must be some proof of negligence. *Looney v. Metropolitan R. Co.*, 200 U. S. 480, 485, 486, 50 L. Ed. 564.

**75. Burden of proof.**—*Texas, etc., R. Co. v. Barrett*, 166 U. S. 617, 41 L. Ed. 1136; *Patton v. Texas, etc., R. Co.*, 179



things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion.<sup>76</sup>

b. *Admissibility*.—Where defendant introduces evidence tending to show his nonnegligence, the plaintiff may give evidence which tends to qualify defendant's evidence.<sup>77</sup> But all evidence immaterial to the issue is properly excluded.<sup>78</sup>

2. INSTRUCTIONS.—A nice criticism of words will not be indulged when the meaning of the instruction is plain and obvious, and cannot mislead the jury.<sup>79</sup>

3. PROVINCE OF COURT AND JURY.—Questions of negligence and contributory negligence are, ordinarily, questions of fact to be passed upon by the jury,<sup>80</sup>

U. S. 658, 663, 45 L. Ed. 361. See, also, *Looney v. Metropolitan R. Co.*, 200 U. S. 480, 485, 486, 50 L. Ed. 564.

If a boiler on a locomotive which exploded and injured an employee was defective and unfit for use, and defendant's servants whose duty it was to repair such machinery, knew or by reasonable care might have known of such defects in said machinery, then such neglect upon the part of its servants is imputable to the defendant, and if the boiler exploded by reason of such defects and injured the plaintiff, the defendant would be responsible for the injuries inflicted upon plaintiff, if plaintiff in no way, by his own neglect, contributed to his injuries: But the burden of the proof is on the plaintiff to show that the boiler and engine that exploded were improper appliances to be used on its railroad by defendant; that by reason of the particular defects pointed out and insisted on by plaintiff, the boiler exploded and injured plaintiff. *Texas, etc., R. Co. v. Barrett*, 166 U. S. 617, 619, 41 L. Ed. 1136.

76. *Patton v. Texas, etc., R. Co.*, 179 U. S. 658, 663, 45 L. Ed. 361.

If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs. *Patton v. Texas, etc., R. Co.*, 179 U. S. 658, 663, 45 L. Ed. 361.

77. The admission of testimony to show that, after the accident, the water spout by which a brakeman was killed was reconstructed so as to be placed at a point farther removed from passing trains is not error. Evidence having been introduced by the railroad company to show by measurements that the water spout did not constitute danger to brakemen on passing trains, the court permitted plaintiff below to show that changes had been made which might have an effect upon the subsequent measurements offered in evidence. The jury were told that nothing could be inferred against the defendant company by reason of the fact that after the accident

such reconstruction of the spout was made, and that such change had no other bearing upon the issues of the case than to enable the jury to ascertain the value of the measurements offered in evidence. *Choctaw, etc., R. Co. v. McDade*, 191 U. S. 64, 69, 48 L. Ed. 96.

78. Plaintiff, a switchman, was knocked off the side of a freight car by a scale box placed close to the track. The defendant attempted to offer in evidence excerpts from an application for the position of brakeman made by the plaintiff two years before the accident, for the purpose of showing that plaintiff had notice of the location of the track scale box and that there was danger in being knocked off a car when passing it. It was held that it was proper to exclude such evidence as it was immaterial to the issue. *Texas, etc., R. Co. v. Swearingen*, 196 U. S. 51, 59, 60, 49 L. Ed. 382.

79. *Instructions*.—*Baltimore, etc., R. Co. v. Mackey*, 157 U. S. 72, 86, 39 L. Ed. 624. See, generally, the title INSTRUCTIONS, vol. 7, p. 26.

In a suit by a brakeman against a railroad company for injuries, it was argued that he had aggravated the injury by refusing proper surgical treatment. With regard to this, the jury were instructed in substance that it was his duty to submit to all treatment that a reasonably prudent person would have submitted to in order to improve his condition, and that no damages could be allowed which might have been prevented by reasonable care. It is suggested that, as a prudent man, he might have postponed recovery from his injury to recovery of damages. The instructions plainly excluded such a view. *Texas, etc., R. Co. v. Behymer*, 189 U. S. 468, 471, 47 L. Ed. 903.

80. *Questions of jury*.—*Elliott v. Chicago, etc., R. Co.*, 150 U. S. 245, 246, 37 L. Ed. 1068; *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542; *Schofield v. Chicago, etc., R. Co.*, 114 U. S. 615, 29 L. Ed. 224; *Delaware, etc., R. Co. v. Converse*, 139 U. S. 469, 35 L. Ed. 213; *Aerkfetz v. Humphreys*, 145 U. S. 418, 36 L. Ed. 758; *Southern Pac. Co. v. Pool*, 160 U. S. 438, 440, 40 L. Ed. 485; *Union Pac. R. Co. v. McDonald*, 152 U. S. 262,

but when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the

283, 38 L. Ed. 434. See ante, "Province of Court and Jury," II, C, 3. See, also, the titles JURY, vol. 7, p. 748; NEGLIGENCE.

"The question of negligence is one of law for the court only where the facts are such that all reasonable men must draw the same conclusion from them, or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish." *Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349, 361, 37 L. Ed. 1107; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 417, 36 L. Ed. 485; *Texas, etc., R. Co. v. Cox*, 145 U. S. 593, 606, 36 L. Ed. 829.

**Illustrative cases.**—In an action by an employee for damages against a railroad company, where the inference to be drawn from the facts is not so plain as to be a legal conclusion of contributory negligence, the question of negligence is one for the jury to determine. *Northern Pac. R. Co. v. Egeland*, 163 U. S. 93, 98, 41 L. Ed. 82.

A court errs in not submitting to the jury to determine whether a plaintiff in forgetting, or not recalling, at the precise moment, the fact that the car from which he attempted to let himself down was the one from which a step was missing, was in the exercise of the degree of care and caution which was incumbent upon a man of ordinary prudence in the same calling, and under the circumstances in which he was placed. If he was, then he was not guilty of contributory negligence that would defeat his right of recovery. *Kane v. Northern Cent. R. Co.*, 128 U. S. 91, 96, 32 L. Ed. 339.

Where a railroad is guilty of negligence in injuring an employee, and there is conflicting testimony as to the employee's contributory negligence, the question should be left for the jury to decide. *Jones v. East Tennessee, etc., R. Co.*, 128 U. S. 443, 32 L. Ed. 478.

"*Hough v. Railway Co.*, 100 U. S. 213, 224, 25 L. Ed. 612, \* \* \* was an action against a railroad company by the representatives of a locomotive engineer. The negligence there complained of, and to which, as was claimed, was to be solely attributed the death of the intestate, was that of the company's officers in assigning to the intestate, for his use, an engine which, by proper diligence on the part of such officers, might have been ascertained to be defective and unsafe. One of the defects there complained of was in the cow catcher or pilot of the engine; the other was that the whistle was insecurely fastened to the boiler. By

reason of the defect in the cow catcher, the engine was thrown from the track, whereby the whistle fastened to the boiler was displaced, and, from the opening thus made, hot water and steam issued, fatally scalding the deceased. It was admitted that the engineer had knowledge of the defect in the cow catcher, but it was not claimed that he was aware of the insufficient fastening of the whistle, or that the defect, if any, in that respect, was of such a character that he should have become advised of it while using the engine on the road. It was proved that he had given notice to the proper officers of the company of the defect in the cow catcher, and they promised that it should be remedied."

The court held that "it was for the jury to say whether the defect in the cow catcher or pilot was such that none but a reckless engineer, utterly careless of his safety, could have used the engine without it being removed. If, under all the circumstances, and in view of the promises to remedy the defect, the engineer was not wanting in due care in continuing to use the engine, then the company will not be excused for the omission to supply the proper machinery upon the ground of contributory negligence. That the engineer knew of the alleged defect was not, under the circumstances, and as matter of law, absolutely conclusive of want of due care on his part." *District of Columbia v. McElligott*, 117 U. S. 621, 623, 29 L. Ed. 943.

Plaintiff was a common laborer in the employment of a railway company. He was returning from work in a train provided by the company under the command of a conductor who was the direct superior of the plaintiff. Upon passing a certain station the conductor ordered plaintiff and three of his fellow laborers to jump, the train then going about four miles an hour and the platform being a foot lower than the car step. The other three jumped safely and then the plaintiff because of the order also jumped and was severely injured. In a suit for damages for his injury, the court held that the question of his contributory negligence was one for the jury. *Northern Pac. R. Co. v. Egeland*, 163 U. S. 93, 98, 99, 41 L. Ed. 82.

A brakeman when last seen was transmitting a signal from the conductor to the engineer to run past a certain station, at which station there was a water tank having a water spout hanging at an angle at the side of it. Shortly after passing this station the brakeman was missed from the train and his body was found between six and seven hundred feet beyond the tank with injuries on it tending to show that he had been

case from the consideration of the jury, and direct a verdict.<sup>81</sup>

**Failure to Refuse to Work with Incompetent Employee.**—The failure of an employee to refuse to work with an incompetent fellow servant will not

struck by the water spout. His lantern was found on top of the car where he was last seen. The car on which he had been riding was higher and wider than the average. In a suit against the company for his death, it was held that the question as to how he met his death was one for the jury. *Choctaw, etc., R. Co. v. McDade*, 191 U. S. 64, 65, 48 L. Ed. 96.

Plaintiff was a head brakeman in the employ of the defendant railroad company. The evidence showed that plaintiff in the discharge of his duty stepped upon the pilot of an engine as it was slowly moving on a dark night into a newly constructed yard. The step of the pilot which had been defective for several days, though this was unknown to the plaintiff, gave way and threw him in front of the engine. His foot caught in the space between the ties which had not been filled up and the engine ran over his leg. The court held that the evidence was enough to demand its submission to the jury, and if found to be true, was enough to warrant a verdict for the plaintiff. *Choctaw, etc., R. Co. v. Tennessee*, 191 U. S. 326, 329, 331, 48 L. Ed. 201.

It is a question for the jury to determine whether or not it is negligence on the part of an employee not to keep a lookout for a coming engine where he has been assured by a boss that there is none to come. *Northern Pac. R. Co. v. Amato*, 144 U. S. 465, 475, 36 L. Ed. 506.

Plaintiff in coupling cars, caught his foot in defective planking at a railroad crossing and it was crushed by the car. It was held that the case should have been left to the jury under proper instructions, inasmuch as there was evidence tending to show that the crossing was in an unsafe condition; that the injury happened in consequence; that the defect was occasioned under such circumstances, and was such in itself, that its existence must have been known to defendant; that sufficient time for repairs had elapsed; and that the plaintiff was acting in obedience to orders in uncoupling at the place and time, and as he was; was ignorant of the special peril; and was in the exercise of due care. *Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349, 361, 37 L. Ed. 1107.

Plaintiff caught his foot in a railroad frog and being unable to extricate it, it was run over and crushed. He testified that the frog was unblocked and one of the foremen testified that he had blocked it before the accident. In view of the plaintiff's testimony, it is a question of fact to submit to the jury as to whether the frog was or was not blocked

at the time of the accident. *Union Pac. R. Co. v. James*, 163 U. S. 485, 488, 41 L. Ed. 236.

An action being instituted against a railroad company for negligence, the following instructions are correct: "The defendants, if they undertook to manage and conduct the business of running their trains by telegraph, were bound to have a proper and fit telegraph line for this purpose, with a reasonable number of telegraph stations and operators to properly conduct and control the movements of the trains. And it is for the jury to decide whether this duty was performed by the defendant or whether they were guilty of negligence and want of ordinary care in this respect by not having the requisite number of telegraph stations and operators for conducting the business of the road. If they were guilty of such negligence and want of care and thus occasioned the injury which otherwise would not have occurred, then the jury would be authorized to find a verdict for plaintiff." *Grand Trunk R. Co. v. Walker*, 154 U. S. Appx. 653, 25 L. Ed. 977.

**81. Questions for court.**—*Elliott v. Chicago, etc., R. Co.*, 150 U. S. 245, 246, 37 L. Ed. 1068; *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542; *Schofield v. Chicago, etc., R. Co.*, 114 U. S. 615, 29 L. Ed. 224; *Delaware, etc., R. Co. v. Converse*, 139 U. S. 469, 35 L. Ed. 213; *Aerkfetz v. Humphreys*, 145 U. S. 418, 36 L. Ed. 758; *Southern Pac. Co. v. Pool*, 160 U. S. 438, 440, 40 L. Ed. 485; *Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 283, 38 L. Ed. 434.

**Illustrative cases.**—In a suit by an employee of a railroad against the company for injuries received where the evidence clearly shows contributory negligence on the part of the plaintiff and no willful intention to injure on the part of the defendant, the case is not a proper one to submit to the jury. *St. Louis, etc., R. Co. v. Schumacher*, 152 U. S. 77, 81, 38 L. Ed. 361.

A fireman was injured by the turning of a step on his engine. It was admitted that the step, the rod, and the nut were in suitable and good condition, that the inspectors at each terminus of the route were competent, and that when the engine started on its trip the step was securely fastened and had been used in safety up to the time of the engine's return. After its return plaintiff was not called upon to have anything to do with the engine until after it had been inspected and repaired. He chose for his own convenience to go upon the engine and do his work prior to such inspection. Under these circumstances the case is



of itself preclude him from recovering for injuries; it is for the jury to say from all the attending circumstances whether his failure to do so is in fact contributory negligence.<sup>82</sup>

#### IV. Liability of Master to Third Persons for Acts of Servant.

**A. For Lawful Acts.**—If an act of an employee be lawful, and one which he is justified in doing, and which casts no personal responsibility upon him, no responsibility attaches to the employer therefor.<sup>83</sup>

**B. For Tortious Acts.**—The rule of "respondeat superior," or that the master shall be civilly liable for the tortious acts of his servant, is of universal application, whether the act be one of omission or commission, whether negligent, fraudulent, or deceitful. If it be done in the course of his employment, the master is liable;<sup>84</sup> and it makes no difference that the master did not authorize or even know of the servant's act or neglect, or even if he disapproved or forbade it, he is equally liable, if the act be done in the course of his servant's employment.<sup>85</sup>

**As to liability of railroad** for injuries to passengers caused by negligence of servants, see the title *CARRIERS*, vol. 3, p. 556. **As to liability of employer** for acts of independent contractor, see the title *INDEPENDENT CONTRACTORS*, vol. 6, p. 904.

**As to liability of corporation**, see the title *CORPORATIONS*, vol. 4, p. 760.

**Reason for Rule.**—"This rule is obviously founded on the great principle of social duty, that every man, in the management of his affairs, whether by

not one for the jury and a verdict for the defendant is proper. *Patton v. Texas*, etc., R. Co., 179 U. S. 658, 665, 45 L. Ed. 361.

**82. Failure to refuse to work with incompetent employee.**—*Northern Pac. R. Co. v. Mares*, 123 U. S. 710, 31 L. Ed. 296.

**83. For lawful acts.**—*New Orleans, etc., R. Co. v. Jopes*, 142 U. S. 18, 27, 35 L. Ed. 919.

**84. Philadelphia, etc., R. Co. v. Derby**, 14 How. 468, 486, 14 L. Ed. 502; *Railroad Co. v. Hanning*, 15 Wall. 649, 657, 21 L. Ed. 220; *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637, 645, 30 L. Ed. 1049. See, also, *Philadelphia, etc., R. Co. v. Quigley*, 21 How. 202, 212, 16 L. Ed. 73; *Denver, etc., Railway v. Harris*, 122 U. S. 597, 608, 30 L. Ed. 1146.

All the cases recognize fully the liability of the principal where the relation of master and servant exists. *Chicago v. Robbins*, 2 Black 418, 426, 17 L. Ed. 298.

"The owner of a vessel is liable for injuries done to third persons or property by the negligence or malfeasance of the master and crew while in the discharge of their duties and acting within the scope of their authority." *The Plymouth*, 3 Wall. 20, 35, 18 L. Ed. 125.

Where the throwing of sticks of wood, by employees, from a moving train for use in their own homes, was an act from which, as a result, injury to a person on the street might reasonably be feared, and if acts of a like nature had been and were habitually performed to the knowledge of the defendant company, who with such knowledge permitted their continuance, then the company is guilty of negligence, and liable for injuries to a passerby caused by the flying sticks of

wood, notwithstanding that the act was that of an employee, beyond the scope of his employment. The question of scope of employment does not enter into this case. *Fletcher v. Baltimore, etc., R. Co.*, 168 U. S. 135, 139, 42 L. Ed. 411.

**85. Philadelphia, etc., R. Co. v. Derby**, 14 How. 468, 486, 14 L. Ed. 502; *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 522, 33 L. Ed. 440; *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637, 645, 30 L. Ed. 1049. See, also, *Philadelphia, etc., R. Co. v. Quigley*, 21 How. 202, 210, 16 L. Ed. 73; *Denver, etc., Railway v. Harris*, 122 U. S. 597, 608, 30 L. Ed. 1146; *Railroad Co. v. Hanning*, 15 Wall. 649, 657, 21 L. Ed. 220.

"There may be found, in some of the numerous cases reported, on this subject, dicta which, when severed from the context, might seem to countenance the doctrine that the master is not liable if the act of his servant was in disobedience of his orders. But a more careful examination will show that they depended on the question, whether the servant, at the time he did the act complained of, was acting in the course of his employment, or in other words, whether he was or was not at the time in the relation of servant to the defendant." *Philadelphia, etc., R. Co. v. Derby*, 14 How. 468, 486, 14 L. Ed. 502.

The general rule is that when an injury has been sustained by the negligent manner in which a wharf or other work is constructed or protected, the principal is liable for the acts and negligence of the agent in the course of the employment, although he did not authorize or know of the acts complained of. When the actor ceases to be a servant or

himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it. If done by a servant, in the course of his employment, and acting within the scope of his authority, it is considered, in contemplation of law, so far the act of the master, that the latter shall be answerable civiliter."<sup>86</sup>

**Same—Not Founded on Contract.**—The maxim of "respondeat superior," which, by legal imputation, makes the master liable for the acts of his servant, is wholly irrespective of any contract, express or implied, or any other relation between the injured party, and the master.<sup>87</sup>

**C. Contract between Master and Servant Not to Use Master's Name.**—A provision in a contract between master and servant that the servant shall not use the name of the master in any manner where the public or any individual may be led to believe that the master is responsible for his actions, does not and cannot affect the master's responsibility to third persons injured by the servant's negligence in the course of his employment.<sup>88</sup>

**D. Enforcing Liability of Master and Servant in Same Action.**—"Whatever its sources or the principles on which it rests, the rule itself is firmly established; and many courts have held the identification of master and servant to be so complete that the liability of both may be enforced in the same action, although other courts have reached the opposite conclusion."<sup>89</sup>

### V. Right of Master against Third Persons.

"No employer has such a property in his workmen, or in their services, that he can, under the ordinary jurisdiction of a court of chancery, maintain a suit, as for a nuisance, against the keeper of a house at which they voluntarily buy intoxicating liquors, and thereby get so drunk as to be unfit for work."<sup>90</sup>

### VI. Employers' Liability Insurance.

A denial of all liability under its policy by an employers' liability insurance company and its refusal to defend suits in the name and on behalf of the assured constitutes such a breach of the contract on its part that it releases the assured from its contract, because such action on the part of the assurer amounts to a waiver of the terms of the policy. And under the terms of this policy the liability of the assured to the injured person and the extent of that liability may be litigated in the first instance in an action between the assured and the assurer.<sup>91</sup>

**MASTER IN CHANCERY.**—"A master in chancery is an officer appointed by the court to assist it in various proceedings incidental to the progress of a cause before it, and is usually employed to take and state accounts, to take and report testimony, and to perform such duties as require computation of interest, the value of annuities, the amount of damages in particular cases, the auditing and ascertaining of liens upon property involved, and similar services. The information which he may communicate by his findings in such cases, upon the evidence presented to him, is merely advisory to the court, which it may accept and act upon or disregard in whole or in part, according to its own judgment as to the weight of the evidence."<sup>1</sup>

agent and is, himself, the master, he alone is responsible. *Railroad Co. v. Hanning*, 15 Wall. 649, 657, 21 L. Ed. 220.

**86. Reason for rule.**—*Chesapeake, etc., R. Co. v. Dixon*, 179 U. S. 131, 137, 45 L. Ed. 121.

"Every person is bound to use due care in the conduct of his business. If the business is committed to an agent or servant, the obligation is not changed." *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637, 645, 30 L. Ed. 1049.

**87. Not founded on contract.**—*Philadelphia, etc., R. Co. v. Derby*, 14 How. 468, 485, 14 L. Ed. 502.

**88. Contract not to use master's name.**—*Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 523, 33 L. Ed. 440.

**89. Chesapeake, etc., R. Co. v. Dixon, 179 U. S. 131, 137, 45 L. Ed. 121.**

**90. Right of master against third person.**—*Northern Pac. R. Co. v. Whalen*, 149 U. S. 157, 162, 37 L. Ed. 686.

**91. St. Louis Dressed Beef, etc., Co. v. Maryland Casualty Co.**, 201 U. S. 173, 50 L. Ed. 712.

**1. Kimberly v. Arms**, 129 U. S. 512, 523, 32 L. Ed. 764. See the title REFERENCE.

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As to liability of owner for negligence of master, see the title COLLISION, vol. 3, p. 876. As to signature of bill of lading by master, see the title BILL OF LADING, vol. 3, p. 233. As to delivery by master at place agreed upon, see the title CARRIERS, vol. 3, p. 599. As to confession of master as evidence against owner, see the title COLLISION, vol. 3, p. 946. As to liability of tug, see the title TOWAGE, TUGS AND TOWS. As to contracts of affreightment and charter parties entered into by master, see the title SHIPS AND SHIPPING. As to hypothecation of ship by master, see the title BOTTOMRY AND RESPONDENTIA, vol. 3, pp. 451, 452. As to jurisdiction of United States court over crime committed by master in foreign waters, see the title CRIMINAL LAW, vol. 4, p. 79. As to liability of master for negligence of pilot, see the title COLLISION, vol. 3, p. 877. As to agreement of consortium between masters, see the title ADMIRALTY, vol. 1, p. 139. As to admissibility of letter of instructions from owner to master, see the title DOCUMENTARY EVIDENCE, vol. 5, p. 455. As to liability of master for bringing in immigrants, see the title ALIENS, vol. 1, p. 256. As to power of master to determine necessity for jettison, see the title GENERAL AVERAGE, vol. 6, p. 554. As to right of master to approach blockaded port, see the title BLOCKADE, vol. 3, p. 374. As to liability for goods lost by negligence of master, see the title SHIPS

AND SHIPPING. As to effect of sale by master, see the title SHIPS AND SHIPPING. As to liability of owner for torts of master, see the title SHIPS AND SHIPPING. As to negligence of master as defense to insurance policy, see the title MARINE INSURANCE, ante, p. 149. As to general liability of owner for negligence of master, see the title MASTER AND SERVANT, ante, p. 275. As to possession of master as possession of owner, see the title SALVAGE. As to power of master to sell wreck to salvors, see the title SALVAGE. As to duty of master to disabled seamen, see the title SEAMEN. As to power of master to enter into salvage contracts, see the title SALVAGE. As to liability of master for loss of hired slaves, see the title SLAVERY AND INVOLUNTARY SERVITUDE. As to master of vessel as bailee, see the title BAILMENTS, vol. 2, p. 783. As to power of master to bind owner for repairs and supplies, see the title MARITIME LIENS, ante, p. 228. As to admissibility of declarations of master, see the title RES GESTÆ. As to payment of wharfage by master, see the title WHARVES AND WHARFINGERS. As to responsibility of government where vessel is chartered by it, see the title UNITED STATES.

### I. Definition.

The master of a ship is the person who is entrusted with the care and management of it.<sup>1</sup> He is the agent of the owner.<sup>2</sup> But he is not to be considered as the general agent of the owner, for all purposes whatsoever that may have connection with the voyage. He is a special agent for navigating the vessel.<sup>3</sup>

### II. Employment and Wages.

**A. Employment**—1. **APPOINTMENT**—a. *By Whom Appointed*.—The master of a vessel is appointed by her owners.<sup>4</sup>

b. *Duration of Office*.—The master when once appointed by the owners continues master until displaced by them or until he surrenders the office himself.<sup>5</sup>

2. **QUALIFICATIONS**—a. *Must Be Competent and Skillful*.—A ship master should be competent and skillful, of sound judgment and discretion, and with sufficient knowledge of the route and experience in navigation to be able to perform in a proper manner all the ordinary duties required of him as master of the vessel.<sup>6</sup>

b. *Not Expected to Be Infallible*.—But the owners do not contract for the mas-

1. **Definition**.—The *Styria v. Morgan*, 186 U. S. 1, 9, 46 L. Ed. 1027; *Butler v. Boston, etc., Steamship Co.*, 130 U. S. 527, 554, 32 L. Ed. 1017.

2. **Insurance Co. v. Gossler**, 96 U. S. 645, 648, 24 L. Ed. 863; *The Lulu*, 10 Wall. 192, 200, 19 L. Ed. 906; *The General Smith*, 4 Wheat. 438, 443, 4 L. Ed. 609; *Ralli v. Troop*, 157 U. S. 386, 413, 39 L. Ed. 742; *The Aurora*, 1 Wheat. 96, 102, 4 L. Ed. 45; *The J. P. Donaldson*, 167 U. S. 599, 603, 42 L. Ed. 292; *The Kate*, 164 U. S. 458, 465, 41 L. Ed. 512; *Harrison v. Fortlage*, 161 U. S. 57, 65, 40 L. Ed. 616. See, generally, the title PRINCIPAL AND AGENT. See post, "Of Vessel," III, A, 2, b.

3. **Special agent for navigating vessel**.—*General Interest Ins. Co. v. Ruggles*, 12 Wheat. 408, 411, 6 L. Ed. 674; *Steamboat New World v. King*, 16 How. 469, 472, 14 L. Ed. 1019. See post, "By Whom Appointed," II, A, 1, a.

In his appropriate character of master, the law considers the master of a vessel an agent, only for the navigation of the vessel, and in such matters as are connected with, and incident to, such employment. And when the books speak of

the master's being agent of the owner, they are to be understood in this sense. *General Interest Ins. Co. v. Ruggles*, 12 Wheat. 408, 411, 6 L. Ed. 674.

4. **Appointed by owner**.—*Sturgis v. Boyer*, 24 How. 110, 16 L. Ed. 591; *The Maria Martin*, 12 Wall. 31, 43, 20 L. Ed. 251; *The Merrimac*, 14 Wall. 199, 200, 20 L. Ed. 873; *The Lady Pike*, 21 Wall. 1, 14, 22 L. Ed. 499; *The J. P. Donaldson*, 167 U. S. 599, 603, 42 L. Ed. 292. See ante, "Definition," I.

5. **Continues in office until removal or surrender**.—*Thomas v. Osborn*, 19 How. 22, 45, 15 L. Ed. 534.

6. **Master should be competent and skillful**.—*Lawrence v. Minturn*, 17 How. 100, 109, 15 L. Ed. 58; *The Propeller Niagara v. Cordes*, 21 How. 7, 16 L. Ed. 41; *The Lady Pike*, 21 Wall. 1, 15, 22 L. Ed. 499; *Ralli v. Troop*, 157 U. S. 386, 398, 39 L. Ed. 742. See post, "Duties," III, B.

The owners are bound to select a master of competent skill and knowledge, to transport in safety the goods and merchandise shipped on board, which necessarily imposes the obligation to employ a master mariner who knows enough about the route to avoid the known ob-

ter's infallibility, nor that he shall do, in an emergency, precisely what, after the event, others may think would have been best.<sup>7</sup>

3. **REMOVAL**.—*a. In General*.—Upon a general retainer of a master of a vessel for no particular voyage, he may be dismissed at any time by the owners without cause assigned.<sup>8</sup> But where he is retained for a particular voyage agreed upon, if the owners dismiss him they are liable to him in a common-law court.<sup>9</sup>

b. *Misconduct of Master*.—The misconduct of a captain, while on a voyage or in a foreign port, does not, ipso facto, deprive him of his office.<sup>10</sup>

c. *Master Part Owner*.—In the United States as provided by § 4250 of the Revised Statutes the owners of a vessel have power to remove a master who is part owner as well as one who is not.<sup>11</sup> But this does not apply where there is a valid written agreement subsisting by virtue of which such master is entitled to possession.<sup>12</sup>

**B. Wages**.—1. **IN GENERAL**.—Where there was no special contract as to the amount of the compensation, the court awarded, upon a libel in personam, what was deemed to be just in the light of what was being paid for like services at that time and place.<sup>13</sup>

2. **LIEN FOR WAGES**.—See the title **MARITIME LIENS**, ante, p. 228.

### III. Powers, Duties and Liabilities.

**A. Powers**.—1. **LIMITS AND DERIVATION**.—"The authority of the master is limited to objects connected with the voyage, and, if he transcend its prescribed limits, his acts become, in legal contemplation, mere nullities."<sup>14</sup> The authority of a master by the maritime law is derived from the commercial usages and laws of the middle ages.<sup>15</sup>

structions and to choose the most feasible track for his route. *Ward v. Chamberlain*, 21 How. 572, 16 L. Ed. 219; *The Lady Pike*, 21 Wall. 1, 14, 22 L. Ed. 499. See the title **SHIPS AND SHIPPING**.

"Where the master, being ignorant of the coast, sailed past the port to which he was destined and ran into another port in the possession of the enemy and was captured, the court of king's bench unanimously decided that the implied warranty to provide a master of competent skill was broken by sending out one who was unable to distinguish between the two ports." *The Lady Pike*, 21 Wall. 1, 16, 22 L. Ed. 499.

7. **Owners do not guarantee master's infallibility**.—*Lawrence v. Minturn*, 17 How. 100, 109, 15 L. Ed. 58; *Ralli v. Troop*, 157 U. S. 386, 398, 39 L. Ed. 742.

**Are not expected to be acquainted with all rocks and shoals**.—"As a general rule," says Mr. Justice Grier, "masters of vessels are not expected to be, and cannot be, acquainted with the rocks and shoals on every coast" (and, we may add, with the currents and shoals of every river), "nor able to conduct a vessel safely into every port." *Sherlock v. Alling*, 93 U. S. 99, 107, 23 L. Ed. 819.

"Owners of vessels are under obligation to employ masters of reasonable skill and judgment in the performance of their duties, but they do not contract that they shall possess such qualities in an extraordinary degree, nor that they shall do in any given emergency what, after the event, others may think would have been best." *The Star of Hope*, 9 Wall. 203, 230, 19 L. Ed. 638.

8. **Upon general retainer owners may dismiss without liability**.—*Montgomery v. Henry*, 1 Dall. 49, 50, 1 L. Ed. 31.

9. **Upon retainer for particular voyage owners liable for dismissal**.—*Montgomery v. Henry*, 1 Dall. 49, 51, 1 L. Ed. 31.

10. **Misconduct does not ipso facto deprive of office**.—*Thomas v. Osborn*, 19 How. 22, 44, 15 L. Ed. 534.

11. **Owners may remove master who is part owner**.—*The Eclipse*, 135 U. S. 599, 608, 34 L. Ed. 269.

12. **Written agreement prevents removal**.—*The Eclipse*, 135 U. S. 599, 608, 34 L. Ed. 269.

13. **Amount of compensation**.—Compensation to a person who had acted for four months (from March 16th to July 26th), both as captain and as one of two pilots on a Missouri steamer, left at \$900 per month, at which sum the circuit court had fixed it; the evidence, which though not so full as it ought to have been, showing that pilots' wages were at the time very high, that the person had performed his duty in both capacities well, and that the owners had charged his services against the government (which had impressed the vessel during twenty-six days of the time) at the rate of \$1,000 per month. *Mephams v. Biessel*, 9 Wall. 370, 19 L. Ed. 677. See the title **PILOTS**.

14. **Cannot transcend limits of authority**.—*The Aurora*, 1 Wheat. 96, 102, 4 L. Ed. 45.

15. **Master's authority derived from customs of middle ages**.—"The maritime law as to the position and powers of the master, and the responsibility of the vessel, is not derived from the civil law of master



2. **POWER TO BIND OWNER**—a. *Of Cargo*.—The acts of a master do not bind the innocent owner of the cargo.<sup>16</sup>

b. *Of the vessel*.—The owners are bound to the performance of all lawful contracts made by the master relative to the usual employment of the ship, and the repairs and other necessities furnished for her use. This rule is established as well upon the implied assent of the owners, as with a view to the convenience of the commercial world.<sup>17</sup> The general rule applicable to agencies, that the agent cannot bind his principal, except in matters coming within the scope of his authority, applies particularly to a master and owner of a vessel.<sup>18</sup> The contract of the master of a ship for seaman's wages, if within the scope of his authority, binds the owner.<sup>19</sup> The acts of the master of a vessel in cases of practical aggression binds the interest of the owner of the ship, whether he be innocent or guilty.<sup>20</sup>

3. **AS TO PASSENGERS**.—The master of a steamboat is authorized to allow persons whose usual employment is on board of such boats to ride from place to place free of charge, such being the usual custom.<sup>21</sup>

4. **AS TO SEAMEN**—a. *Power of Selecting Crew*.—By virtue of his office and the rules of maritime law, the captain or master has charge of the selection and employment of the crew,<sup>22</sup> and he may make any explanations and statements for the proper furtherance of this object.<sup>23</sup>

b. *Power to Enforce Discipline*.—The mates and common mariners are alike subject to the orders of the master of the vessel,<sup>24</sup> and he has full powers to enforce discipline and subordination.<sup>25</sup>

and servant, nor from the common law. It had its source in the commercial usages and jurisprudence of the middle ages." The *China*, 7 Wall. 53, 68, 19 L. Ed. 67; The *John G. Stevens*, 170 U. S. 113, 122, 42 L. Ed. 969. See the title **ADMIRALTY**, vol. 1, p. 119.

16. **Innocent owner of cargo not bound by master**.—The *Marianna Flora*, 11 Wheat. 1, 6 L. Ed. 405. See post, "As to Cargo," III, A, 5; "Duty to Cargo," III, B, 5.

**Cannot bind owner by signing false bill of lading**.—A willful fraud committed by the master on a third person, by signing false bills of lading, is not within his agency. *Schooner Freeman v. Buckingham*, 18 How. 182, 191, 15 L. Ed. 341. See the title **BILL OF LADING**, vol. 3, p. 232.

17. **Owners are bound by lawful necessary contracts**.—The *Lulu*, 10 Wall. 192, 200, 19 L. Ed. 906, citing The *General Smith*, 4 Wheat. 438, 443, 4 L. Ed. 609; The *Kate*, 164 U. S. 458, 465, 41 L. Ed. 512, citing The *Aurora*, 1 Wheat. 96, 101, 4 L. Ed. 45. See post, "Power to Sell Vessel," III, A, 6; "Duty to Vessel," III, B, 2. See the title **MARITIME LIENS**, ante, p. 228.

18. **Can only bind owner by matters in scope of authority**.—General Interest Ins. Co. v. *Ruggles*, 12 Wheat. 408, 411, 6 L. Ed. 674. See ante, "Definition," I. See, generally, the title **PRINCIPAL AND AGENT**.

19. **Owner bound by contract for seaman's wages**.—*Andrews v. Wall*, 3 How. 568, 11 L. Ed. 729. See, generally, the title **SEAMEN**.

20. **Piratical acts of master**.—*Harmony v. United States*, 2 How. 210, 11 L. Ed. 239. See the title **PIRACY**.

21. **May allow passengers to ride free of**

**charge**.—*Steamboat New World v. King*, 16 How. 469, 472, 14 L. Ed. 1019.

**Authority usually exercised by master is lawful**.—"If the master acted under an authority usually exercised by masters of steamboats, if such exercise of authority must be presumed to be known to and acquiesced in by the owners, and the practice is, even indirectly, beneficial to them, it must be considered to have been a lawful exercise of an authority incident to his command." *Steamboat New World v. King*, 16 How. 469, 472, 14 L. Ed. 1019. See, generally, the titles **CARRIERS**, vol. 3, p. 556; **SHIPS AND SHIPPING**.

22. **Master selects and employs crew**.—*Butler v. Boston, etc., Steamship Co.*, 130 U. S. 527, 554, 32 L. Ed. 1017. See post, "Liability for Seamen's Wages," III, C, 1, b.

The master can refuse to receive or dismiss the mates and mariners, for his appointment as master gives him the sole, undoubted and exclusive right of choosing every seaman under him, whatever courtesy he might be inclined to show to the recommendation of those by whom he was himself employed. *Farrel v. McClea*, 1 Dall. 392, 1 L. Ed. 191.

23. **May make necessary declarations and explanations**.—"The same authority from the owner which allows the master to hire the crew, justifies him in making such declarations and explanations as are proper to attain the object. Those declarations and explanations are as much within the scope of the authority, as the act of hiring itself." *United States v. Gooding*, 12 Wheat. 460, 470, 6 L. Ed. 693.

24. **Crew subject to master's orders**.—*Farrel v. McClea*, 1 Dall. 392, 1 L. Ed. 191.

25. **Captain may enforce discipline**.—"In

5. AS TO CARGO.—See ante, "Of Cargo," III, A, 2, a; post, "Duty to Cargo," III, B, 5.

a. *Power to Deliver Cargo as Ransom*.—A master can deliver part of his cargo in payment of ransom of his vessel and the residue of the cargo, where the vessel is captured by the enemy.<sup>26</sup>

b. *Power to Sell Cargo*.—The master may sell the cargo only in case of urgent necessity,<sup>27</sup> as for repairs to the ship where he has no means or credit,<sup>28</sup> or for the purpose of prosecuting the voyage.<sup>29</sup> "If part of the cargo is so far damaged as to be unfit to be carried on, the master may sell it at an intermediate port, as the agent of the shipper, for whom it may concern, and carry on the remainder."<sup>30</sup>

6. POWER TO SELL VESSEL.—See ante, "Of Vessel," III, A, 2, b; post, "Duty to Vessel," III, B, 2.

a. *Necessity for Sale*—(1) *In General*.—A master has power to sell his vessel in cases of absolute necessity.<sup>31</sup>

(2) *Nature of Necessity*.—The power of a master to sell the vessel does not arise from a legal necessity.<sup>32</sup> It is a moral necessity.<sup>33</sup>

(3) *Question of Fact*.—The necessity for a sale of the vessel is a question of fact, to be determined in each case by the circumstances in which the master is

the discipline of the merchant service, where an act of disobedience is persisted in, and endangers the due subordination of others, the captain is justified, not only in punishing personally but in resorting to any reasonable measures necessary to produce submission and safety." *Wilkes v. Dinsman*, 7 How. 89, 128, 12 L. Ed. 618.

26. *Master may deliver cargo as ransom*.—*Dupont de Nemours & Co. v. Vance*, 19 How. 162, 171, 15 L. Ed. 584.

27. *In case of urgent necessity*.—*The Julia Blake*, 107 U. S. 418, 426, 27 L. Ed. 595. See the title SHIPS AND SHIP-PING.

28. *Cargo may be sold for repairs*.—Repairs cannot be made by the master unless he has means or credit; and if he has neither, and his situation is such that he cannot communicate with the owners, he may sell a part of the cargo for that purpose if it is necessary for him to do so in order to raise the means to make the repairs. *The Star of Hope*, 9 Wall. 203, 19 L. Ed. 638.

29. *Cargo sold in order to prosecute voyage*.—*Dupont de Nemours & Co. v. Vance*, 19 How. 162, 171, 15 L. Ed. 584.

30. *Damaged portion of cargo may be sold*.—*The Propeller Mohawk*, 8 Wall. 153, 161, 19 L. Ed. 406.

31. *Vessel can only be sold in case of necessity*.—*Ward v. Peck*, 18 How. 267, 268, 15 L. Ed. 383; *Post v. Jones*, 19 How. 150, 15 L. Ed. 618. See, generally, the title SHIPS AND SHIPPING.

"Although the power of the master to sell his ship in any case, without the express authority of the owner, was formerly denied, yet it is now the received doctrine of the courts in this country as well as in England, that the master has the right to sell in case of actual necessity." *The Amelie*, 6 Wall. 18, 26, 18 L. Ed. 806; *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604,

8 L. Ed. 243. See post, "Good Faith," III, A, 6, b.

*Stranded vessel*.—The right of the master to sell a vessel stranded, depends on the circumstances under which it is done, to justify it; the master must act in good faith, and exercise his best discretion for the benefit of all concerned; and a sale can only be made on the compulsion of a necessity, to be determined in each case by the actual peril to which the vessel is exposed, and from which it is probable, in the opinion of persons competent to judge, the vessel cannot be saved; this is an extreme necessity. *The Sarah Ann*, 13 Pet. 387, 10 L. Ed. 213. See post, "Where Vessel Is Stranded," III, B, 5, c, (2).

The power of the master to sell the vessel is applied to cases where the vessel is disabled, stranded, or sunk; where the master has no means and can raise no funds to repair her so as to prosecute his voyage, yet, where the spes recuperandi may have a value in the market, or the boats, the anchor, or the rigging, are or may be saved, and have a value in market; where the cargo, though damaged, has a value, because it has a market, and it may be for the interest of all concerned that it be sold. *Post v. Jones*, 19 How. 150, 158, 15 L. Ed. 618.

32. *The power of a master to sell should not be termed a legal necessity*, for though the necessity, information and good faith of the master will make the sale legal, the term legal is not descriptive of the prerequisite upon which the master's right to sell depends. *The Sarah Ann*, 13 Pet. 387, 400, 10 L. Ed. 213.

33. *The power of a master to sell a wrecked or stranded vessel may properly be termed a moral necessity*, because when the peril and information concur, it then becomes an urgent duty upon the master to sell for the preservation of the interest

placed, and the perils to which the property is exposed.<sup>34</sup>

b. *Good Faith*.—The master must exercise good faith in selling his ship.<sup>35</sup> The power of a master to sell his vessel will be closely scrutinized by the court, lest it be abused.<sup>36</sup> If possible, the master should obtain the advice of persons of skill and experience before he sells.<sup>37</sup>

c. *Effect on Sale of Extrication from Peril*.—From the mere fact of the vessel having been extricated from her peril, no presumption can be raised of the master's incompetency in selling the vessel.<sup>38</sup>

d. *Necessity for Consulting Owner*.—If the master can within a reasonable time consult the owners, he is required to do it, because they should have an opportunity to decide whether in their judgment a sale is necessary.<sup>39</sup>

e. *Wreck in Distant Ocean*.—But this power of a master to sell has no application to a wreck in a distant ocean.<sup>40</sup>

of all concerned. *The Sarah Ann*, 13 Pet. 387, 10 L. Ed. 213.

**34. Necessity a question of fact.**—*The Amelie*, 6 Wall. 18, 18 L. Ed. 806.

**35. Good faith and necessity must concur.**—In order to justify the sale, by the master of his vessel, in a distant port, in the course of her voyage, good faith in making the sale, and a necessity for it, must both concur; and the purchaser, in order to have a valid title, must show their concurrence. *The Amelie*, 6 Wall. 18, 18 L. Ed. 806. See ante, "Necessity for Sale," III, A, 6, a.

**36. Power to sell closely scrutinized.**—*Post v. Jones*, 19 How. 150, 158, 15 L. Ed. 618.

**Interest of owners protected.**—"The interest of owners of vessels, in cases of a sale by the master, when pressed to make it by necessity arising from the perils of the sea, is amply protected; and the power of the master to sell is secured from abuse, by the limitations placed upon the exercise of it, and by the obligation of the purchaser at the sale to maintain his ownership against the claim of the original owner, by showing that the necessity for a sale had arisen; that it was made in the good faith and sound discretion of the master." *The Sarah Ann*, 13 Pet. 387, 401, 10 L. Ed. 213.

**37. A master should never sell, when in port with a disabled ship, without first calling to his aid disinterested persons of skill and experience, who are competent to advise, after a full survey of the vessel and her injuries, whether she had better be repaired or sold.** And although his authority to sell does not depend on their recommendation, yet, if they advise a sale, and he acts on their advice, he is in a condition to furnish the court or jury reviewing the proceedings, strong evidence in justification of his conduct. *The Amelie*, 6 Wall. 18, 27, 18 L. Ed. 806.

**38. No presumption of master's incompetency raised.**—*The Sarah Ann*, 13 Pet. 387, 400, 10 L. Ed. 213.

**Repair of vessel does not disprove necessity.**—It is said, the fact that a vessel was repaired by the purchaser and sent to Boston, disproves that the sale was a ne-

cessity. Not so. It may tend to prove the surveyors were mistaken, but does not affect the question of the duty of the master to follow their advice, when given in such strong terms, and with no evidence before him that it was erroneous. But in fact, the surveyors did not err in their conclusion that the vessel was not worth the cost of repairs, as the amount in the registry of the court for which the vessel was sold in Boston will fail to reimburse the claimant the money expended by him, in purchasing and repairing her. *The Amelie*, 6 Wall. 18, 29, 18 L. Ed. 806.

**39. Consultation with owner.**—*The Amelie*, 6 Wall. 18, 27, 18 L. Ed. 806; *The Julia Blake*, 107 U. S. 418, 428, 27 L. Ed. 595.

**Distance from owner criterion of authority.**—The true criterion for determining the authority of the master to sell a vessel stranded near a foreign port, or in a port of the United States, or of a different state than that to which the vessel belongs, or in which the owners may be or reside, when the necessity occurs, is the distance of the owners or insurers from the scene of stranding. If, by the ordinary means to convey intelligence of the situation of the vessel, the master can obtain directions as to what he should do, he should resort to those means; but if the peril be such that there is a probability of loss, and it is made more hazardous by every day's delay, the master may act promptly, to save something for the benefit of all concerned, though but little can be saved. There is no way of doing so more effectual than by exposing the vessel to sale; by which the enterprise of such men is brought into competition as are accustomed to encounter such risks, and who know from experience how to estimate the probable profits of such adventures. *The Sarah Ann*, 13 Pet. 387, 10 L. Ed. 213. See post, "Must Obey Instructions," III, B, 1, a.

**40. Where master has no choice.**—The rule that a master may sell his vessel has no application to a wreck in a distant ocean where the property is derelict or about to become so. The contrivance of an auction sale under such circumstances



f. *Rigging and Sails*.—The power to sell the hull extends to the rigging and sails.<sup>41</sup>

g. *Fraudulent Sale by Master*.—If the master sells, without good faith, or without a sound discretion, the owner may, against the purchaser, assert his right of property in the sails and rigging; as he may in the case of a stranded vessel, which has been sold without good faith in the master.<sup>42</sup>

7. RIGHT TO TRAFFIC PRIVATELY.—Upon a special agreement for wages and commissions, one who is a master and supercargo has no right to traffic privately for his personal benefit.<sup>43</sup>

8. RIGHT TO RETAIN FREIGHT.—The master of a vessel has a right as a general creditor to retain the freight for the payment of a debt due himself as against the original owner or his assignee.<sup>44</sup>

9. RIGHT TO SEEK SHELTER FROM STORM.—Masters have a right, and oftentimes it is their duty, to seek shelter from a storm; and the fact that it would have been better to have kept on the course, may be more apparent afterward than it could have been to any one at the time.<sup>45</sup>

**B. Duties.**—See ante, "Qualifications," II, A, 2.

1. DUTY TO OWNER—*a. Must Obey Instructions*.—The master should always obey the instructions of his owner.<sup>46</sup>

*b. Must Not Cause Unnecessary Expense*.—The master should not cause his owner any unnecessary expense.<sup>47</sup>

2. DUTY TO VESSEL.—See ante, "Power to Bind Owner," III, A, 2; "Power to Sell Vessel," III, A, 6.

*a. In General*.—The master is justified in taking all reasonable precautions for the safety of the vessel.<sup>48</sup>

where the master is hopeless, helpless, and passive, where there is no money, no market, no competition, where the vendor must take what is offered or get nothing and has no choice but submission, is a transaction which has no characteristic of a valid contract. *Post v. Jones*, 19 How. 150, 158, 159, 15 L. Ed. 618.

41. The power of the master to sell the hull of the stranded vessel, exists also as to her rigging and sails; which he may have striped from her, after unsuccessful efforts to get her afloat, or when the vessel, in his own judgment and that of those competent to form an opinion and to advise, cannot be delivered from her peril. *The Sarah Ann*, 13 Pet. 387, 10 L. Ed. 213.

42. Owner may assert right of property. —*The Sarah Ann*, 13 Pet. 387, 10 L. Ed. 213.

43. No right to traffic privately.—Where a master and supercargo was to receive a certain sum per month as wages, and a commission of five per cent, and also one-tenth of all the profits, and it was agreed that these were to be in full of all services and privileges, the master and supercargo had no right to traffic upon his own account, for his own benefit. *Mathewson v. Clarke*, 6 How. 122, 12 L. Ed. 370. See ante, "Wages," II, B.

44. Master's right to retain freight against owner.—*Hodgeson v. Butts*, 3 Cranch 140, 158, 2 L. Ed. 391.

45. Right to seek shelter from storm.—*The Propeller Niagara v. Cordes*, 21 How. 7, 33, 16 L. Ed. 41. See post, "Duties," III, B. And see the title SHIPS AND SHIPPING.

46. "The trust reposed in a master of a vessel obliges him to obey the written instructions of his owners, where they give any, and where the instructions are silent, he is, at all events, to do nothing but what is consonant to the laws of the land, whether with or without a view to their advantage." *Patapsco Ins. Co. v. Coulter*, 3 Pet. 222, 232, 7 L. Ed. 659. See ante, "Necessity for Consulting Owner," III, A, 6, d.

47. Should know and be governed by the course of trade.—At Port Colborne there is an elevator belonging to the railroad company, and there is no other warehouse or receptacle in which wheat can be stored. The course of the trade demands that wheat shipped to Port Colborne must go through that elevator, and if the vessels making delivery are so numerous that it cannot relieve them promptly they must await their turn. The master of a vessel must be held to have made his contract with a full knowledge of this course of trade, and be governed by it. He had, therefore, no right, when he found there would be a delay of several days in delivering his cargo at the elevator, to carry it to Buffalo at the expense of the owner. *The Convoy's Wheat*, 3 Wall. 225, 230, 18 L. Ed. 194.

48. Damages by storm justifies putting into port.—A vessel sixteen days out encountered heavy gales, the sea broke over the forward part of the vessel, and carried away the jib boom, and both top-masts, and they were obliged, in the emergency, to cut away the rigging, to clear the jib boom from the vessel, and

b. *Duty to Use Ordinary Care.*—A master is bound to use ordinary care and must not carelessly run into danger.<sup>49</sup>

c. *Employment of Fraud.*—But his duty will not oblige him to violate the good faith even of an enemy, in order to preserve his ship, nor to employ fraud, in order to effect that object.<sup>50</sup>

d. *Duty When Pilot Is on Board.*—Though a pilot is on board a vessel, the master still has the duty of seeing to the safety of the ship and keeping a good lookout.<sup>51</sup>

e. *Absence from Vessel.*—The absence of the master from the vessel is not incompatible with his official relation and authority. It is not necessary for the existence of such a relation, and the exercise of such an authority, that he should always be on her deck. He may be absent for a longer or shorter time, and at a greater or lesser distance, without forfeiting his authority.<sup>52</sup>

3. DUTY TO KNOW FOREIGN LAWS.—Every shipmaster should acquaint himself with the revenue and navigation laws of foreign countries with which he is trading.<sup>53</sup>

4. DUTY TO PROCEED ON VOYAGE—*a. Must Proceed with Dispatch.*—It is the duty of the master to proceed on his voyage with all possible dispatch.<sup>54</sup>

b. *Threat of Illegal Capture.*—A master is not bound to abandon his voyage under threat or warning of illegal capture.<sup>55</sup>

5. DUTY TO CARGO.—See ante, "As to Cargo," III, A, 5; "Power to Bind Owner," III, A, 2.

a. *In General.*—In the absence of any special agreement to the contrary or ex-

get rid of the broken spars. Both topmasts broke off about halfway between the caps and the cross bars; and they lost in the disaster the mainsail, the two topsails, the gallant sail, and the spanker. Crippled and disabled as the vessel was, she was obviously incapable of proceeding on her voyage; and the master was justified in putting into Lisbon for repairs, which was the nearest port. The *Brig Collenberg*, 1 Black 170, 174, 17 L. Ed. 89.

49. *Must use ordinary care.*—*Smith v. Burnett*, 173 U. S. 430, 43 L. Ed. 756. See ante, "Qualifications," II, A, 2. And see the titles SHIPS AND SHIPPING; WHARVES AND WHARFINGERS.

A captain who, in the night and in a fog, enters a port, supposing it to be his port of destination, enters at his peril of its being so, unless there is some necessity for his seeking a port. If there is proper ground to doubt whether the port was the one which he supposed it to be, and he can safely wait outside till morning, or can signal a tug boat to pilot him in, he should not proceed till he can see or know where he is going. The *Portsmouth*, 9 Wall. 682, 19 L. Ed. 754.

A barge proceeding down a river on a squally night approached the piers of a bridge crossing the river. Any prudent officer would have stopped the barge until the weather became calm. It was the duty of the master of the boat in question to do so, and failing in this duty he was chargeable with the consequences of his negligence. The *Mohler*, 21 Wall. 230, 22 L. Ed. 485.

50. *Duty does not require employment of fraud.*—*Hannay v. Eve*, 3 Cranch 242, 2 L. Ed. 427.

51. *Master not absolved from duty by pilot's presence.*—*Ralli v. Troop*, 157 U. S. 386, 402, 39 L. Ed. 742. See, generally, the title PILOTS.

"The master is not wholly absolved from his duties while the pilot is on board, and may advise with him, and even displace him in case he is intoxicated or manifestly incompetent. He is still in command of the vessel, except so far as her navigation is concerned, and bound to see that there is a sufficient watch on deck, and that the men are attentive to their duties." The *Oregon*, 158 U. S. 186, 194, 39 L. Ed. 943.

52. *Need not be on vessel all the time.*—*Thomas v. Osborn*, 10 How. 22, 45, 15 L. Ed. 534.

53. *It is the duty of the master of a barque to acquaint himself with the laws of the country with which he is trading, and to conform his conduct to those laws.* He cannot defend himself under asserted ignorance, or erroneous information on the subject. It is the habit of every nation to construe and apply their revenue and navigation laws with exactness and without much consideration for the hardship of individual cases. The magnitude and variety of the interests depending upon their efficient administration compel to this, and every ship master engaged in a foreign trade must take notice of them. *Howland v. Greenway*, 22 How. 491, 502, 16 L. Ed. 391.

54. *Duty not to deviate from course.*—The *Maggie Hammond*, 9 Wall. 435, 436, 445, 19 L. Ed. 772. See the titles MARINE INSURANCE, ante, p. 149; SHIPS AND SHIPPING.

55. *Threat of illegal capture.*—*Williams*

ception in the bill of lading or contract of shipment, the duty of the master extends to all that relates to the loading as well as the safe-keeping, due transportation, and right delivery of the goods.<sup>56</sup>

b. *Stowage of Cargo*.—It is the duty of the master to see to the proper stowage of the cargo,<sup>57</sup> if he is unable to stow certain articles of cargo as directed, he should give notice to that effect to the shipper.<sup>58</sup>

c. *Care of Cargo*—(1) *On Voyage*.—A master should not run the cargo into unnecessary danger.<sup>59</sup> Safety to the cargo received on board, though not so high a consideration as safety to the ship, is one which should constantly govern the action of the master.<sup>60</sup>

(2) *Where Vessel Is Stranded*.—If a vessel is stranded, it is the duty of the captain to take all possible care of the cargo.<sup>61</sup> He must not abandon his ship

*v. Suffolk Ins. Co.*, 13 Pet. 415, 10 L. Ed. 226.

56. **General duty to cargo**.—The *Lady Pike*, 21 Wall. 1, 15, 22 L. Ed. 499. See the titles CARRIERS, vol. 3, p. 556; SHIPS AND SHIPPING.

57. **Duty to stow cargo properly**.—*Ralli v. Troop*, 157 U. S. 386, 402, 39 L. Ed. 742. See the title SHIPS AND SHIPPING.

"The master is bound to use due diligence and skill in stowing and staying the cargo; but there is no absolute warranty that what is done shall prove sufficient." *Lawrence v. Minturn*, 17 How. 100, 115, 15 L. Ed. 58.

"As the quantity of lading and the consequent trim and seaworthiness of a vessel are matters as to which the master is, generally speaking, bound to exercise his skill, and over which he is intrusted for the benefit of all concerned with a supervision, his failure to do so properly is negligence." *Lawrence v. Minturn*, 17 How. 100, 110, 15 L. Ed. 58.

58. **Should notify shipper if unable to stow**.—*The Star of Hope*, 17 Wall. 651, 655, 21 L. Ed. 719.

59. **Justified in unshipping contraband goods**.—An Austrian vessel bound from Trieste to New York via Sicily took on board large quantities of sulphur at Port Empedocle, Sicily. The master then learned that war had broken out between the United States and Spain, and that sulphur had been declared contraband of war by the Spanish government. He unshipped and stored the sulphur at Port Empedocle and it was held that he was justified in thus relanding and warehousing the contraband portion of his cargo and that in doing so he had reasonable regard for the interests of both ship and cargo. *The Styria v. Morgan*, 186 U. S. 1, 9, 46 L. Ed. 1027.

It was not the duty of a master where he had unshipped a cargo of sulphur at Port Empedocle, Sicily, upon learning of a declaration of war between the United States and Spain and that sulphur had been decreed contraband of war, to re-ship such sulphur on no better assurance than that such contraband had been removed than the statements of anonymous and irresponsible contributors to a newspaper

published in Palermo, a community which was extremely solicitous that such action should be taken. *The Styria v. Morgan*, 186 U. S. 1, 16, 46 L. Ed. 1027.

60. **Safety to cargo an important consideration**.—*Boyd v. Moses*, 7 Wall. 316, 320, 19 L. Ed. 192; *The Julia Blake*, 107 U. S. 418, 426, 27 L. Ed. 595.

"The master, as the agent of all concerned, is still bound to a prudent regard for the interests of the cargo, and must endeavor to hold the balance evenly between ship and cargo when their interests conflict." *The Styria v. Morgan*, 186 U. S. 1, 9, 46 L. Ed. 1027.

"Sir William Scott, speaking of the powers and duties of the master, said: 'Though in the ordinary state of things he is a stranger to the cargo, beyond the purposes of safe custody and conveyance, yet in cases of instant and unforeseen and unprovided necessity, the character of the agent and supercargo is forced upon him, not by the immediate act and appointment of the owner, but by the general policy of the law; unless the law can be supposed to mean that valuable property in his hand is to be left without protection and care. It must unavoidably be admitted, that in some cases he must exercise the discretion of an authorized agent over the cargo, as well in the prosecution of the voyage at sea, as in intermediate ports, into which he may be compelled to enter.'" *Ralli v. Troop*, 157 U. S. 386, 397, 39 L. Ed. 742.

61. **Vessel stranded**.—*The Portsmouth*, 9 Wall. 682, 19 L. Ed. 754. See ante, "Necessity for Sale," III, A, 6, a.

**After a vessel is stranded, there is still an obligation upon the master to take all possible care of the cargo.** His duties in that respect are not varied by that event, and proof merely of reasonable care and diligence will not excuse him from liability. *The Propeller Niagara v. Cordes*, 21 How. 7, 16 L. Ed. 41.

In times of disaster, it is always the duty of the ship master to exercise his best judgment, and to use his best exertions for the benefit of the owners of both vessel and cargo. *The North Carolina*, 15 Pet. 40, 45, 10 L. Ed. 653.

The master's duty to his owners and to the freighters is to exercise the high-



and cargo upon any grounds, so far as the goods are concerned, when it is practicable for human exertion, skill, and prudence, to save them from the impending peril.<sup>62</sup> If the vessel is not a total loss it is the duty of the master to save what he can from the wreck.<sup>63</sup>

d. *Transportation of Cargo*—(1) *Must Carry Cargo to Destination*.—It is the duty of the master as the appointed agent of the owner to do all that in good faith ought to be done to carry the cargo to its place of destination.<sup>64</sup> It should be carried in the master's own ship if possible.<sup>65</sup>

(2) *Duty to Transship Goods*.—In case of disaster to his ship, it is the duty of the master to transship the goods and send them on by another vessel if one can be had.<sup>66</sup>

e. *Delivery of Cargo*.—The master cannot detain the goods on board of the vessel after the arrival at the port of destination. He must deliver them.<sup>67</sup>

f. *Duty to Sell Cargo*.—Where the vessel is damaged and it is unsafe to carry on the cargo, such cargo may be sold.<sup>68</sup>

**C. Liabilities**—1. **LIABILITY IN REGARD TO ORDINARY EMPLOYMENT OF VESSEL**.—a. *Liability for Repairs*—(1) *In Foreign Port*.—If a vessel is repaired in a foreign port, the master is as liable for those repairs, as for the wages of his

est prudence as well as skill, to guard against loss. He should use every effort to save his cargo. *The Portsmouth*, 9 Wall. 682, 686, 19 L. Ed. 754.

62. *Duty not to abandon goods*.—*The Propeller Niagara v. Cordes*, 21 How. 7, 16 L. Ed. 41.

**Leaving cargo uncared for during winter**.—After the vessel was stranded, the master is guilty of culpable negligence in not protecting the cargo with sufficient care, and in returning home and allowing the cargo to remain in the vessel during the remaining part of the winter and until a late day in the spring. *The Propeller Niagara v. Cordes*, 21 How. 7, 16 L. Ed. 41.

**"Duties remain to be performed by the master, as the agent of the owner or of all concerned, after the voyage is suspended by the stranding of the vessel.** His duty is, if practicable, to relieve the ship and prosecute the voyage; and his obligation to take all possible care of the goods still continues, and is by no means discharged or lessened while it appears that the goods have not perished with the wreck. Safe custody is as much the duty of the carrier as due transport and right delivery; and when he is unable to carry the goods forward to their place of destination by the stranding of the vessel, he is still bound by the original obligation to take all possible care of the goods, and is responsible for every loss or injury which human skill and prudence could prevent." *McAndrews v. Thatcher*, 3 Wall. 347, 369, 18 L. Ed. 155, citing *The Propeller Niagara v. Cordes*, 21 How. 7, 27, 16 L. Ed. 41.

63. **Must save what he can from wreck**.—*General Interest Ins. Co. v. Ruggles*, 12 Wheat. 408, 413, 6 L. Ed. 674.

64. **Cargo must be carried to destination**.—*The Julia Blake*, 107 U. S. 418, 431, 27 L. Ed. 595. See the titles CARRIERS, vol. 3, p. 556; SHIPS AND SHIPPING.

65. **The master of a vessel is bound to**

**carry the goods shipped on her to their place of destination in his own ship**, unless he is prevented from so doing by the act of God, the public enemy, the act of the shipper, or by some one of the perils excepted in the contract of shipment. *The Maggie Hammond*, 9 Wall. 435, 436, 19 L. Ed. 772.

66. **Transshipment of goods in case of disaster**.—*Harrison v. Fortlage*, 161 U. S. 57, 65, 40 L. Ed. 616, citing *The Maggie Hammond*, 9 Wall. 435, 458, 19 L. Ed. 772.

**When the vessel is disabled in the course of the voyage**, and cannot be seasonably repaired to perform it, he is bound to transship the goods and send them forward in another vessel, if one can be had in the same or in any reasonable contiguous port. *The Maggie Hammond*, 9 Wall. 435, 436, 19 L. Ed. 772.

67. **Cannot detain goods on vessel**.—*The Eddy*, 5 Wall. 481, 18 L. Ed. 486.

**The master is bound to deliver the goods in a reasonable time**. What may be so, depends upon the facilities there may be for the discharge of the cargo at the port of delivery, and the impediments in the way of it. *Brittan v. Barnaby*, 21 How. 527, 534, 16 L. Ed. 177. See the titles CARRIERS, vol. 3, p. 556; SHIPS AND SHIPPING.

68. **Cargo in unhealthy condition**.—Where a vessel is damaged and it appears that the repairs or procurement of another vessel would necessarily produce such a retardation of the voyage as would in all probability, occasion a destruction of the article, in specie, before it could arrive at the port of destination, or, from its damaged condition, it could not be re-shipped in time, consistently with the health of the crew or safety of the vessel, or would not be in a fit condition, from pestilential effluvia or otherwise, to be carried on, it then becomes the duty of the master to sell the goods for the benefit

sailors, because the workmen, as well as the sailors, are employed by him and equally subject to his control and dismissal.<sup>69</sup>

(2) *In Home Port*.—"If a vessel is in port, where the owners reside, and they, without the interposition of the master, employ carpenters, etc., to repair her, the master is not liable; not merely because he does not employ them, but because he is not answerable for their conduct, when employed."<sup>70</sup>

b. *Liability for Seamen's Wages*—(1) *In General*.—The master is liable for the wages of the sailors,<sup>71</sup> and he is also liable for the wages of a mate whom he has admitted to serve on the vessel, though the latter was shipped by the owner.<sup>72</sup>

(2) *Means Relied on to Discharge Liability*.—Freight is relied on by the master to discharge his personal responsibility for disbursements and wages.<sup>73</sup>

(3) *Liability Not Dissolved by Death*.—The contract of a master for seaman's wages is not dissolved by the death of the master.<sup>74</sup>

2. **LIABILITY FOR NEGLIGENCE**.—The master of a vessel is liable for his negligence.<sup>75</sup> He is responsible to the owners for damages caused by his own misconduct.<sup>76</sup>

3. **REASONABLE CARE TAKEN BY MASTER**.—The master is not liable where he has taken all reasonable precautions for the safety of the ship.<sup>77</sup>

of whom it might concern. *Hugg v. Augusta Ins., etc., Co.*, 7 How. 595, 12 L. Ed. 834.

69. **Liable for repairs in foreign port**.—*Farrel v. McClea*, 1 Dall. 392, 393, 1 L. Ed. 191.

70. **Not liable for repairs in home port**.—*Farrel v. McClea*, 1 Dall. 392, 393, 1 L. Ed. 191.

71. **Seamen's wages**.—*Farrel v. McClea*, 1 Dall. 392, 393, 1 L. Ed. 191. See ante, "Power of Selecting Crew," III, A, 4, a.

72. **Mate's wages**.—*Farrel v. McClea*, 1 Dall. 392, 1 L. Ed. 191.

73. **Means relied on to discharge liability**.—*Sheppard v. Taylor*, 5 Pet. 675, 710, 8 L. Ed. 269.

74. **Death does not dissolve liability**.—*Andrews v. Wall*, 3 How. 568, 11 L. Ed. 729. See the title SEAMEN.

75. **Examples**.—The master is liable for a breach of duty where an invitee on the vessel is injured, through the master's negligence. *Leathers v. Blessing*, 105 U. S. 626, 630, 26 L. Ed. 1192.

Gross negligence on the part of a master of a vessel in not having the hose and fire engine on his ship in working order as required by statute is a fraud on the law and the public. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 393, 12 L. Ed. 465.

By § 43 of the act of February 28, 1871, in regard to the regulation of steam vessels, the master is liable to the full amount for any damage sustained by a passenger or his baggage, if such damage happens through any neglect or failure to comply with any of the provisions of the act or through known defects. *Butler v. Boston, etc., Steamship Co.*, 130 U. S. 527, 549, 553, 32 L. Ed. 1017.

76. **Responsible to owner**.—*Purviance v. Angus*, 1 Dall. 180, 184, 1 L. Ed. 90.

"Reasonable care, attention, prudence and fidelity, are expected from the master of a ship, and if any misfortune or mischief ensues from the want of them, either

in himself or his mariners, he is responsible in a civil action." *Purviance v. Angus*, 1 Dall. 180, 184, 1 L. Ed. 90.

77. **Examples**.—The master of a vessel came to a berth on appellants' business; and there was evidence to the effect that the broker with whom the engagement was made, and appellants' foreman were both informed that the vessel would draw when loaded from fourteen to fourteen and one-half feet, and that the master was assured by both that there was plenty of water; that the berth had been dredged out to between fourteen and fifteen feet; and that there was fourteen feet "sure at low water." The evidence also tended to show that the foreman suggested on Friday to the master to make some soundings for himself; that there might have been something dropped over from a lighter that he did not know of; that the captain did make soundings and found sufficient water as the vessel then lay; that the captain being advised to do so sounded around the vessel on Saturday and discovered no dangerous condition; that the vessel did not commence leaking until Sunday morning; and that the master thereupon did all he could to save her. It was held from this evidence that the master was not guilty of negligence. *Smith v. Burnett*, 173 U. S. 430, 438, 43 L. Ed. 756.

Where a vessel was loaded at a wharf with a cargo of crushed stone weighing about six hundred tons; and the contract which was oral did not expressly name the number of tons to be loaded, nor guarantee the depth of the water nor the position of the vessel at the wharf; and there was a ridge of rock in the berth assigned to the vessel, projecting above the bottom of the river and endangering her safety even when only partially loaded; and the vessel though stanch, strong and seaworthy was wrecked by grounding on the rock; it was held that no ordinary skill or effort on the part of the master or owners could have been

4. **STORMY WEATHER.**—The ship master is not responsible for loss occasioned by boisterous weather or adverse winds.<sup>78</sup>

**MATERIALITY.**—See note 1.

**MATHEMATICAL SCIENCE.**—As to copyright on, see the title **COPYRIGHT**, vol. 4, p. 606.

**MATTERS.**—See note 2.

**MATURITY.**—“As commonly understood, the word ‘maturity,’ in its application to bonds and other similar instruments, refers to the time fixed for their payment, which is the termination of the period they have to run.”<sup>73</sup>

exercised effectively to save the vessel. *Smith v. Burnett*, 173 U. S. 430, 437, 43 L. Ed. 756. See, generally, the title **WHARVES AND WHARFINGERS**.

Where the master superintended certain alterations of the deck of his vessel which he was about to put to sea in and then deemed the deck sufficiently strong to stand an unusual weight of cargo on it, and which he believed safely stowed, he is not liable where the cargo has to be jettisoned on account of its great weight endangering the ship. *Lawrence v. Min-turn*, 17 How. 100, 111, 15 L. Ed. 58.

78. **Master not liable for adverse weather.**—*Clark v. Barnwell*, 12 How. 272, 282, 13 L. Ed. 985.

1. **Material alteration.**—See the title **ALTERATION OF INSTRUMENTS**, vol. 1, p. 262.

**Representations in insurance.**—As to **materiality** to risk of statements made in representation on policies of insurance, see the title **INSURANCE**, vol. 7, p. 153.

2. **Matter in issue.**—“The matter in issue’ has been defined in a case of leading authority, as ‘that matter upon which the plaintiff proceeds by his action, and

which the defendant controverts by his pleading.’” *Reynolds v. Stockton*, 140 U. S. 254, 270, 35 L. Ed. 464, quoting Judge Wallace in *Smith v. Ontario*, 18 Blatchford 454, 457. See the title **RES ADJUDICATA**.

**Matter in dispute.**—As to rule that the amount of the “matter in dispute” prerequisite to appeals is inapplicable to criminal case, see the title **APPEAL AND ERROR**, vol. 1, p. 851.

As to “matters in dispute” involving sufficient amount to give appellate court jurisdiction, see the title **APPEAL AND ERROR**, vol. 1, p. 837.

**Matter of form.**—As to “matter of form” as used in a state providing that on abatement of actions for matter of form, a new suit may be instituted within a certain period, see the title **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, p. 1009.

**New matter.**—See **NEW**.

3. **Maturity.**—*United States v. Union Pac. R. Co.*, 91 U. S. 72, 85, 23 L. Ed. 224.



# MAXIMS.

BY H. H. THURLOW.

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### I. Scope of Title.

**Equitable Maxims.**—Under this head it is intended to treat, in a general way, those well-known maxims followed by courts of equity, by setting out the maxims, together with a few concrete instances of their application.

**Legal Maxims.**—Under this head no treatment at all is attempted, further than to set out the maxim or principle, and to refer to the specific title where it is applied.

### II. Equitable Maxims.

**A. Relating to Parties**—1. **HE WHO SEEKS EQUITY MUST DO EQUITY.**—When a party comes into a court of chancery, seeking equity, he is bound to do justice, and not ask the court to become the instrument of iniquity.<sup>1</sup> It is true that one who asks no favors need grant none. But if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity.<sup>2</sup> The

#### 1. He who seeks equity must do equity.

—King v. Hamilton, 4 Pet. 311, 328, 7 L. Ed. 869; Clarke v. White, 12 Pet. 178, 9 L. Ed. 1046; Taylor v. Longworth, 14 Pet. 172, 175, 10 L. Ed. 405; Hager v. Thomson, 1 Black 80, 93, 17 L. Ed. 41; Neblett v. MacFarland, 92 U. S. 101, 23 L. Ed. 471; Peoples Nat. Bank v. Marye, 191 U. S. 272, 48 L. Ed. 180.

**Rule universal.**—It is a familiar rule in equity, "that he who comes into court for assistance, must do equity." 2 Hoven-den on Frauds 41. "The interposition of courts of equity is governed by an anxious

attention to the claims of equal justice; and, therefore, it may be laid down as an universal rule that they will not interfere, unless the plaintiff will consent to do that which the justice of the case requires to be done." Fonblanque's Equity, note a, p. 190, ch. 4, § 41 (Phila. Ed. 1831). Galloway v. Finley, 12 Pet. 264, 288, 9 L. Ed. 1079.

**2. Applies only to those seeking equity.**—Fosdick v. Schall, 99 U. S. 235, 253, 25 L. Ed. 339.

**Not to substantive right under statute.**—It is otherwise where the complainants

maxim has been applied by the courts in decreeing specific performance,<sup>3</sup> in setting aside a defective conveyance,<sup>4</sup> or an invalid mortgage,<sup>5</sup> in canceling a land

are not seeking equity, but to avail themselves of a substantive right under the statutory law of the state. *Missouri, etc., Trust Co. v. Krumseig*, 172 U. S. 351, 358, 43 L. Ed. 474.

**May apply to defendant.**—The maxim, "He who seeks equity must do equity," is as appropriate to the conduct of the defendant as to that of the complainant. Good faith and early assertion of rights are as essential on the part of the defendant as of the complainant. *Brown v. Lake Superior Iron Co.*, 134 U. S. 530, 535, 33 L. Ed. 1021, citing *Reynes v. Dumont*, 130 U. S. 354, 32 L. Ed. 934.

**May cure omission of legal defense.**—Being capable of imposing its own terms on the party to whom it grants relief, there may be cases in which its relief ought to be extended to a person who might have defended, but has omitted to defend himself at law. *Marine Ins. Co. v. Hodgson*, 7 Cranch 332, 337, 3 L. Ed. 362.

**Doctrine of election.**—The doctrine of election rests upon the principle that he who seeks equity must do it, and means, as the term is ordinarily used, that where two inconsistent or alternative rights or claims are presented to the choice of a party, by a person who manifests the clear intention that he should not enjoy both, then he must accept or reject one or the other; and so, in other words, that one cannot take a benefit under an instrument and then repudiate it. *Peters v. Bain*, 133 U. S. 670, 695, 33 L. Ed. 696.

**3. In decreeing specific performance.**—There is no principle in equity better settled than that he who asks a specific execution of his contract must show a performance on his part, or that he has offered to perform. *Boone v. The Missouri Iron Co.*, 17 How. 340, 343, 15 L. Ed. 171. See the title SPECIFIC PERFORMANCE.

**This rule without exception.**—*Buchanan v. Upshaw*, 1 How. 56, 84, 11 L. Ed. 46.

**Equity may modify contract.**—Where specific performance is asked, equity may so modify an agreement as to do justice so far as circumstances will permit, and refuse specific execution, unless the party seeking it will comply with such modifications as justice requires. *Mechanics' Bank v. Lynn*, 1 Pet. 376, 383, 7 L. Ed. 185.

**Party may take conditional decree.**—Where it would be inequitable, from a change of circumstances, to enforce a contract specifically, equity may refuse a decree unless the party will consent to a conscientious modification of the contract, or, what would generally amount to the same thing, take a decree upon condition

of doing or relinquishing certain things to the other party. *Willard v. Tayloe*, 8 Wall. 557, 567, 19 L. Ed. 501. See the title JUDGMENTS AND DECREES, vol. 7, p. 544.

**What currency may be tendered.**—Where the parties, at the time the proposition to sell, embodied in the covenant of a lease, was made, had reference to the currency then recognized by law as a legal tender, which consisted only of gold and silver coin, only such tender will justify a decree for specific performance, under the maxim that he who seeks equity must do equity. *Willard v. Tayloe*, 8 Wall. 557, 574, 19 L. Ed. 501.

**4. In setting aside defective conveyance.**—Where a bona fide purchaser, for a valuable consideration and without notice, has enhanced the value of property by permanent expenditures, and has been subsequently evicted by the true owner on account of some latent infirmity in the title, and the true owner is obliged to come into a court of equity to obtain relief against the purchaser, the court will first require reasonable compensation for such expenditures to be made, upon the principle that he who seeks equity must first do equity. *Williams v. Gibbs*, 20 How. 535, 538, 15 L. Ed. 1013; *Canal Bank v. Hudson*, 111 U. S. 66, 83, 28 L. Ed. 354.

**Parties to be placed in statu quo.**—Where a transaction ought never to have taken place, the parties are to be placed as far as possible in the situation in which they would have been except for such transaction, on the general principle that he who seeks equity must do equity. *Neblett v. MacFarland*, 92 U. S. 101, 103, 23 L. Ed. 471.

**Surrendered bond to be returned, not paid.**—And where a bond is surrendered in consideration of a conveyance of land, such bond must be returned before the conveyance will, be set aside, though such bond need not be paid. *Neblett v. MacFarland*, 92 U. S. 101, 103, 23 L. Ed. 471.

**5. In setting aside invalid mortgage.**—Where stockholders are allowed to come in and contest the validity of a mortgage, they are amenable to the rule that they who seek equity must do equity. It is just that they should pay a fair price for what they have received; that a mortgage, given for the construction of the road, though excessive by reason of the fraud in the contract, should stand for the reasonable value of what the company actually received in the way of construction. *Thomas v. Brownville, etc., R. Co.*, 109 U. S. 522, 526, 27 L. Ed. 1018, approved in *Porter v. Pittsburg Bessemer Steel Co.*, 120 U. S. 649, 673, 30 L. Ed. 830. See the title MORTGAGES AND DEEDS OF TRUST.

patent,<sup>6</sup> in setting aside a sale of land,<sup>7</sup> including a judicial sale,<sup>8</sup> in granting relief from a usurious contract,<sup>9</sup> or a contract for the payment of money which is in part invalid,<sup>10</sup> in appointing a receiver,<sup>11</sup> and in enjoining ejectment proceedings,<sup>12</sup> or the collection of a tax.<sup>13</sup>

2. **HE WHO COMES INTO EQUITY MUST COME WITH CLEAN HANDS.**—Those who come into a court of equity, seeking equity, must come with pure hands and a pure conscience. If they claim relief against the frauds of others, they must themselves be free from the imputation. And if they have been engaged in an illegal business and been cheated, equity will not aid them.<sup>14</sup> The maxim has

6. **In canceling land patent.**—*Moffat v. United States*, 112 U. S. 24, 28 L. Ed. 623; *United States v. Minor*, 114 U. S. 233, 29 L. Ed. 110. See the title **PUBLIC LANDS**.

**Does not apply as against state.**—But the proposition that a defendant, having violated a public statute in obtaining public lands that were dedicated to other purposes, cannot be required to surrender them until it has been reimbursed the amount expended by it in procuring the legal title, is not within the reason of the ordinary rule that one who seeks equity must do equity; and, if sustained, would interfere with the prompt and efficient administration of the public domain. *United States v. Trinidad Coal, etc., Co.*, 137 U. S. 160, 171, 34 L. Ed. 640.

7. **In setting aside sale of land.**—He, who seeks equity must do equity in the transaction in respect to which relief is sought; and in a suit to set aside a sale of land, the plaintiff must tender the amount justly due the defendants. *McQuiddy v. Ware*, 20 Wall. 14, 19, 22 L. Ed. 311. See, generally, the title **RESCISSIION, CANCELLATION AND REFORMATION**.

8. **In setting aside judicial sale.**—*Davis v. Gaines*, 104 U. S. 386, 26 L. Ed. 757. See the title **JUDICIAL SALES**, vol. 7, p. 703.

9. **In granting relief from usurious contract.**—Courts of equity will give no relief to a borrower of money upon usurious interest, except on the condition that he pay to the lender the money lent with legal interest. *Brown v. Swann*, 10 Pet. 497, 503, 9 L. Ed. 508, citing *Scott v. Reid*, 10 Pet. 524, 9 L. Ed. 519; *Fowler v. Equitable Trust Co.*, 141 U. S. 384, 35 L. Ed. 786; *Hubbard v. Tod*, 171 U. S. 474, 43 L. Ed. 246; *Missouri, etc., Trust Co. v. Krumseig*, 172 U. S. 351, 357, 43 L. Ed. 474, citing *Tiffany v. Boatman's Institution*, 18 Wall. 375, 21 L. Ed. 868. See the title **USURY**.

10. **In granting relief from invalid money contract.**—It is a settled rule in equity that where a party is in conscience bound to pay a certain sum of money which, together with an amount that he is not legally bound to pay, is brought as a legal claim against him, equity will not restrain the collection of the whole, unless he pay or offer to pay, by tender, the sum which he justly and legally owes.

*Peoples Nat. Bank v. Marye*, 191 U. S. 272, 287, 48 L. Ed. 180.

11. **In appointing receiver.**—As a condition of appointing a receiver of mortgaged railroad property, a court of equity may impose such terms in reference to the payment from the income during the receivership of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property as may, under the circumstances of the particular case, appear to be reasonable. *Fosdick v. Schall*, 99 U. S. 235, 251, 25 L. Ed. 339. See the title **RECEIVERS**.

12. **In enjoining ejectment proceedings.**—*Erwin v. Blake*, 8 Pet. 18, 27, 8 L. Ed. 852; *Sheets v. Selden*, 7 Wall. 416, 19 L. Ed. 166. See the title **EJECTMENT**, vol. 5, p. 695.

**Not where accounting necessary.**—*Prout v. Roby*, 15 Wall. 471, 477, 21 L. Ed. 58.

13. **In enjoining collection of tax.**—A taxpayer has no right to come into equity and enjoin the collection of any tax, without first tendering that part of such tax which is valid. *Peoples Nat. Bank v. Marye*, 191 U. S. 272, 287, 48 L. Ed. 180.

14. **He who comes into equity must come with clean hands.**—*Manhattan Medicine Co. v. Wood*, 103 U. S. 218, 222, 27 L. Ed. 706; *Wheeler v. Sage*, 1 Wall. 518, 529, 17 L. Ed. 646; *Clarke v. White*, 12 Pet. 178, 9 L. Ed. 1046; *Sample v. Barnes*, 14 How. 70, 74, 14 L. Ed. 330; *Bein v. Heath*, 6 How. 228, 247, 12 L. Ed. 416; *Kitchen v. Rayburn*, 19 Wall. 254, 263, 22 L. Ed. 64; *Crosby v. Buchanan*, 23 Wall. 420, 457, 23 L. Ed. 138; *Farley v. Kittson*, 120 U. S. 303, 318, 30 L. Ed. 684. See the title **FRAUD AND DECEIT**, vol. 6, p. 421.

**Rule without exception.**—*Creath v. Sims*, 5 How. 192, 204, 12 L. Ed. 111.

**Rule applies to defendant.**—"In equity a party is not at liberty to set up a legal defense, which grew out of his own misconduct." 2 Hovenden on Frauds 16. And surely, if such a legal defense could not be set up, much less could it be made a ground for relief by a complainant. *Galloway v. Finley*, 12 Pet. 264, 288, 9 L. Ed. 1079.

**Principle old as chancery itself.**—It is a leading principle of equity, that a court of chancery, when called on for specific aid, exercises its discretion whether it will interpose; and will in no case inter-



been applied against a combination of persons for an illegal and fraudulent purpose,<sup>15</sup> against a person who has schemed in order to escape taxation,<sup>16</sup> against one who has made an illegal or fraudulent contract,<sup>17</sup> or a fraudulent conveyance,<sup>18</sup> or a fraudulent loan of money,<sup>19</sup> against one who has used a fraudulent

feere, when the party seeking its aid has practiced any unfairness. He must come into court with clean hands. This principle is as old as the chancery law itself. *Galloway v. Finley*, 12 Pet. 264, 288, 9 L. Ed. 1079.

**Active aid and withholding aid distinguished.**—The difference between that degree of unfairness which will induce a court of equity to interfere actively by setting aside a contract, and that which will induce a court to withhold its aid, is well settled. It is said that the plaintiff must come into court with clean hands, and that a defendant may resist a bill for specific performance by showing that, under the circumstances, the plaintiff is not entitled to the relief he asks. Omission or mistake in the agreement, or that it is unconscientious or unreasonable, or that there has been concealment, misrepresentation or any unfairness, are enumerated among the causes which will induce the court to refuse its aid; and if, to any unfairness, a great inequality between the price and value be added, a court of chancery will not afford its aid. *Cathcart v. Robinson*, 5 Pet. 264, 8 L. Ed. 120.

**Absence of legal title not enough.**—Something more than the absence of legal title is necessary to call into action the processes of a court of equity; the right, whatever it may be or from what source derived, must be not only one not protected by legal title, but in and of itself appealing to the conscience of a chancellor. *Deweese v. Reinhard*, 165 U. S. 386, 390, 41 L. Ed. 757.

**Where intruder attacks invalid conveyance.**—Where a conveyance is of long standing, has been acquiesced in for many years by the government, and parties in reliance thereon have invested large sums of money, any attempt by an intruder to set it aside is offensive to every sense of right and justice, and equity will lend no helping hand to such effort. *Cooper v. Roberts*, 18 How. 173, 15 L. Ed. 338; *Spencer v. Lapsley*, 20 How. 264, 15 L. Ed. 902; *Cragin v. Powell*, 128 U. S. 691, 700, 32 L. Ed. 566.

**Unconscionable act must be within issue.**—But any unconscionable act must be within the issue, and such act against other parties, or in another transaction, will not be ground for refusing equity jurisdiction under this rule. *Clarke v. White*, 12 Pet. 178, 192, 9 L. Ed. 1046.

**15. Illegal and fraudulent combination.**—Where the court was imposed on, and a combination formed, the object and direct tendency of which was to secure the title to the valuable real estate of an insolvent debtor, at the expense and sacrifice of his creditors, such proceeding is

against good conscience and good morals, and cannot receive the sanction of a court of equity. *Wheeler v. Sage*, 1 Wall. 518, 530, 17 L. Ed. 646.

**16. Scheme to escape taxation.**—A court of equity will not knowingly use its extraordinary powers to promote a scheme for escaping taxation, as where the plaintiff converted his property into United States notes, and sued for an injunction against such taxation. *Mitchell v. Commissioners*, 91 U. S. 206, 23 L. Ed. 302.

**17. Fraudulent contract.**—Where the complainants do not come into court with clean hands, and are seeking the benefit of a contract obtained by fraud, they can have no standing in a court of equity. *Kitchen v. Rayburn*, 19 Wall. 254, 263, 22 L. Ed. 64. See, generally, the titles **FRAUD AND DECEIT**, vol. 6, p. 394; **ILLEGAL CONTRACTS**, vol. 6, p. 737.

**Contract involving corruption of public officer.**—To enforce a contract which began with the corruption of a public officer, and progressed in the practice of known and willful deception in its execution, can never be consummated or sanctioned by any court. The law leaves the parties to such a contract as it found them. *Bartle v. Coleman*, 4 Pet. 184, 188, 7 L. Ed. 825.

**Maxim in pari delicto applies in equity.**—A court of equity will not intervene to give relief to either party from the consequences of a fraudulent agreement. The maxim "in pari delicto potior est conditio defendentis" must prevail. *Randall v. Howard*, 2 Black 585, 588, 17 L. Ed. 269; *Creath v. Sims*, 5 How. 192, 204, 12 L. Ed. 111. See post, "Legal Maxims." III. See the title **FRAUD AND DECEIT**, vol. 6, p. 421.

**Judgment based on illegal contract.**—No court of chancery will give effect to a judgment upon an illegal contract or subject matter, in violation of the established rules of equity. *Smith v. Chesapeake, etc., Canal Co.*, 14 Pet. 45, 46, 10 L. Ed. 347.

**18. Fraudulent conveyance.**—If a party seeks relief in equity, he must be able to show on his part there has been honesty and fair dealing. Hence, where plaintiff seeks to recover property conveyed in fraud of creditors, he will not be permitted to do so after the fraud is accomplished. *Dent v. Ferguson*, 132 U. S. 50, 65, 33 L. Ed. 242. See the title **FRAUDULENT AND VOLUNTARY CONVEYANCES**, vol. 6, p. 472.

**19. Fraudulent loan of money.**—Where the facts connected with a loan of money show, if the loan was in fact for the husband, a deliberate fraud on the wife's part, she cannot under such circumstances, invoke the aid of a court of chancery. The

trademark,<sup>20</sup> one who has made a wrongful location of land,<sup>21</sup> or one who invokes the doctrine of subrogation after inequitable conduct,<sup>22</sup> and also against one who purchased property at an unconscionable figure for speculative purposes.<sup>23</sup>

3. **EQUITY AIDS THE VIGILANT, NOT THE SLOTHFUL.**—And in intimate connection with the preceding maxim, equity will never be called into activity to remedy the consequences of laches or neglect, or the want of reasonable diligence—*Vigilantibus et non dormientibus jura subveniunt*.<sup>24</sup> But this maxim does not

law protects her, but it gives her no license to commit a fraud against the rights of an innocent party. *Bein v. Heath*, 6 How. 228, 247, 12 L. Ed. 416.

20. **Fraudulent trademark.**—"A court of equity will extend no aid to sustain a claim to a trademark of an article which is put forth with a misrepresentation to the public as to the manufacturer of the article, and as to the place where it is manufactured. \* \* \* An exclusive privilege for deceiving the public is assuredly not one that a court of equity can be required to aid or sanction. To do so would be to forfeit its name and character." *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 222, 227, 27 L. Ed. 706. See, generally, the title **TRADEMARKS, TRADENAMES AND UNFAIR COMPETITION**.

21. **Wrongful location of land.**—Where the terms of a location prove that the locator considered himself as comprehending a previous entry within his location, \* \* \* he either did not mean to acquire the land within such entry, or he is to be considered as a man watching for the accidental mistakes of others, and preparing to take advantage of them. What is gained at law by a person of this description, equity will not take from him; but it does not follow that equity will aid his views. *Taylor v. Brown*, 5 Cranch 234, 256, 3 L. Ed. 88, approving *Bodley v. Taylor*, 5 Cranch 191, 3 L. Ed. 75; *Cragin v. Powell*, 128 U. S. 691, 700, 32 L. Ed. 566; *Deweese v. Reinhard*, 165 U. S. 386, 41 L. Ed. 757. See the title **PUBLIC LANDS**.

22. **Asking subrogation after inequitable conduct.**—One who invokes the doctrine of subrogation must come with clean hands. *German Bank v. United States*, 148 U. S. 573, 37 L. Ed. 564. See the title **SUBROGATION**.

23. **Property purchased at unconscionable figure.**—Where complainants ask the interposition of a court of equity to establish their title to property worth over half a million of dollars, obtained by purchase at execution sale for \$275, the immense disproportion between the value and the cost shocks the conscience of a chancellor and forbids the supporting action of a court of equity. *Randolph v. Quidnick Co.*, 135 U. S. 457, 458, 34 L. Ed. 200, citing *Mississippi, etc., R. Co. v. Cromwell*, 91 U. S. 643, 23 L. Ed. 367.

**After prior sale to railroad.**—It may well be doubted whether a court of equity

could be successfully appealed to by a purchaser from a county of property worth upwards of two hundred thousand dollars for a nominal consideration of less than four hundred dollars, where such purchaser bought with knowledge of the county's previous sale to a railroad company and admits that he secured his own grant for a grossly inadequate consideration because of the disputed validity of such previous sale. *Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 13, 39 L. Ed. 873.

**Contract to convey valuable patents.**—A contract to convey valuable patents, based upon a consideration which is totally inadequate, is too unconscionable to be specifically enforced in equity. *Dalzell v. Dueber Watch Case Mfg. Co.*, 149 U. S. 315, 323, 37 L. Ed. 749, citing *Cathcart v. Robinson*, 5 Pet. 264, 276, 8 L. Ed. 120; *Mississippi, etc., R. Co. v. Cromwell*, 91 U. S. 643, 23 L. Ed. 367; *Pope Mfg. Co. v. Gormully*, 144 U. S. 224, 36 L. Ed. 414. See, generally, the titles **PATENTS; SPECIFIC PERFORMANCE**.

24. **Equity aids the vigilant, not the slothful.**—*Creath v. Sims*, 5 How. 192, 204, 12 L. Ed. 111; *Magee v. Manhattan Life Ins. Co.*, 92 U. S. 93, 23 L. Ed. 699; *Lupton v. Janney*, 13 Pet. 381, 386, 10 L. Ed. 210. And see the title **LACHES**, vol. 7, p. 790.

**In absence of diligence, equity remains passive.**—Nothing can call forth a court of equity into activity but conscience, good faith, and reasonable diligence; when these are wanting, the court is passive, and does nothing. *Wagner v. Baird*, 7 How. 234, 258, 12 L. Ed. 681.

**Delay in invoking aid of equity.**—Courts of equity uniformly proceed, independently of any statute of limitations, upon the principle of refusing relief to those who unreasonably delay to invoke their aid. *Parker v. Dacres*, 130 U. S. 43, 50, 32 L. Ed. 848, citing *Richards v. Mackall*, 124 U. S. 183, 187, 31 L. Ed. 396. See the title **LACHES**, vol. 7, p. 798.

**Rule especially applicable where rights of third persons intervene.**—*Elmendorf v. Taylor*, 10 Wheat. 152, 168, 6 L. Ed. 289. See the title **LACHES**, vol. 7, p. 803.

**Time affects character of relief.**—The time at which a party appeals to a court of equity for relief affects largely the character of the relief which will be granted. If one, aware of the situation, believes he has certain legal rights, and desires to insist upon them, he should do



apply as against the state.<sup>25</sup>

**B. Relating to Action of Court**—1. **EQUITY SUFFERS NO WRONG WITHOUT A REMEDY.**—It is a maxim long recognized that equity will suffer no wrong to be without a remedy.<sup>26</sup> And a fortiori, equity will not turn a party to another forum to enforce a right it has itself established.<sup>27</sup>

2. **EQUITY FOLLOWS THE LAW.**—Wherever the rights or the situation of the parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim *equitas sequitur legem* is strictly applicable.<sup>28</sup> Following this maxim, also, equity gives effect to statutes of limitation,<sup>29</sup> adopts the legal rule as to possession in

so promptly. *Vigilantibus non dormientibus equitas subvenit* is a maxim of equity. *New York City v. Pine*, 185 U. S. 93, 103, 46 L. Ed. 820.

**Failure to assert legal defense.**—Whenever a competent remedy or defense shall have existed at law, the party who may have neglected to use it will never be permitted here to supply the omission, to the encouragement of useless and expensive litigation, and perhaps to the subversion of justice. *Creath v. Sims*, 5 How. 192, 204, 12 L. Ed. 111; *Beloit v. Morgan*, 7 Wall. 619, 623, 19 L. Ed. 205. See the title **PLEADING**.

**Injury which diligence might have avoided.**—Courts of equity will not interfere to assist a party to obtain redress for an injury which might by ordinary diligence have been avoided. *Bend v. Hoyt*, 13 Pet. 263, 268, 10 L. Ed. 154.

**Equity will not imply trust where diligence is lacking.**—It would be going too far for a court of equity, in favor of those who would do nothing for themselves, to hold a certain person a trustee by implication, for the purpose of charging him with a breach of trust. *Fitzsimmons v. Ogden*, 7 Cranch 2, 21, 3 L. Ed. 249. See the title **TRUSTS AND TRUSTEES**.

25. **Maxim does not apply as against the state.**—*United States v. Beebe*, 127 U. S. 338, 344, 32 L. Ed. 121. And see the title **LACHES**, vol. 7, p. 820.

26. **Equity suffers no wrong without a remedy.**—*Rees v. Watertown*, 19 Wall. 107, 121, 22 L. Ed. 72; *Joy v. St. Louis*, 138 U. S. 1, 46, 34 L. Ed. 843.

27. **Equity will enforce equitable right.**—*Terrell v. Allison*, 21 Wall. 289, 291, 22 L. Ed. 634.

**Remedy applied on equitable principles.**—Equity will afford a remedy which a court of law cannot afford, and where not by authority of some statute, it will be applied as the principles of equity require its application. *Bodley v. Taylor*, 5 Cranch 191, 223, 3 L. Ed. 75.

**Equity cannot enforce void contract.**—Where a contract is void at law for want of power to make it, a court of equity has no jurisdiction to enforce such contract, or, in the absence of fraud, accident, or mistake to so modify it as to make it legal and then enforce it. *Hedges v. Dixon County*, 150 U. S. 182, 192, 37 L. Ed. 1044.

**Nor appoint receiver to collect taxes.**—

A court of equity cannot appoint a receiver to levy and collect taxes, merely because the writ of mandamus has issued and failed, or because no officer can be found to perform that duty. *Thompson v. Allen County*, 115 U. S. 550, 558, 29 L. Ed. 472. See, generally, the titles **RECEIVERS**; **TAXATION**.

28. **Equity follows the law.**—*Magniac v. Thomson*, 15 How. 281, 299, 14 L. Ed. 696; *Carrol v. Green*, 92 U. S. 509, 516, 23 L. Ed. 738; *Hedges v. Dixon County*, 150 U. S. 182, 192, 37 L. Ed. 1044. See the title **EQUITY**, vol. 5, p. 834.

**Where estate not liable at law.**—Where the equities are clearly equal, and the estate is not liable at law, it will not be held liable in equity. *Pickersgill v. Lahens*, 15 Wall. 140, 146, 21 L. Ed. 119.

**Where remedy at law has been lost.**—Where a contract is hard, and destitute of all equity, the court will leave parties to their remedy at law; and if that has been lost by negligence, they must abide by it. *King v. Hamilton*, 4 Pet. 311, 328, 7 L. Ed. 869; *Dade v. Irwin*, 2 How. 383, 390, 11 L. Ed. 308. See ante, "Equity Aids the Vigilant, Not the Slothful," II, A, 3. See the title **LACHES**, vol. 7, p. 790.

**Where surety discharged at law.**—Equity will not charge a surety who is discharged at law. *Riddle v. Mandeville*, 5 Cranch 322, 332, 3 L. Ed. 114.

**Equity cannot violate law.**—A court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law, or even without authority of law. *Rees v. Watertown*, 19 Wall. 107, 122, 22 L. Ed. 72.

**Must give effect to constitutional provision.**—A court of equity cannot give effect to a contract which is void under a constitutional provision. *Litchfield v. Ballou*, 114 U. S. 190, 193, 29 L. Ed. 132.

29. **Equity gives effect to statute of limitations.**—From the authorities, it appears the rule is well settled, both in England and in this country, that effect will be given to the statute of limitation, in equity, the same as at law. *Miller v. McIntyre*, 6 Pet. 61, 67, 8 L. Ed. 320. See the title **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, p. 900.

**Where case rests upon implied trust.**—Where the case is one resting upon the



ejectment,<sup>30</sup> recognizes the legal rule as to priority of mortgages,<sup>31</sup> and follows the maritime law in regard to liens.<sup>32</sup> But this maxim is not destructive of equitable principles; and in every case where equity takes jurisdiction at all, it will exercise that jurisdiction upon its own principles.<sup>33</sup>

3. **EQUITY ACTS IN PERSONAM.**—Generally, if not universally, equity jurisdiction is exercised in personam, and not in rem, and depends upon the control of the court over the parties.<sup>34</sup>

4. **EQUITY ACTS SPECIFICALLY.**—See the title **SPECIFIC PERFORMANCE**.

**C. Relating to Determination of Rights**—1. **EQUALITY IS EQUITY.**—The maxim equality is equity is also frequently invoked by courts of chancery.<sup>35</sup>

2. **EQUITY TREATS AS DONE WHAT OUGHT TO BE DONE.**—Equity treats

enforcement of an implied trust, courts of equity follow the courts of law in applying the statute of limitations. *Beaubien v. Beaubien*, 23 How. 190, 16 L. Ed. 484.

30. **Adopts legal rule as to possession in ejectment.**—Courts of equity adopt the same rule as to possession, to bar a recovery in ejectment, as courts of law. *Peyton v. Stith*, 5 Pet. 485, 486, 8 L. Ed. 200. See the title **EJECTMENT**, vol. 5, p. 695.

31. **Recognizes legal priority of mortgages.**—A first mortgage conveys the legal estate; a second, merely an equity or redemption; and as equity follows the law, and the owner of the legal title, by means of it, has a legal right, after condition broken, to the possession and a remedy at law for acquiring it, he is entitled to priority. *Neslin v. Wells*, 104 U. S. 428, 440, 26 L. Ed. 802. See the title **MORTGAGES AND DEEDS OF TRUST**.

32. **Equity follows maritime law.**—When vessels have passed into the hands of an assignee or receiver, it has been the constant practice of courts of bankruptcy and equity to respect the liens given by the maritime law, to marshal such liens and direct their payment, precisely as a court of admiralty would have done. *Pratt v. Paris Gas Light, etc., Co.*, 168 U. S. 255, 259, 42 L. Ed. 458. See the title **MARITIME LIENS**, ante, p. 228.

33. **Equity follows equitable principles.**—*Bodley v. Taylor*, 5 Cranch 191, 222, 3 L. Ed. 75.

**Equity will protect creditors.**—Equity, true to its ideas of substantial justice, refuses to be bound by the letter of legal procedure, or to lend its aid to a mere speculative purchase which threatens injury and ruin to a large body of honest creditors, who have trusted for the payment of their debts to the legal validity of proceedings theretofore taken. *Randolph v. Quidnick Co.*, 135 U. S. 457, 460, 34 L. Ed. 200.

34. **Equity acts in personam.**—*Hart v. Sansom*, 110 U. S. 151, 154, 28 L. Ed. 101; *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207. See the title **EQUITY**, vol. 5, p. 837.

**Decrees enforced by personal process.**—Without regard to the situation of the subject matter, equity courts consider the equities between the parties, and decree in

personam according to those equities, and enforce obedience to their decrees by process in personam. *Cole v. Cunningham*, 133 U. S. 107, 119, 33 L. Ed. 538, citing *Phelps v. McDonald*, 99 U. S. 298, 308, 25 L. Ed. 473.

**Power over foreign property.**—A court of chancery, acting in personam, may well decree the conveyance of land in any other state, and may enforce its decree by process against the defendant. *Watkins v. Holman*, 16 Pet. 25, 57, 10 L. Ed. 873. See the title **EQUITY**, vol. 5, p. 838.

35. **Equality is equity.**—*Bank v. Sherman*, 101 U. S. 403, 406, 25 L. Ed. 866; *Meddaugh v. Wilson*, 151 U. S. 333, 346, 38 L. Ed. 183; *Glover v. Patten*, 165 U. S. 394, 411, 41 L. Ed. 760.

**Maxim applied to a will.**—Where a testatrix had made a general bequest to her five children, a prior loan to one was treated as an advancement, the court saying: "The instincts of a mother would naturally lead her to put her daughters upon an exact equality, and the case is manifestly one for the application of the legal maxim that 'equality is equity.'" *Glover v. Patten*, 165 U. S. 394, 411, 41 L. Ed. 760.

**Maxim applied to bankrupt property.**—In the disposition of property among creditors, equality is equity. And where it was the genius and purpose of a statute to secure this result as far as possible from the moment its aid was invoked, whether by debtor or creditor, an assignment after the bill was filed, but before an amended bill, will still be inoperative. *Bank v. Sherman*, 101 U. S. 403, 406, 25 L. Ed. 866.

**Equality of burden.**—In the application of this maxim, it is a general principle that a trust estate must bear the expenses of its administration. It is also established by sufficient authority, that where one of many parties having a common interest in a trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself, or by proportional contribution from those who accept the benefit of his efforts. *Trustees v. Greenough*, 105 U. S. 527, 532, 26 L. Ed. 1157; *Central R., etc., Co. v. Pettus*, 113 U. S. 116, 126, 28 L.

as done that which ought to have been done,<sup>36</sup> or that which the parties intended should be done.<sup>37</sup> Under this maxim, contracts for the sale of land have been treated as performed,<sup>38</sup> acts prevented by fraud as done,<sup>39</sup> mutual payments of money as canceled,<sup>40</sup> and a location of land for another as held in trust.<sup>41</sup> Under special circumstances, it is even possible a court of equity might invoke this maxim to establish a will.<sup>42</sup> But the maxim will never be applied to the injury of innocent third persons.<sup>43</sup>

3. **EQUITY LOOKS TO SUBSTANCE, NOT FORM.**—A court of equity looks rather to the substance of things than to their forms, under the maxim *ut res magis valeat quam pereat*.<sup>44</sup> Hence, equity dispenses with technical or formal proceedings,<sup>45</sup>

Ed. 915; *Meddaugh v. Wilson*, 151 U. S. 333, 346, 38 L. Ed. 183.

**Contribution among wrongdoers not inequitable.**—Equal contribution to discharge a joint liability is not inequitable, even as between wrongdoers, although the law will not, in general, support an action to enforce it where the payments have been unequal. *Selz v. Unna*, 6 Wall. 327, 336, 18 L. Ed. 799. See the title **CONTRIBUTION AND EXONERATION**, vol. 4, p. 597.

36. **Equity treats as done what ought to be done.**—*Taylor v. Longworth*, 14 Pet. 172, 175, 10 L. Ed. 405; *Meddaugh v. Wilson*, 151 U. S. 333, 346, 38 L. Ed. 183.

37. **Or what parties intended to be done.**—*Craig v. Leslie*, 3 Wheat. 563, 578, 4 L. Ed. 460; *Casey v. Cavaroc*, 96 U. S. 467, 491, 24 L. Ed. 779.

38. **Contract for sale of land.**—In view of a court of equity, a contract for the sale of land is treated, says Mr. Justice Story, for most purposes, precisely as if it had been specifically performed. The vendee is treated as the owner of the land and the vendor as the owner of the money. *Guntton v. Carroll*, 101 U. S. 426, 430, 25 L. Ed. 935. See the title **SPECIFIC PERFORMANCE**.

39. **Acts prevented by fraud.**—Courts of equity will not only interfere in cases of fraud to set aside acts done, but they will also, if acts have by fraud been prevented from being done by the parties, interfere and treat the case exactly as if the acts had been done. 1 Story Eq. Jur., § 187. *Moore v. Crawford*, 130 U. S. 122, 128, 32 L. Ed. 878; *Carpenter v. Providence, etc., Ins. Co.*, 4 How. 185, 224, 11 L. Ed. 931. See the title **FRAUD AND DECEIT**, vol. 6, p. 421.

40. **Mutual payments of money.**—When one person is to pay money and receive the same money, and nothing remains but to enter receipts and payments in their proper accounts accordingly, the law will consider that as done which ought to be done. *Cavender v. Cavender*, 114 U. S. 464, 472, 29 L. Ed. 212.

41. **Land located for another.**—If a location made for another person be sustainable and the locator, instead of showing the land really covered by the entry, shows other land, and appropriates to himself the land actually entered, this appears to the court to be a species of mala

fides, which will, in equity, convert him into a trustee for the party originally entitled to the land. *Massie v. Watts*, 6 Cranch 148, 162, 3 L. Ed. 181. See the title **TRUSTS AND TRUSTEES**.

42. **Establishing a will.**—Where equity has ordered the parties to a will to go before a probate court, and this procedure has failed to procure the requisite action, it will be a matter for grave consideration whether the inherent powers of a court of chancery may not afford a remedy where the right is clear, by itself establishing the will. *Gaines v. Chew*, 2 How. 619, 647, 11 L. Ed. 402. See the title **WILLS**.

43. **Maxim not applied to injury of third persons.**—While equity will consider as done what the parties intended should be done, equity will not exercise this power when it would injure third persons who have incurred detriment and acquired consequent rights by the acts that are done. *Casey v. Cavaroc*, 96 U. S. 467, 491, 24 L. Ed. 779, citing *Casey v. National Bank*, 96 U. S. 492, 24 L. Ed. 789; *Casey v. Schuchardt*, 96 U. S. 494, 24 L. Ed. 790.

44. **Equity looks to substance, not form.**—*Hinkle v. Wanzer*, 17 How. 353, 364, 15 L. Ed. 173; *Texas v. Hardenberg*, 10 Wall. 68, 89, 19 L. Ed. 839; *Crosby v. Buchanan*, 23 Wall. 420, 457, 23 L. Ed. 138; *Meddaugh v. Wilson*, 151 U. S. 333, 346, 38 L. Ed. 183.

**Qualification of preceding maxim.**—This qualification of the more concise and general rule, that equity considers that to be done which is agreed to be done, will comprehend the cases which come under this head of equity. *Craig v. Leslie*, 3 Wheat. 563, 578, 4 L. Ed. 460.

45. **Equity dispenses with formal proceedings.**—There is no propriety in requiring technical and formal proceedings, when they tend to embarrass and delay the administration of justice, unless they are required by some fixed principle of equity law or practice, which the court would not be at liberty to disregard. *Kelsey v. Hobby*, 16 Pet. 269, 10 L. Ed. 961.

**Where rights rests upon statute.**—When substantial rights, resting upon a statute, which is clearly within the legislative power, come in conflict with mere forms and modes of procedure in the courts, the



grants relief regardless of who is plaintiff or defendant,<sup>46</sup> looks past nominal parties,<sup>47</sup> considers the bona fides of a transaction,<sup>48</sup> regards money to be invested in land as land, and land directed to be sold as money,<sup>49</sup> and looks to the intention of parties to a deed,<sup>50</sup> particularly in regard to an absolute deed which is in effect a mortgage.<sup>51</sup>

4. EQUITY IMPUTES INTENT TO FULFILL OBLIGATIONS.—See the title TRUSTS AND TRUSTEES.

5. WHERE EQUITIES EQUAL, THE LAW PREVAILS.—It is a well-known maxim

latter must give way, and adapt themselves to the forms necessary to give effect to such rights. The flexibility of chancery methods enables it to do this without violence to principle. *Missouri, etc., Trust Co. v. Krumseig*, 172 U. S. 351, 361, 43 L. Ed. 474, citing *Holland v. Challen*, 110 U. S. 15, 28 L. Ed. 52.

**Any other rule intolerable in equity.**—In truth, it would not be tolerable for a court administering equity to seize upon a technicality for the purpose or with the result of entrapping either of the parties before it. *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 401, 38 L. Ed. 1014.

**Substantial compliance with statutory procedure sufficient.**—It is not necessary, as has been repeatedly said in the federal supreme court, that the form or mode of securing a right should follow precisely that prescribed by a statute. If the right is substantially preserved or secured, it may be done by such suitable methods as the flexibility of chancery proceedings will enable the court to adopt, and which are most in conformity with the practice of the court. *Brine v. Insurance Co.*, 96 U. S. 627, 639, 24 L. Ed. 858, citing *Ex parte McNeil*, 13 Wall. 236, 20 L. Ed. 624.

46. **Equity grants relief without regard to parties.**—A court of equity looks to substance rather than form, and when it has jurisdiction of parties, it grants the appropriate relief without regard to whether they come as plaintiff or defendant. *Littlefield v. Perry*, 21 Wall. 205 223, 22 L. Ed. 577.

47. **Equity looks past nominal parties.**—Courts of equity can look past the nominal parties to the real ones unrestrained by any technicalities. *Miles v. Caldwell*, 2 Wall. 35, 40, 17 L. Ed. 755. See the title PARTIES.

48. **Equity considers bona fides of transaction.**—Equity looks at the substance and not at the mere form in which a transaction takes place; and a chancellor will not be astute to charge a constructive trust upon one who has acted honestly and paid a full and fair consideration without notice or knowledge. *United States v. Detroit Lumber Co.*, 200 U. S. 321, 333, 50 L. Ed. 499, citing *Wilson v. Wall*, 6 Wall. 83, 90, 18 L. Ed. 727.

49. **Equity treats land as already bought or sold.**—See the title CONVERSION AND RECONVERSION, vol. 4, p. 599.

50. **Equity looks to intention in a deed.**—It may be shown that a deed was made

to defraud creditors, or to give a preference, or to secure a loan, or for any other object not apparent on its face. The object of parties in such cases will be considered by a court of equity; it constitutes a ground for the exercise of its jurisdiction, which will always be asserted to prevent fraud or oppression and to promote justice. *Brick v. Brick*, 98 U. S. 514, 516, 25 L. Ed. 256, citing *Hughes v. Edwards*, 9 Wheat. 489, 6 L. Ed. 142; *Russell v. Southard*, 12 How. 139, 13 L. Ed. 927. See the title FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 472.

51. **Treats absolute deed as mortgage.**—It is an established doctrine that a court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as security for a loan of money. That court looks beyond the terms of the instrument to the real transaction; and when that is shown to be one of security, and not of sale, it will give effect to the actual contract of the parties. *Peugh v. Davis*, 96 U. S. 332, 336, 24 L. Ed. 775, citing *Shillaber v. Robinson*, 97 U. S. 68, 77, 24 L. Ed. 967; *Russell v. Southard*, 12 How. 139, 153, 13 L. Ed. 927; *Jackson v. Lawrence*, 117 U. S. 679, 681, 29 L. Ed. 1024; *Hughes v. Edwards*, 9 Wheat. 489, 6 L. Ed. 142; *Sprigg v. Bank*, 14 Pet. 201, 10 L. Ed. 419; *Morris v. Nixon*, 1 How. 118, 11 L. Ed. 69; *Peugh v. Davis*, 96 U. S. 332, 24 L. Ed. 775; *Teal v. Walker*, 111 U. S. 242, 28 L. Ed. 415. See the title MORTGAGES AND DEEDS OF TRUST.

**No precise form necessary for mortgage.**—While it may be conceded that no precise form of words is necessary to constitute a mortgage, yet there must be a present purpose of the mortgagor to pledge his land for the payment of a sum of money, or the performance of some other act, or it cannot be construed to be a mortgage. *New Orleans Nat. Banking Ass'n v. Adams*, 109 U. S. 211, 214, 27 L. Ed. 910.

**Intention to give mortgage security necessary.**—But equity may not decree an equitable mortgage under this maxim, where there was clearly no intention to give mortgage security. *Biebinger v. Continental Bank*, 99 U. S. 143, 146, 25 L. Ed. 371.

**Mortgagee becomes trustee after payment.**—Where a mortgage debt is paid, equity will consider the mortgagee as a



in equity that where the equities are equal, the legal title must prevail.<sup>52</sup> And he who has equal equity, may acquire the legal estate, if he can, so as to protect his equity.<sup>53</sup> But the legal title does not avail as against a superior equity,<sup>54</sup> though such equity must be clearly established.<sup>55</sup>

6. **THE FIRST IN TIME IS BEST IN RIGHT.**—Between merely equitable claimants, each having equal equity with the other, he who hath the precedency in time, has the advantage in right.<sup>56</sup> The maxim only applies where the equities

mere trustee for the mortgagor. *Hughes v. Edwards*, 9 Wheat. 489, 496, 6 L. Ed. 142.

**52. Where equities equal, the law prevails.**—*Fitzsimmons v. Ogden*, 7 Cranch 2, 3 L. Ed. 249; *Simmons v. Ogle*, 105 U. S. 271, 277, 26 L. Ed. 1087; *Townsend v. Little*, 109 U. S. 504, 27 L. Ed. 1012.

**Legal title to land.**—Where the appellant has the legal title and the possession, without fraud or any unfairness, where he found the land subject to entry by the records of the land office, and bought and paid for it, in such case the maxim applies in all its force, that better is the condition of the defendant. The equities of the parties being equal, the legal title must prevail. *Simmons v. Ogle*, 105 U. S. 271, 277, 26 L. Ed. 1087. See the title **PUBLIC LANDS**.

**Chose in action.**—Where an equity was successively assigned in a chose in action to two innocent persons, whose equities are equal, according to the moral rule governing a court of chancery, and one has drawn to his equity a legal title, it is well settled that the equities being equal, the law must prevail. *Judson v. Corcoran*, 17 How. 612, 614, 15 L. Ed. 231.

**Purchaser for value.**—Nothing is clearer than that a purchaser for a valuable consideration, without notice of a prior equitable right, obtaining the legal estate at the time of his purchase, is entitled to priority in equity as well as at law, according to the well-known maxim that when equities are equal the law shall prevail. *Townsend v. Little*, 109 U. S. 504, 511, 27 L. Ed. 1012, citing *Williams v. Jackson*, 107 U. S. 478, 27 L. Ed. 529; *Vattier v. Hinde*, 7 Pet. 252, 8 L. Ed. 675.

**Legal title better than prior equity.**—It is a general principle in courts of equity, that, where both parties claim by an equitable title, the one who is prior in time is deemed the better in right; and that where the equities are equal in point of merit, the law prevails. This leads to the reason for protecting an innocent purchaser, holding the legal title, against one who has the prior equity; a court of equity can act only on the conscience of a party; if he has done nothing that taints it, no demand can attach upon it, so as to give any jurisdiction. *Boone v. Chiles*, 10 Pet. 177, 210, 9 L. Ed. 383, citing *Fitzsimmons v. Ogden*, 7 Cranch 2, 18, 3 L. Ed. 249; *Bayley v. Greenleaf*, 7 Wheat. 46, 5 L. Ed. 393, approved in *Lansdale v. Daniels*, 100 U. S. 113, 118, 25 L. Ed. 587.

**Counterclaims unavailable after judg-**

**ment.**—Although counterclaims might have been offered in evidence in a suit at law, brought in the name of the assignor, he who has neglected to avail himself of that advantage cannot, after the judgment, avail himself of such discounts, as plaintiff in equity. To deprive a party of the fruits of a judgment at law, it must be against conscience that he should enjoy them; the party complaining must show that he has more equity than the party in whose favor the law has decided. *Brashear v. West*, 7 Pet. 608, 616, 8 L. Ed. 801. See the title **SET-OFF, RECOUPMENT AND COUNTERCLAIM**.

**53. He who has equal equity may acquire legal title.**—*Fitzsimmons v. Ogden*, 7 Cranch 2, 3 L. Ed. 249.

**54. Superior equity defeats legal title.**—But where parties possess equities superior to those of a patentee, upon which the patent issued, a court of equity will, upon proper proceedings, enforce such equities by compelling a transfer of the legal title, or enjoining its enforcement, or canceling the patent. *Gibson v. Chouteau*, 13 Wall. 92, 102, 20 L. Ed. 534.

**55. Superior equity must be clearly established.**—Where the defendants are in possession of land, and have been for many years, some or all of them, under legal titles, and the complainants seek to recover the land, on the ground of their superior equity, the interests thus acquired, and which have been so long enjoyed, ought not to be disturbed by an equitable claim which is not clearly established. *Garnett v. Jenkins*, 8 Pet. 75, 86, 8 L. Ed. 871.

**56. The first in time is best in right.**—*Fitzsimmons v. Ogden*, 7 Cranch 2, 18, 3 L. Ed. 249; *Buchannon v. Upshaw*, 1 How. 56, 11 L. Ed. 46; *Hallett v. Collins*, 10 How. 174, 13 L. Ed. 376; *Louisiana v. Mississippi*, 202 U. S. 1, 50 L. Ed. 913.

**Where same interest assigned to two persons.**—The assignor having parted with his interest by assignment, a second assignee can take nothing, and, as he represents his assignor, he is bound by the equities imposed on the latter; hence has arisen the maxim in such cases, that he who is first in time is best in right. *Judson v. Corcoran*, 17 How. 612, 614, 15 L. Ed. 231.

**Where prior equity fortified by legal title.**—An execution against an equity of redemption of a mortgager of land cannot be enforced in equity, where third parties have, for a valuable consideration, without notice, acquired a previous equi-

are equal;<sup>57</sup> and is opposed to the rule of priority in case of maritime liens.<sup>58</sup>

7. OF TWO INNOCENT PARTIES, THE ONE IN FAULT SUFFERS.—Where one of two innocent parties must lose, and one of them is in fault, the law throws the burden of the loss upon him.<sup>59</sup>

### III. Legal Maxims.

**Actio personalis mortur cum persona.**—<sup>60</sup>Æquitas est correctio legis generaliter latae qua parti deficit.<sup>61</sup>

**Caveat Venditor—Caveat Emptor.**—The distinction as to warranty by the civil law and at common law may be briefly summed up by saying that the one, the civil law doctrine, finds its expression in the maxim caveat venditor, whilst the rule of the common law is conveyed by the aphorism caveat emptor.<sup>62</sup>

**Damnum Absque Injuria.**<sup>63</sup>—See the title DAMAGES, vol. 5, p. 157.

**De minimis non curat lex,** the law does not notice trifling matters.<sup>64</sup>

**Et sicut ad quaestionem juris** non respondent juratores sed iudices: sic ad

table right, and gotten in, also, the legal estate. They stand upon the great principle that they have the prior equity, and that equity is fortified by the legal title. *Van Ness v. Hyatt*, 13 Pet. 294, 300, 10 L. Ed. 168.

57. Maxim has no application where equities unequal.—The maxim—qui prior est tempore potior est jure—only applies in cases in which the equities are equal. Hence, it has no application where the equities are unequal by reason of negligence or laches. *Neslin v. Wells*, 104 U. S. 428, 441, 26 L. Ed. 802. See the titles LACHES, vol. 7, p. 803; NEGLIGENCE.

58. Opposed to rule of maritime liens.—The principle applicable to maritime cases, which gives priority of lien to the last creditor furnishing supplies and repairs for the conservation of the ship or voyage, does not apply to railroads. As to them the common law rule prevails, qui prior est in tempore, potior est in jure. *Galveston Railroad v. Cowdrey*, 11 Wall. 459, 20 L. Ed. 199. See the title MARITIME LIENS, ante, p. 228.

59. Of two innocent parties, the one in fault suffers.—The *Monte Allegre*, 9 Wheat. 616, 6 L. Ed. 174; *Calais Steamboat Co. v. Van Pelt*, 2 Black 372, 17 L. Ed. 282; *Carpenter v. Longan*, 16 Wall. 271, 21 L. Ed. 313; *Butler v. United States*, 21 Wall. 272, 275, 22 L. Ed. 614; *Maçee v. Manhattan Life Ins. Co.*, 92 U. S. 93, 98, 23 L. Ed. 699; *Brant v. Virginia Coal, etc., Co.*, 93 U. S. 326, 336, 23 L. Ed. 927; *Savings Bank v. Creswell*, 100 U. S. 630, 25 L. Ed. 713; *People's Bank v. National Bank*, 101 U. S. 181, 183, 25 L. Ed. 907; *Pompton v. Cooper Union*, 101 U. S. 196, 204, 25 L. Ed. 803; *Neslin v. Wells*, 104 U. S. 428, 437, 26 L. Ed. 802. See the title FRAUD AND DECEIT, vol. 6, p. 423.

**Rule differently stated.**—Where one of two innocent parties must suffer, through the fraud or negligence of a third party, the loss shall fall upon him who made such fraud or negligence possible. *Bank v. Neal*, 22 How. 96, 111, 16 L. Ed. 323.

**Where parties equally innocent.**—A

court of equity will not transfer a loss that has already fallen upon one innocent party to another party equally innocent, the equities being equal. *Holly v. Missionary Society*, 180 U. S. 284, 295, 45 L. Ed. 531.

60. *Stewart v. Baltimore, etc., R. Co.*, 168 U. S. 445, 448, 42 L. Ed. 537. See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 12.

61. Æquitas est correctio legis.—“In some cases the letter of a legislative act is restrained by an equitable construction; in others it is enlarged; in others the construction is contrary to the letter. The equitable construction which restrains the letter of a statute is defined by Aristotle, as frequently quoted, in this manner: ‘æquitas est correctio legis generaliter latae qua parti deficit.’” *Beley v. Naphtaly*, 169 U. S. 353, 360, 42 L. Ed. 775. See the titles INTERPRETATION AND CONSTRUCTION, vol. 7, p. 257; STATUTES.

62. **Caveat venditor—Caveat emptor.**—*Meyer v. Richards*, 163 U. S. 385, 398, 41 L. Ed. 199. See the titles JUDICIAL SALES, vol. 7, p. 703; SALES; SHERIFFS’ CONSTABLES’ AND MARSHALS’ SALES; VENDOR AND PURCHASER.

63. *Wabash R. Co. v. Defiance*, 167 U. S. 88, 101, 42 L. Ed. 87; *Chicago, etc., R. Co. v. Omaha*, 170 U. S. 57, 77, 42 L. Ed. 948; *Meyer v. Richmond*, 172 U. S. 82, 95, 43 L. Ed. 374.

64. **De minimis non curat lex.**—Where a judgment for delinquent taxes was appealed on the ground that the delinquent tax list was incorrectly published, but the appellants did not show wherein the published list differed from the original, the court cannot assume that the variance, if any there were, was sufficient to affect their substantial rights. The maxim de minimis non curat lex applies. *Maish v. Arizona*, 164 U. S. 599, 602, 41 L. Ed. 567; *Wisconsin Cent. R. Co. v. Forsythe*, 159 U. S. 46, 62, 40 L. Ed. 71. See the titles APPEAL AND ERROR, vol. 1, p. 333; TAXATION.



quaestionem facti, non respondent iudices sed juratores.<sup>65</sup>

**Ex dolo malo non oritur actio.**—No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.<sup>66</sup>

**Expressio Unius Est Exclusio Alterius.**<sup>67</sup>—See the titles CONTRACTS, vol. 4, p. 552; CONSTITUTIONAL LAW, vol. 4, p. 51; INTERPRETATION AND CONSTRUCTION, vol. 7, p. 257; RECORDS; STATUTES. In pari delicto potior est conditio defendentis. See the titles FRAUDS AND DECEIT, vol. 6, p. 421; ILLEGAL CONTRACTS, vol. 6, p. 737. And see ante, "He Who Comes into Equity Must Come with Clean Hands," II, A, 2. In præsumptione legis iudicium redditur in invitum.<sup>68</sup>

**Lex Neminem Cogit ad Vana Seu Impossibilia.**—The law requires of no man that which is unreasonable or impracticable; lex neminem cogit ad vana seu impossibilia.<sup>69</sup>

**Mobilia Sequuntur Personam.**<sup>70</sup>—See the titles CONFLICT OF LAWS, vol. 3, p. 1020; TAXATION.

**Nemo Tenetur Seipsum Accusare.**<sup>71</sup>—See the title CONSTITUTIONAL LAW, vol. 4, p. 504. Noscitur a sociis.<sup>72</sup> See the titles INTERPRETATION AND CONSTRUCTION, vol. 7, p. 257; STATUTES.

**Nullum Tempus Occurrit Regi.**<sup>73</sup>—See the titles LACHES, vol. 7, p. 790; LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 900.

**Omnis Ratihabitio Retrotrahitur.**—No maxim, where it does not prejudice the rights of strangers, is better settled in reason and law than omnis ratiha-

65. *Mitchell v. Harmony*, 13 How. 115, 144, 14 L. Ed. 75. See the title QUESTIONS OF LAW AND FACT.

66. **Ex dolo malo non oritur actio.**—"There are several old and very familiar maxims of the common law which formulate the result of that law in regard to illegal contracts. They are cited in all law books upon the subject and are known to all of us. They mean substantially the same thing and are founded upon the same principles and reasoning. They are: *Ex dolo malo non oritur actio*; *Ex pacto illicito non oritur actio*; *Ex turpi causa non oritur actio*." *McMullen v. Hoffman*, 174 U. S. 639, 654, 43 L. Ed. 1117; *Pullman's Palace Car Co. v. Central Transp. Co.*, 171 U. S. 138, 151, 43 L. Ed. 108. See the titles GAMBLING CONTRACTS, vol. 6, p. 537; ILLEGAL CONTRACTS, vol. 6, p. 737.

67. **Expressio unius est exclusio alterius.**—Where a special act was silent with reference to the ratification of contracts to supply water, the court thought the maxim *expressio unius est exclusio alterius* applicable, and that it was clearly the intention of the legislature to supersede the general law in that particular, leaving the general law to stand where it was proposed that the city shall erect and maintain waterworks of its own. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 22, 43 L. Ed. 341.

68. *Hilton v. Guyot*, 159 U. S. 113, 201, 40 L. Ed. 95.

69. *Withers v. Greene*, 9 How. 213, 232, 13 L. Ed. 109.

70. **Mobilia sequuntur personam.**—There are doubtless cases in the state reports announcing the principle that the ancient maxim of *mobilia sequuntur personam* still applies to personal property,

and that it may be taxed at the domicile of the owner, but upon examination they all or nearly all relate to intangible property, such as stocks, bonds, notes and other choses in action. *Union, etc., Transit Co. v. Kentucky*, 199 U. S. 194, 206, 50 L. Ed. 150.

71. **Nemo tenetur seipsum accusare.**—The maxim *nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons which has long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists, that the states, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment. *Brown v. Walker*, 161 U. S. 591, 597, 40 L. Ed. 819; *Bram v. United States*, 168 U. S. 532, 544, 42 L. Ed. 568.

72. *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 687, 40 L. Ed. 849; *The Three Friends*, 166 U. S. 1, 60, 41 L. Ed. 837.

73. **Nullum tempus occurrit regi.**—Lapse of time does not, of itself, furnish a conclusive bar to the title of the sovereign, agreeably to the maxim *nullum tempus occurrit regi*. *United States v. Chaves*, 159 U. S. 452, 464, 40 L. Ed. 215; *United States v. Pendell*, 185 U. S. 200, 46 L. Ed. 866.



bitio retrotrahitur et mandato priori æquiparatur.<sup>74</sup> Partus sequitur ventrem.<sup>75</sup> See the titles ANIMALS, vol. 1, p. 316; SLAVERY AND INVOLUNTARY SERVITUDE.

**Protectio Trahit Subjectionem, et Subjection Protectionem.**<sup>76</sup>—See the title CITIZENSHIP, vol. 3, p. 788.

**Rex Non Protest Peccare.**—The English maxim that the king can do no wrong, does not declare that the government, or those who administer it, can do no wrong; and, moreover, this maxim has no application in this country.<sup>77</sup>

**Suum Cuique Tribuere.**<sup>78</sup>—See the title DUE PROCESS OF LAW, vol. 5, p. 499.

**Via Trita, Via Tuta.**<sup>79</sup>—See the title POWERS.

**Volente Non Fit Injuria.**—See the title DAMAGES, vol. 5, p. 157.

**MAY.**—See, generally, the title STATUTES. “It is familiar doctrine that where a statute confers a power to be exercised for the benefit of the public or of a private person, the word ‘may’ is often treated as imposing a duty rather than conferring a discretion.”<sup>1</sup> “This rule of construction is, however, by no means

74. *Supervisors v. Schenck*, 5 Wall. 772, 781, 18 L. Ed. 556. See the titles PRINCIPAL AND AGENT; SALES.

75. *Alberty v. United States*, 162 U. S. 499, 501, 40 L. Ed. 1051.

76. **Protectio trahit subjectionem.**—The principle of English nationality embraced all persons born within the King’s allegiance and subject to his protection. Such allegiance and protection were mutual—as expressed in the maxim *protectio trahit subjectionem* et *subjection protectionem*—and were not restricted to natural born subjects and naturalized subjects, or to those who had taken an oath of allegiance, but were predicable of aliens in amity, so long as they were within the kingdom. *United States v. Wong Kim Ark*, 169 U. S. 649, 655, 42 L. Ed. 890.

77. *Langford v. United States*, 101 U. S. 341, 343, 25 L. Ed. 1010.

78. **Suum cuique tribuere.**—Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice—*suum cuique tribuere*. *Holden v. Hardy*, 169 U. S. 366, 388, 42 L. Ed. 780.

79. **Via trita, via tuta.**—The extension of the judicial powers, by an analogy to the supreme prerogative jurisdiction of the court of king’s bench, or a state court, and its application to process hitherto unknown in the history of the jurisprudence of England or this court, may lead to consequences of the most alarming kind: *Via trita, via tuta*. *Ex parte Crane*, 5 Pet. 190, 223, 8 L. Ed. 92.

1. **May—Mandatory.**—*United States v. Thoman*, 156 U. S. 353, 359, 39 L. Ed. 450, citing *Mason v. Fearson*, 9 How. 248, 13 L. Ed. 125; *Washington v. Pratt*, 8 Wheat. 681, 5 L. Ed. 714; *Supervisors v. United States*, 4 Wall. 435, 18 L. Ed. 419.

In *Mason v. Fearson*, 9 How. 248, 258, 13 L. Ed. 125, it is said: “Whenever it is provided that a corporation, or officer

may act in a certain way, or it ‘shall be lawful’ for them to act in a certain way, it may be insisted on as a duty for them to act so, if the matter, as here, is devolved on a public officer, and relates to the public or third persons.”

In *Ritchie v. Franklin County*, 22 Wall. 67, 74, 22 L. Ed. 825, it is said: “The acts of the general assembly of Missouri of 1865 and 1866 gave authority to the county courts to borrow money and issue bonds for road purposes where ‘the amount of proposed expenditure had been submitted to a vote of the people.’ The county court of Franklin County construed the provision on the subject of this submission as discretionary and not mandatory. Although this construction was wrong, the language used by the legislature gave color to it. To declare that a court ‘may’ for the purpose of information, submit its proposed action to the people, is not the best nor the usual way of instructing the court not to do the thing proposed unless the taxpayers approved it. Such language is well calculated to mislead any one unaccustomed to the construction of statutes, and it cannot be a matter of surprise that this county court treated the provision requiring a vote for information as discretionary.”

In *Supervisors v. United States*, 4 Wall. 435, 445, 18 L. Ed. 419, an act provided that the board of supervisors under township organization in such counties as may be owing debts which their current revenue, under existing laws, is not sufficient to pay, may, if deemed advisable, levy a special tax. It was held that may as thus used is mandatory. The court said: “The conclusion to be deduced from the authorities is, that where power is given to public officers, in the language of the act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory. What they are em-

invariable. Its application depends on the context of the statute, and on whether it is fairly to be presumed that it was the intention of the legislature to confer a discretionary power or to impose an imperative duty."<sup>2</sup>

**MAY BE.**—See **MAY**, ante, p. 325. And see note 3.

**MAYOR.**—See the title **MUNICIPAL CORPORATIONS**, and references given. As to power to take acknowledgment, see the title **ACKNOWLEDGMENTS**, vol. 1, p. 82. As to directing mandamus to a mayor, see the title **MANDAMUS**, ante, p. 84.

**MEANDER.**—See the titles **BOUNDARIES**, vol. 3, pp. 466, 481; **PUBLIC LANDS**. See note 4.

powered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depository to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless." To the same effect, see *Galena v. Amy*, 5 Wall. 703, 708, 709, 18 L. Ed. 560. See, generally, **SHALL**.

**2. May—Permissive.**—*United States v. Thoman*, 156 U. S. 353, 359, 39 L. Ed. 450; *Minor v. Mechanics' Bank*, 1 Pet. 46, 7 L. Ed. 47; *Binney v. Chesapeake, etc., Canal Co.*, 8 Pet. 201, 8 L. Ed. 917; *Thompson v. Carroll*, 22 How. 422, 16 L. Ed. 387.

In *Mason v. Fearson*, 9 How. 248, 259, 13 L. Ed. 125, it is said: "Where the act to be done affects no third persons, and is not clearly beneficial to them or the public, the words **may** do an act, or it is 'lawful' to do it, do not mean 'must,' but rather indicate an intent in the legislature to confer a discretionary power."

In *Thompson v. Carroll*, 24 How. 422, 16 L. Ed. 387, the court said: "It is only where it is necessary to give effect to the clear policy and intention of the legislature that such a liberty can be taken with the plain words of the statute."

The charter of a corporation provided, "that the capital stock of said corporation, **may** consist of \$500,000, divided into shares of \$10 each, and shall be paid in the following manner." Story, J., said: "The argument of the defendants is, that **may**, in this section, means 'must;' and reliance is placed upon a well-known rule in the construction of public statutes, where the word **may**, is often construed as imperative. Without question, such a construction is proper, in all cases where the legislature mean to impose a positive and absolute duty, and not merely to give a discretionary power. But no general rule can be laid down upon this subject, further than that that exposition ought to be adopted in this, as in other cases, which carries into effect the true intent and object of the legislature in the enactment. The ordinary meaning of the language must be presumed to be intended, unless it would manifestly defeat the object of the provisions. Now, we cannot say, that there is any leading ob-

ject in this charter, which will be defeated, by construing the word **may** in its common sense, as importing a power to extend the capital stock to \$500,000 and not an obligation, that it shall be that sum and none other." *Minor v. Mechanics' Bank*, 1 Pet. 46, 63, 64, 7 L. Ed. 47.

A statute provided that any surplus of the revenues of any parish or municipal corporation in the state "**may** be applied to the payment of the indebtedness of former years." It was held that **may** was permissive. *United States v. Thoman*, 156 U. S. 353, 39 L. Ed. 450. See, generally **SHALL**.

**3. May be.**—In *South Carolina v. Gailard*, 101 U. S. 433, 438, 25 L. Ed. 937, it is said: "The bills are to be deposited 'to abide the decision of the court in any proceeding which **may be** instituted,' thus implying that when the deposit was made proceedings had not been instituted."

In *Pompton v. Cooper Union*, 101 U. S. 196, 202, 25 L. Ed. 803, it is said: "In *County of Callaway v. Foster*, 93 U. S. 567, 23 L. Ed. 911, a statute authorized the stock of a railroad company to be subscribed for, and bonds to provide the means of paying for it to be issued and sold 'by the county court of any county in which any part of said railroad **may be**.' The stock was subscribed and the bonds were issued and sold before the route of the road was surveyed or located. In construing the phrase **may be**, this court said: '**May be** what?' This expression is incomplete, and is to be construed with reference to the subject matter. If used in a statute where a road already built was the subject matter, it would refer to the presence or existence there of the road. \* \* \* But when used in reference to a railroad not yet built not located or surveyed, and, indeed, not yet organized, it must have quite a different meaning.' Upon any reasonable construction it embraces Callaway, which was one of the possible sites, and a site ultimately occupied in fact.' The bonds were sustained."

**4. Meander.**—In *Railroad Co. v. Schurmeir*, 7 Wall. 272, 286, 19 L. Ed. 74, it is said: "**Meander** lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the

**MEANS.**—See note 1.

**MEANTIME.**—See note 2.

**MEAT.**—As to judicial notice of inspection, see the title JUDICIAL NOTICE, vol. 7, p. 674.

**MEASURE OF DAMAGES.**—See, generally, the title DAMAGES, vol. 5, p. 168. The specific titles should also be consulted in every instance, as the measure of damages in particular actions is usually treated in that place.

**MEASURES.**—See the title WEIGHTS AND MEASURES. As to measuring logs, see the title LOGS AND LOGGING, vol. 7, p. 1059.

**MECHANIC.**—See the title MECHANICS' LIENS.

**MECHANICAL.**—See note 3.

banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser."

In *Jefferies v. East Omaha Land Co.*, 134 U. S. 178, 196, 33 L. Ed. 872, it is said: "In *Railroad Co. v. Schurmeir*, 7 Wall. 272, 19 L. Ed. 74, this court said: '**Meander** lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser. In preparing the official plat from the field notes, the **meander** line is represented as the border line of the stream, and shows, to a demonstration, that the watercourse, and not the **meander** line, as actually run on the land, is the boundary.'"

In *Horne v. Smith*, 159 U. S. 40, 43, 40 L. Ed. 68, the court said: "The **meander** line is not a line of boundary, but one designed to point out the sinuosities of the bank of the stream, and as a means of ascertaining the quantity of land in the fraction which is to be paid for by the purchaser. *Railroad Co. v. Schurmeir*, 7 Wall. 272, 19 L. Ed. 74; *Hardin v. Jordan*, 140 U. S. 371, 380, 35 L. Ed. 428."

In *Niles v. Cedar Point Club*, 175 U. S. 300, 306, 44 L. Ed. 171, it is said: "Generally, these **meandered** lines are lines which course the banks of navigable streams or other navigable waters. Here,

it appears distinctly from the field notes and the plat that the surveyor, Rice, stopped his surveys at this 'marsh' as he called it. These surveys were approved and a plat prepared, which was based upon the surveys and field notes, and showed the limits of the tracts which were for sale." See, also, the title PUBLIC LANDS.

**1. Means.**—In *McCulloch v. Maryland*, 4 Wheat. 316, 413, 4 L. Ed. 579, it is said: "To employ the **means** necessary to an end, is generally understood as employing any **means** calculated to produce the end, and not as being confined to those single **means**, without which the end would be entirely unattainable."

**Patent.**—See, generally, the title PATENTS. And see *Tilghman v. Proctor*, 102 U. S. 708, 728, 26 L. Ed. 279; *O'Reilly v. Morse*, 15 How. 62, 14 L. Ed. 601.

**2. Meantime.**—See *Stephens v. McCargo*, 9 Wheat. 502, 508, 6 L. Ed. 145.

**3. Mechanical instruments.**—In *Robertson v. Oelschlaeger*, 137 U. S. 436, 438, 34 L. Ed. 744, it is said: "There is undoubtedly a clear distinction between mechanical implements and philosophical instruments or apparatus." See, generally, the title REVENUE LAWS.

**Mechanical process.**—See, generally, the title PATENTS. And see *Risdon Iron, etc., Works v. Medart*, 158 U. S. 68, 72, 39 L. Ed. 899.

**Mechanical skill.**—See the title PATENTS. And see *Stimpson v. Woodman*, 10 Wall. 117, 19 L. Ed. 866.



## MECHANICS' LIENS.

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### CROSS REFERENCES.

See the titles **LIENS**, vol. 7, p. 890; **MARSHALING ASSETS AND SECURITIES**, ante, p. 261; **RAILROADS**.

As to jurisdiction of state court to subject property to mechanic's lien when it is in the custody and possession of the district court of the United States, see the title **COURTS**, vol. 4, p. 1172. As to impairment of the obligation of contract by a statute altering and enlarging the remedy for enforcement of a mechanic's lien, see the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 758. As to whether a mechanic has an insurable interest on property he is building, see the title **INSURANCE**, vol. 7, p. 66. As to common-law liens, see the title **LIENS**, vol. 7, p. 890. As to maritime liens, see the title **MARITIME LIENS**, ante, p. 218. As to protection of persons furnishing labor and materials to the United States, see the title **UNITED STATES**.

### I. Definition.

A mechanic's lien may be defined to be a claim created by law for the purpose of securing a priority of payment of the price and value of work performed and  
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materials furnished in erecting or repairing a building or other structure, and as such it attaches to the land as well as the buildings erected thereon.<sup>1</sup>

## II. Object, Origin and Nature.

**A. Object.**—Experience has shown that mechanics and tradesmen, who furnish labor and materials for the construction of buildings, are often defrauded by insolvent owners and dishonest contractors. Many build houses on speculation, and after the labor of the mechanic and the materials are incorporated into them, the owner becomes insolvent, and sells the buildings, or encumbers them with liens; and thus, one portion of his creditors are paid at the expense of the labor and property of others. Or, the solvent owner, who builds by the agency of a contractor or middleman, pays his price and receives his building, without troubling himself to inquire what has been the fate of those whose labor or means have constructed it. These evils required a remedy, and such a one is given by acts giving the mechanic's lien.<sup>2</sup>

**B. Origin.**—Mechanic's liens were unknown in the common-law and equity jurisprudence both of England and of this country. They were clearly defined and regulated in the civil law. Where they exist in this country they are the creatures of local legislation. They are governed in everything by the statutes under which they arise. These statutes vary widely in different states.<sup>3</sup>

**C. Nature.**—"It is not the contract of erecting or repairing the building which creates the lien, but it is the use of the materials furnished and the work and labor expended by the contractor, whereby the building becomes a part of the freehold, that gives the materialman and laborer his lien under the statute. The lien is brought into operation by virtue of the statute, and the contract for building is entered into presumably in view of, or with reference to, the statute."<sup>4</sup>

## III. Construction of Statutes.

Although mechanics' liens are the creation of statute,<sup>5</sup> the legislation being remedial should be liberally construed so as to afford the security intended.<sup>6</sup> Substantial compliance, in good faith, with the requirements of the particular law is

**1. Definition.**—*Van Stone v. Stillwell*, etc., Mfg. Co., 142 U. S. 128, 136, 35 L. Ed. 961.

"In certain states a lien is created by statute in favor of mechanics, called the mechanics' lien, by which a person furnishing materials or work on a building acquires a lien on the property to secure the payment of his claim." *Galveston Railroad v. Cowdrey*, 11 Wall. 459, 482, 20 L. Ed. 199.

**2. Object.**—*Winder v. Caldwell*, 14 How. 434, 445, 14 L. Ed. 487.

Its object is not to secure contractors, who can take care of themselves, but those who may suffer loss by confiding in them. It is not the merit of the contractor that gave rise to the system, but the protection of those who might be wronged by him, if the owner were not compelled thus to take care of their interests before he pays away the price stipulated. *Winder v. Caldwell*, 14 How. 434, 445, 14 L. Ed. 487.

**3. Origin.**—*Canal Co. v. Gordon*, 6 Wall. 561, 571, 18 L. Ed. 894.

The enactments in regard to mechanic's liens vary in the different states and territories, and to the variance in their terms, judicial decisions necessarily

conform. *Springer Land Ass'n v. Ford*, 168 U. S. 513, 524, 42 L. Ed. 562.

A mechanic's lien is a creature of the statute, and was not recognized at common law. *Van Stone v. Stillwell*, etc., Mfg. Co., 142 U. S. 128, 136, 35 L. Ed. 961. See, also, *Springer Land Ass'n v. Ford*, 168 U. S. 513, 524, 42 L. Ed. 562.

**4. Nature.**—*Van Stone v. Stillwell*, etc., Mfg. Co., 142 U. S. 128, 136, 35 L. Ed. 961.

Mechanics' liens, except where the statute otherwise provides, arise by operation of law, independent of the express terms of the contract, in case the stipulated labor is performed or the promised materials are furnished; the principle being, that the parties are supposed to contract on the basis, that, if the stipulated labor is performed or the promised materials are furnished, the laborer or materialman is entitled to the lien which the law affords, provided he gives the required notice within the specified time. *McMurray v. Brown*, 91 U. S. 257, 266, 23 L. Ed. 321.

**5. Creature of statute.**—*Springer Land Ass'n v. Ford*, 168 U. S. 513, 42 L. Ed. 562. And see ante, "Origin," II, B.

**6. Liberal construction.**—*Davis v. Alvord*, 94 U. S. 545, 24 L. Ed. 283; *Mining Co. v. Cullins*, 104 U. S. 176, 177, 26 L. Ed.

sufficient, and the test of such compliance is to be found in the statute itself.<sup>7</sup> When the courts of a state have construed her own statutes, the federal supreme court follows such construction.<sup>8</sup>

#### IV. Property Subject to Lien.

**A. Railroads.**—Ordinary lien laws giving to mechanics and laborers a lien on buildings including the lot upon which they stand, or a lien upon a lot or farm or other property for work done thereon, or for materials furnished in the construction or repair of buildings, should not be interpreted as giving a lien upon the roadway, bridges or other property of a railroad company, that may be essential in the operation and maintenance of its road for the public purposes for which it was established.<sup>9</sup>

**B. Canals.**—Under the California laws relating to mechanic's lien, the lien of a contractor on a canal is limited to that portion of the canal which was constructed by him.<sup>10</sup>

**C. Area of Land Subject to Lien.**—What area of land is subject to a mechanics' lien in a given case largely depends on the character of the improvement. The extent of ground proper and necessary to the enjoyment of a building, a wall, or a fence, would not be the same as that required for or appertaining to an irrigation system, but the principle of determination is the same.<sup>11</sup> The parties may contract to extend the area of property to be covered by the lien.<sup>12</sup>

#### V. Who May Subject Property to Lien.

**Contractors.**—In some states, contractors do not come within the protection afforded by mechanic's lien.<sup>13</sup> But in most states the contractor is pro-

704; *Springer Land Ass'n v. Ford*, 168 U. S. 513, 524, 42 L. Ed. 562.

7. *Springer Land Ass'n v. Ford*, 168 U. S. 513, 524, 42 L. Ed. 562.

The words any contract, in the act of congress approved Feb. 2, 1859, 11 Stat. 376, are sufficiently comprehensive to include special contracts as well as contracts which arise by implication, unless the materialman is secured by a deed of trust or mortgage, or in some other form of security repugnant to the theory that he ever intended "to hold a lien under the mechanics' lien law." *McMurry v. Brown*, 91 U. S. 257, 265, 23 L. Ed. 321.

**Owner.**—Where the owner of land for whom work was being done had neither the legal nor the equitable title until the completion of certain work was done, yet if he became the owner when said work was completed, by the fact of its completion, he was the "owner" under the mechanic's lien law of Utah passed March 12th, 1890, which provided, that "any person having an assignable, transferable or conveyable interest or claim in or to any land, building, structure, or other property mentioned in this act, shall be deemed an owner." *Bear Lake, etc., Irrigation Co. v. Garland*, 164 U. S. 1, 25, 41 L. Ed. 327.

8. "If *Canal Co. v. Gordon*, 6 Wall. 561, 18 L. Ed. 894, is at variance with the decision of the courts of Iowa construing her own statute, we must follow the latter." *Brooks v. Railway Co.*, 101 U. S. 443, 452, 25 L. Ed. 1057. See the title COURTS, vol. 4, p. 1066.

9. **Railroads.** — *Buncombe County*

*Comm'rs v. Tommey*, 115 U. S. 122, 29 L. Ed. 305. See ante, "Definition," I.

The statutes of North Carolina of March 28, 1870, and March 1, 1873, the first giving a lien to mechanics and laborers in certain cases, and the other regulating sales under mortgages given by corporations, do not give to those performing labor and furnishing materials in the construction of railroads, a lien upon the property and franchises of the corporation owning and operating such roads. *Buncombe County Comm'rs v. Tommey*, 115 U. S. 122, 29 L. Ed. 305.

**Texas.**—A mechanics' lien does not exist in Texas in favor of those who supplied materials or money for constructing railroads. *Galveston Railroad v. Cowdrey*, 11 Wall. 459, 482, 20 L. Ed. 199.

10. **Canals.**—*Canal Co. v. Gordon*, 6 Wall. 561, 572, 18 L. Ed. 894.

11. **Area of land subject to lien.**—*Springer Land Ass'n v. Ford*, 168 U. S. 513, 530, 42 L. Ed. 562.

12. **Extension of parties.**—Where a contractor agrees to construct a blast furnace on defendant's premises to be paid on monthly estimates as the work progresses, and balance to be secured by a mechanic's lien on all the furnace company's interest in a certain town in conformity with the provisions of the state statute, it was held, that the parties could contract to extend the area of property to be covered by the lien. *Sheffield Furnace Co. v. Witherow*, 149 U. S. 574, 575, 576, 37 L. Ed. 853.

13. The reason for this has been given as that such persons have an opportunity, and are capable of obtaining their own se-



tected,<sup>14</sup> and, in one case, even though he was a stockholder of the company against which he claims, he was held entitled to protection.<sup>15</sup>

## VI. Material and Work Covered by Lien.

The different states have various provisions in regard to the material and work covered by the lien.<sup>16</sup>

## VII. Assignment of Lien.

Mechanic's liens are, in some jurisdictions, made assignable by statute.<sup>17</sup>

## VIII. Priorities.

It may be stated as a general rule that as to liens existing before the commencement of work, the mechanic's lien is subordinate,<sup>18</sup> and as to subsequent liens, it

curities; that they do not labor as mechanics' but superintend work done by others; that they are not tradesmen in lumber, or other materials for building, but employ others to furnish materials, and that if such contractor should by accident be a carpenter, or an owner or vendor of lumber, yet he deals not with the owner in this capacity, but as an undertaker, who has covenanted for his own securities. *Winder v. Caldwell*, 14 How. 434, 444, 14 L. Ed. 487.

**District of Columbia.**—A master builder, undertaker, or contractor, who undertakes by contract with the owner to erect a building, or some part or portion thereof, on certain terms, does not come within the letter or spirit of the act of congress passed March 2, 1833 (4 Stat. at L. 659), entitled an act to secure to mechanics and others, payment for labor done and materials furnished in the erection of buildings in the District of Columbia. *Winder v. Caldwell*, 14 How. 434, 14 L. Ed. 487.

**Indiana.**—Where a party is a contractor with the company, he is not protected under § 1 of the act of 1877 (§ 5284 of the Revised Statutes of Indiana), which gives a lien to employees of the company for work and labor done and performed by them for the company. *Vane v. Newcombe*, 132 U. S. 220, 233, 33 L. Ed. 310.

14. See post, "Priorities," VIII.

15. The contractor was a stockholder in a construction company, which, when it placed on the market the bonds secured by the mortgage, gave a guaranty that the local subscriptions and grants would be sufficient to prepare the road for the reception of the rails, and also undertook to make good any deficiency. Held, that he was not thereby estopped from setting up his lien, as against the mortgagee. If the holders of the bonds sustained any loss by reason of the guaranty, the company which gave it is liable in damages. *Meyer v. Hornby*, 101 U. S. 728, 25 L. Ed. 1078.

"It is argued that because he was a stockholder of the construction company he is now estopped to set up his lien for work and labor performed, to the detriment of these bondholders. It is difficult to see how any such claim can be sustained. It was the corporation, and

not he, who gave the guaranty. If the bondholders have suffered any loss for which that instrument provides a remedy, the corporation is liable to suit for damages. Even then it must be proved that there has been a loss, and that the loss was suffered because the local subscriptions and grants were not sufficient to prepare the whole of said line for the rails. Before he can in any event be held liable, it must be shown that the construction company is liable and cannot respond to that liability." *Meyer v. Hornby*, 101 U. S. 728, 729, 25 L. Ed. 1078.

### 16. Material and work covered by lien.

—"It is somewhat difficult to draw the line between the kind of work and labor which is entitled to a lien, and that which is mere professional or supervisory employment, not fairly to be included in those terms. Some courts have held, under laws similar to those of Utah, that an architect who furnishes plans and superintends the erection of a building acquires a lien thereon as for work and labor." *Mining Co. v. Cullins*, 104 U. S. 176, 179, 26 L. Ed. 704.

**Utah.**—Where it was the duty of an employee of a mining company by virtue of said employment to plan, oversee and direct the work of said mine, and while in the performance of said duties he did some manual labor, it was held, that he was entitled to a miner's lien as provided by the compiled laws of Utah, § 1221. *Mining Co. v. Cullins*, 104 U. S. 176, 26 L. Ed. 704.

**Indiana.**—The act of 1877 (§ 5286 of the Revised Statutes of Indiana) gives a lien to employees of the corporation only for work and labor done and performed by them for the corporation. It does not give a lien for the value of materials furnished, nor for advances of money made. *Vane v. Newcombe*, 132 U. S. 220, 234, 33 L. Ed. 310.

17. **Assignment of lien.**—Under the mechanic's lien law and civil practice act of Montana, a mechanic who has completed his claim by filing a lien, may assign it to another, who may institute a proceeding on it in his own name. *Davis v. Bilsland*, 18 Wall. 659, 21 L. Ed. 969.

18. **Priorities.**—A mechanic's lien filed

has the priority.<sup>19</sup> This rule is changed in some states, by statute, by giving a

upon a dock which had been constructed upon a lot owned by the railroad company, is not prior to a mortgage upon the said property which had been executed more than three years previous to the construction of the dock. *Toledo, etc., R. Co. v. Hamilton*, 134 U. S. 296, 297, 33 L. Ed. 905.

Where a mortgage upon the land of a railroad company containing words of general description had been recorded three years before the construction of a dock thereon, it had priority over a mechanic's lien upon the dock, although the railroad company only had the full equitable title to the land upon which the dock was erected because the full equitable title was vested in the railroad company before the contract for construction of the dock was made, and such mortgage conveys land which is held by a full equitable as well as that held by a legal title. *Toledo, etc., R. Co. v. Hamilton*, 134 U. S. 296, 305, 33 L. Ed. 905.

"A recorded mortgage, given by a railroad company on its roadbed and other property, creates a lien whose priority cannot be displaced thereafter, directly by a mortgage given by the company, nor directly by a contract between the company and a third party for the erection of buildings or other words of original construction." *Toledo, etc., R. Co. v. Hamilton*, 134 U. S. 296, 299, 33 L. Ed. 905.

Where a suit was brought by the contractors to enforce an alleged lien upon the earnings of a section of a railroad against the claim to priority of bondholders secured by an earlier mortgagee, upon all the property of the road and all that it might subsequently acquire, it was held, that the contractors did not have a lien upon the earnings of this section, upon the ground that their moneys constructed the section, because the work was not done at the request of the mortgagees, but upon a contract with the lessee of the road. *Thompson v. White Water Val. R. Co.*, 132 U. S. 68, 74, 33 L. Ed. 256.

19. A rolling mill company delivered to a railroad company iron rails and other materials to be used in the construction of the road. The materials were delivered at different times during a period of over two months. Within less than six months from the date when the last material was delivered, the rolling mill company commenced proceedings to enforce its lien under the Illinois statute then in force. It was held that the rolling mill company had a valid lien upon the property superior to a deed of trust executed long after the delivery of the material had been commenced. *Chicago, etc., R. Co. v. Union Rolling Mill Co.*, 109 U. S. 702, 719, 27 L. Ed. 1081.

A party having a mortgage containing an after-acquired property clause, does

not have priority over a mechanic's lien which fastened upon the property before coming into the possession or ownership of the mortgagor. *Bear Lake, etc., Irrigation Co. v. Garland*, 164 U. S. 1, 16, 41 L. Ed. 327.

A mortgage which contains the after-acquired property clause is not superior to a contractor's lien, if the mortgagor's title is not perfected until the completion of the work by the contractor, since the title came to the mortgagor burdened with the claim of the lienor which attached simultaneously with the vesting of such title in the mortgagor. *Bear Lake, etc., Irrigation Co. v. Garland*, 164 U. S. 1, 21, 41 L. Ed. 327.

The fiction of the doctrine of relations, by which it is claimed that the lien of a mortgage, containing the after-acquired property clause attaches to a right of way prior to a lien of a contractor, will not be indulged in for cutting off intervening claims of third parties against the right or title set up and acquired by the first possessor, nor will it be indulged in for the purpose of thereby effecting an injustice by subjecting the right of way to the prior lien of a mortgage, when the existence to the title of the said right of way was made possible only after and by the labor of the lienors. *Bear Lake, etc., Irrigation Co. v. Garland*, 164 U. S. 1, 23, 41 L. Ed. 327.

Where a mortgage including after-acquired property was on record before a contractor began work upon the canal or right of way, it was held, that a contractor's lien was superior to the lien of the mortgage when the mortgagor had no title, and the mortgage would not be a lien upon the property until the work was completed by the contractor, and that the title would then pass to the mortgagor burdened with the lien of the contractor. *Bear Lake, etc., Irrigation Co. v. Garland*, 164 U. S. 1, 23, 41 L. Ed. 327.

**Montana.**—Under the Montana law the liens secured to mechanics and materialmen have precedence over all other incumbrances put upon the property, after the commencement of the building. *Davis v. Bilsland*, 18 Wall. 659, 21 L. Ed. 969.

**Pennsylvania.**—The joint resolutions of the Pennsylvania legislature, passed January 21, 1843, intended to give to all unpaid contractors a priority of claim, on property of railroad, over every right that could be acquired by a mortgagee, or acquired under a mortgage, if the mortgage was made after the debt to the contractor was incurred. *Fox v. Seal*, 22 Wall. 424, 437, 438, 22 L. Ed. 774.

The joint resolution of the legislature of Pennsylvania, passed January 21st, 1843, in effect declared that while his claim against the company exists, a subsequent mortgage or transfer cannot be

mechanic's lien priority over prior liens, as to building or improvements put on the land, but leaving the land itself subject to the general rule.<sup>20</sup>

### IX. Waiver and Loss.

**A. How Determined.**—"The question whether a lien is obtained, or is displaced when it once attaches, is largely a matter of intention to be inferred from the acts of the parties and all the surrounding circumstances."<sup>21</sup>

**B. Accepting Other Security**—1. **IN GENERAL.**—Lien laws do not in general create a lien in favor of a materialman who has accepted in full a different security at the time the contract or agreement was made. Examples of the kind, such as a trust deed or mortgage, may be mentioned, which are regarded as a species of security inconsistent with the idea of a mechanic's lien upon the same land for the same debt.<sup>22</sup> But if the owner does not fulfill his contract by paying

set up to defeat the contractor's resort to the property and his superior right to have it applied to the payment of the debt due him. *Fox v. Seal*, 22 Wall. 424, 438, 22 L. Ed. 774.

**Utah.**—Where the statute of Utah (2 Utah Compiled Laws 1888), which provides a mechanic's lien, under the provisions of which a contractor within sixty days after the completion of his contract was to file a claim stating his demand, and in order to make his lien binding was to begin proceeding within ninety days from the time the lien was filed, was repealed by the statute of March 12th, 1890, which was a re-enactment and continuation of the former, and allowed one year after filing claim to enforce the mechanic's lien, it was held, that a contractor commencing work on the 16th of August, 1889, and continued to work until December, 1890, had a prior claim over a mortgage which was recorded in November, 1889, although he had not filed his claim within the sixty days provided in the act of 1888 but was filed within the year allowed by the act of 1890, and this though the act of 1890 enacted that the repeal of the act of 1888 should not affect existing rights and remedies. *Bear Lake, etc., Irrigation Co. v. Garland*, 164 U. S. 1, 4, 13, 41 L. Ed. 327.

A contractor claimed a lien for the construction of a canal on public lands, where the legal or equitable title to the right of way did not vest in the person taking possession until the said canal was completed under the United States Revised Statutes, § 2339, which provides: "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes have vested and accrued and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed." It was held, that the contractor's lien was prior to a mortgage which included after-acquired property, even though the lien attached to the property

as it was created and came into being, and arose coincident with the ownership of the canal by the mortgagor. *Bear Lake, etc., Irrigation Co. v. Garland*, 164 U. S. 1, 19, 41 L. Ed. 327.

**20. Iowa.**—So changed in Iowa by § 1855 of the revision, now § 2141 of the code. *Brooks v. Railway Co.*, 101 U. S. 443, 25 L. Ed. 1057.

Under the laws of Iowa, a mechanic's lien for work done under a contract takes precedence of all incumbrances put on the property by mortgage or otherwise, after the work was commenced. *Removal Cases*, 100 U. S. 457, 25 L. Ed. 593.

Where a contractor in Iowa performs labor and furnishes materials upon a section or division of a railroad in Iowa then in the process of construction, and there was a pre-existing and duly recorded mortgage executed by the company on its entire line of road to secure its bonds, held, that on filing his claim within the time, and in the mode prescribed by the statute, he has, as against the mortgagees, a paramount lien upon the entire road. *Brooks v. Railway Co.*, 101 U. S. 443, 25 L. Ed. 1057; *Meyer v. Hornby*, 101 U. S. 728, 25 L. Ed. 1078.

**21. How determined.**—*Grant v. Strong*, 18 Wall. 623, 624, 21 L. Ed. 859.

**22. In general.**—*Grant v. Strong*, 18 Wall. 623, 21 L. Ed. 859; *McMurray v. Brown*, 91 U. S. 257, 266, 23 L. Ed. 321.

Contracts of a special character, such as to give a mortgage to the laborer or mechanic, if duly executed under circumstances showing that the claim to a lien was not intended by the parties, may defeat such a claim. *McMurray v. Brown*, 91 U. S. 257, 266, 23 L. Ed. 321.

A mechanic's lien does not attach where a builder took a real security for payment of the work which he was to do, and afterwards, the work being all done, gave it up and took a mere note. *Grant v. Strong*, 18 Wall. 623, 21 L. Ed. 859.

**When a lien has once attached,** the taking of a note does not of itself operate as a release. *Grant v. Strong*, 18 Wall. 623, 628, 21 L. Ed. 859.

**Missouri.**—The rule seems to be established in Missouri, and it is so in many



in the manner stipulated, the mechanic is entitled to his lien.<sup>23</sup>

2. **WHAT CONSTITUTES OTHER SECURITY.**—A statement in a contract between a railroad company and a construction company that the former would pay the latter out of a certain fund—the subscription of a particular county along the road—is not such a taking by the latter company of a collateral security as to vitiate its lien.<sup>24</sup>

**C. Claim Greater than Sum Due.**—The fact that a mechanics' lien is claimed for a greater sum than is actually owing, or is actually covered by the lien, does not vitiate the claim when honestly made.<sup>25</sup>

**D. Sale under Foreclosure Decree.**—The lien of a contractor is not disturbed by a sale under a decree to foreclose a mortgage, and he has no right to look to the proceeds of the sale for payment.<sup>26</sup>

**E. By Judgment.**—A judgment does not extinguish the right which the contractor has from the time his debt was incurred to have the property of his debtors first applied to the satisfaction of his debt.<sup>27</sup>

of the other states, that a contractor does not waive his right to file a mechanics' lien by receiving from the owner of the building a promissory note for the amount due, payable at a time beyond the expiration of the period within which he is required to file his lien, but within the period within which suit must be commenced to enforce the lien, the taking of the note merely suspending the right of action. This rule is based upon the principle, recognized in that state, that the execution of a note, for a pre-existing debt is not a payment of the debt, but only presumptively so; but a party relying upon that principle must, in an action on the original debt, produce the note for cancellation. *Van Stone v. Stillwell*, etc., *Mfg. Co.*, 142 U. S. 128, 136, 35 L. Ed. 961.

23. *McMurray v. Brown*, 91 U. S. 257, 266, 23 L. Ed. 321.

"If the labor has been performed or the materials furnished, no matter in what the owner agreed to pay, if he has not paid in any way, the laborer or mechanic has a right to resort to the security provided by law, unless the rights of third persons intervene before he gives the required notice." *McMurray v. Brown*, 91 U. S. 257, 266, 23 L. Ed. 321.

"It is well settled that an agreement for the extension of credit by receiving a note of the party, or the independent security of a third person, falling due at a day beyond the period within which the lien must be asserted, will be no waiver when the agreement to give the note or security has not been performed by the promisor. To hold otherwise would be to say that the builder or materialman must have intended to waive his lien in the event of a refusal to comply with the agreement. On the debtor's refusal to keep the agreement, the builder or materialman ought not to be bound by it, but should be remitted to his rights, independently of the contract." *Chicago, etc., R. Co. v. Union Rolling Mill Co.*, 109 U. S. 702, 721, 27 L. Ed. 1081.

Where a party furnished materials for the construction of a building, under an agreement that the owner thereof, by way of payment for them, would convey to him certain real estate at a stipulated price per foot, held, that on the refusal of the owner so to convey, or in lieu thereof to pay for such materials, the party is entitled to his lien, provided that in due time he gives the notice required by law. *McMurray v. Brown*, 91 U. S. 257, 23 L. Ed. 321.

24. **What constitutes other security.**—*Remsval Cases*, 100 U. S. 457, 25 L. Ed. 593.

**Agreement between the parties.**—A rolling mill company in delivering steel rails and other material to a railroad company stipulated that until the material was fully paid for, the rolling mill company should have a lien thereon. It was held that this stipulation was not a waiver of the rolling mill company's statutory lien. The court said: "When the contract was made, the railroad for which the materials were to be furnished was in contemplation only. The survey of its route had not been completed, nor had the right of way been obtained. The evident purpose of the stipulation was to secure a specific lien on the materials furnished, and to require them to be used in the construction of the railroad where they would be subject to the statutory lien, and the facts of this case show that this was a wise precaution. The contract, therefore, so far from showing a waiver of the statutory lien, shows a purpose on the part of the rolling mill company to retain it." *Chicago, etc., R. Co. v. Union Rolling Mill Co.*, 109 U. S. 702, 720, 27 L. Ed. 1081.

25. **Claim greater than sum due.**—*Springer Land Ass'n v. Ford*, 168 U. S. 513, 527, 42 L. Ed. 562.

26. **Sale under foreclosure decree.**—*Fox v. Seal*, 22 Wall. 424, 443, 22 L. Ed. 774.

27. **By judgment.**—*Fox v. Seal*, 22 Wall. 424, 440, 22 L. Ed. 774.

## X. Enforcement.

**A. What Must Be Proved.**—In Montana mechanics and laborers asserting a lien upon real property for their work, and claiming priority over mortgagees and others, who have acquired interests in the property, must furnish strict proof of all that is essential to the creation of the lien; and that requires them to prove when the work was commenced, the character of the work, and when it was completed.<sup>28</sup>

**B. Jurisdiction.**—The foreclosure of a mechanic's lien is essentially a suit in equity, requiring specific directions for the sale of the property, such as are usually given upon the foreclosure of mortgages and sale of mortgaged premises.<sup>29</sup>

**C. Parties.**—Where a mechanic filed a bill to enforce a lien upon certain buildings for work performed thereon, and the lien was discharged by the owner's written undertaking, with surety approved by the court, that he would pay the amount recovered with costs, it was held, that the decree in personam for the amount due the mechanic could be taken only against the owner. The remedy of the mechanic against the surety is by an action at law upon the understanding.<sup>30</sup>

**D. Claim.**—It is provided in some of the states that a claim must be filed with the owner in order to obtain the benefit of the mechanic's lien.<sup>31</sup>

**28. What must be proved.**—*Davis v. Alvord*, 94 U. S. 545, 24 L. Ed. 283.

**29. Jurisdiction.**—*Sheffield Furnace Co. v. Witherow*, 149 U. S. 574, 579, 37 L. Ed. 853; *Davis v. Alvord*, 94 U. S. 545, 546, 24 L. Ed. 283.

A suit to recover judgment for labor performed by the plaintiff upon a quartz mill and mine in Montana Territory, and to enforce a mechanic's and laborer's lien upon the defendant's interest in the premises for the payment of the judgment, is a suit in equity, requiring specific directions for the sale of the property, such as are usually given upon the foreclosure of mortgages and the sale of mortgaged premises. *Davis v. Alvord*, 94 U. S. 545, 24 L. Ed. 283.

The fact that, according to the modes of procedure adopted in the territory, a personal judgment for the amount found due is usually rendered in such cases, with directions that, if the same be not satisfied out of other property of the debtor, the property upon which the lien is adjudged to exist shall be sold, and the proceeds applied to its payment, does not change the character of the suit from one of equitable cognizance and convert it into an action of law. *Davis v. Alvord*, 94 U. S. 545, 24 L. Ed. 283.

Where the state legislation gives to a party the choice in the state courts between an action at law and a suit in equity to enforce a mechanic's lien, it does not oust the jurisdiction of the federal court, sitting in equity, of its jurisdiction to enforce such rights, provided they are of an equitable nature. *Sheffield Furnace Co. v. Witherow*, 149 U. S. 574, 579, 37 L. Ed. 853.

In a suit brought to enforce a mechanic's lien created by the statutes of the territory of Idaho which authorize

the court to order a sale of the real estate that is subject to the lien, and judgment against the owner thereof for any deficiency in the proceeds of the sale, as in actions for the foreclosure of mortgages, the proceeding is in the nature of a suit in equity, and therefore appeal and not writ of error is the proper appellate proceeding. *Idaho, etc., Imp. Co. v. Bradbury*, 132 U. S. 509, 515, 33 L. Ed. 433. See, generally, the title APPEAL AND ERROR, vol. 1, p. 333.

**30. Parties.**—*Phillips v. Gilbert*, 101 U. S. 721, 25 L. Ed. 833.

"It would facilitate the ends of justice if a decree could be made at once against the undertakers, as is done against stipulators in admiralty proceedings. But we find no precedent for such a course upon a bond or undertaking given by way of indemnity in proceedings at common law or in chancery, unless it be expressly so stipulated in the instrument, or unless the parties enter into a recognizance, which is matter of record." *Phillips v. Gilbert*, 101 U. S. 721, 725, 25 L. Ed. 833.

**31.** These enactments vary in the different states. Substantial compliance, in good faith, with the requirements of the particular law is sufficient, and the test of such compliance is to be found in the statute itself. Required by § 1524 of the Compiled Laws of New Mexico. *Springer Land Ass'n v. Ford*, 168 U. S. 513, 524, 42 L. Ed. 562.

A claim duly filed by a contractor described the Springer Land Association and others and the Maxwell Land Grant Company and others, as "owners or reputed owners;" and stated a demand for the sum of \$17,634.27, as "the balance due and owing to the said contractor, by the aforesaid owners, or reputed owners, after deducting all just credits and offsets for

**E. Time of Bringing Action.**—The different states have various provisions regulating the time in which action must be brought.<sup>32</sup>

excavating and embankments done and performed by him under a certain contract entered into by the said Springer Land Association, a copy of which contract is hereto annexed and made a part of this claim of lien. As also for the further sum of three hundred and ninety dollars (\$390) for excavating and hauling, ordered by the engineer in charge of said ditch, and allowed by him in pursuance of the provisions of said contract;" and it stated when the work was commenced and when it was finished, and that on the last date it was "completed and accepted." It gave the names of the reputed owners of the land as the Maxwell Land Grant Company and others, enumerating them, trustees of that company; and alleged that claimant "was employed to do the said work by the Springer Land Association, C. N. Barnes, general manager, approved by C. C. Strawn as president." And it added that "the terms, time given and conditions of said contract are those that fully appear in the copy of the said contract which is attached hereto and made a part thereof." Held, that this claim of lien was sufficient under the statute in respect of all these particulars. *Springer Land Ass'n v. Ford*, 168 U. S. 513, 524, 42 L. Ed. 562.

Section 1524 of the compiled laws of New Mexico creating mechanic's lien for work done required the contractor, in order to obtain the benefit of the act, to file for record "a claim containing a statement of his demands, after deducting all just credit and offset, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the materials," and a claim of a lien which sets forth the above is sufficient even though the person by whom he was employed was not stated. *Springer Land Ass'n v. Ford*, 168 U. S. 513, 524, 42 L. Ed. 562.

New Mexico compiled laws, §. 1524, provided that a contractor claiming a mechanic's lien should file a "statement of his demands after deducting all just credit and offset." Under this statute a claimant filed a demand for a certain sum as "the balance due and owing to said contractor by the aforesaid owners or reputed owners after deducting all just credits and offsets for excavating and embankments." Under a contract between the claimant and the owners of the property a copy of which was annexed, it was held that this statement was sufficient under the statute. *Springer Land Ass'n v. Ford*, 168 U. S. 513, 524, 42 L. Ed. 562.

**District of Columbia.**—A mechanic, pursuant to his contract with the owner of certain lots in the city of Washington, erected a row of buildings upon them.

Held, that he did not lose his lien because his notice claimed it upon the property as an entirety, without specifically setting forth the amount claimed upon such building. *Phillips v. Gilbert*, 101 U. S. 721, 25 L. Ed. 833.

**Montana.**—Work was done by the plaintiff, under a contract with the defendant made Aug. 1, 1869, on two distinct parcels of property situated in Montana Territory—one a quartz mill and the other a quartz mine—separated a considerable distance from each other. The work on the mill was completed in the fall of 1869 or in the summer of 1870. Nothing was done afterwards, except to make occasional repairs as they were needed. The work on the mine was done in 1870, but it was not shown when the work was commenced. In June, 1871, upon an accounting between the plaintiff and the defendant, there was found due to the plaintiff a large sum, which the parties agreed should be a lien upon the mill and mine in equal proportions. Notices claiming a lien upon each for the amount as thus apportioned were accordingly filed in the recorder's office. Held: 1st. That a lien did not arise from this contract of apportionment, or from the special contract under which the work was done, but from the work itself, which was performed upon the property; 2d. That the work being done on different parcels of property, the lien claimed on one was to be considered separately from the lien claimed on the other; 3d. That the notice, so far as the mill was concerned, was filed too late, the statute requiring the notice to be filed within sixty days after the completion of the work; and that the occasional repairs subsequently made could no be added to the work done months before, so as to render the whole work one continued performance, for which a single lien could be claimed within sixty days after the last repairs; 4th. That it not appearing when the work upon the mine was commenced in 1870, it will not be presumed that it was commenced before the mortgage of the defendant was executed and recorded in September of that year, so as to give to the lien for the work priority over the mortgage. *Davis v. Alvord*, 94 U. S. 545, 24 L. Ed. 283.

As to effect of claiming more than sum due, see ante, "Claim Greater than Sum Due," IX. C.

**32. Time of bringing action.**—Where it appears that the work was finished on August 8, 1888, and accepted August 18, and that the unpaid residue of the consideration was not due for several months thereafter, and that suit was begun on February 11, 1889, it was held, that proceedings were taken within the time required by the law of Alabama, which re-



**F. Execution.—Scire Facias.**—In some of the states a scire facias may be issued to enforce a mechanic's lien.<sup>33</sup>

**MEDIATE DESCENT.**—See the title DESCENT AND DISTRIBUTION, vol. 5, p. 336.

**MEDICAL JURISPRUDENCE.**—This is treated under the various titles, such as BLOODSTAINS, vol. 3, p. 380; EXPERT AND OPINION EVIDENCE, vol. 5, p. 200; INSANITY, vol. 6, p. 1072; INSPECTION AND PHYSICAL EXAMINATION, vol. 7, p. 14. As to presumption of survivorship in common disaster, see the title PRESUMPTIONS AND BURDEN OF PROOF.

**MEDICINE.**—See the titles CONSTITUTIONAL LAW, vol. 4, p. 377; PHYSICIANS AND SURGEONS, and references given.

**MEDIUM OF PAYMENT.**—See the title PAYMENT.

**MEETING END ON.**—See the title COLLISION, vol. 3, p. 914.

**MEETINGS OF CREDITORS.**—See the title BANKRUPTCY, vol. 2, p. 872.

**MELIORATIONS.**—See note 1.

**MEMBERS.**—See the title STOCK AND STOCKHOLDERS.

**MEMORANDUM.**—As to admissibility of memorandum, see the title DOCUMENTARY EVIDENCE, vol. 5, pp. 453, 461. As to memorandum to refresh memory of witness, see the title WITNESSES. As to memorandum required by statute of frauds, see the title FRAUDS, STATUTE OF, vol. 6, p. 462. See note 2.

quires a statement in writing, claiming a lien, to be filed in the office of the judge of probate within six months after the indebtedness to the lienholder has accrued. Sheffield, etc., R. Co. v. Gordon, 151 U. S. 285, 294, 38 L. Ed. 164.

2 Compiled Laws of Utah, 1888, 406, from § 3806 to and including § 3820, requiring contractors having mechanic's liens to enforce them within a certain time, was repealed by the statute of March the 12th, 1890, which was a re-enactment and continuation of the former, but extended the time to enforce said lien, and which contained a proviso; "that the repeal of said acts shall not affect any right or remedy instituted or pending under the laws hereby repealed;" held, that it does not discharge the lien of a contractor who commenced work on the 16th of August and continued to work until December, 1890. Bear Lake, etc., Irrigation Co. v. Garland, 164 U. S. 1, 15, 41 L. Ed. 327.

33. Under the act of Pennsylvania of April 4, 1862, all that is necessary to enable a contractor to proceed by scire facias against a company claiming to hold the real or personal estate of a debtor corporation to such contractor, by virtue of a mortgage, made in contravention of the resolution of 1843, is that he has obtained a judgment against the indebted company which gave the mortgage. It is not required that his judgment shall be a lien on the property, because the lien of the debt remains so long as the debt remains unsatisfied. Fox v. Seal, 22 Wall. 424, 442, 443, 22 L. Ed. 774.

Where a scire facias is issued to enforce a mechanic's lien upon a house under the mechanic's lien law of the District of Columbia, it is not necessary to file a dec-

laration, as it discloses the facts on which it is founded, and requires an answer from the defendant. Therefore the plea is properly to the writ. Winder v. Caldwell, 14 How. 434, 442, 14 L. Ed. 487.

1. **Meliorations.**—Green v. Biddle, 8 Wheat. 1, 82, 5 L. Ed. 547.

2. **Memorandum.**—The postmaster general directed that if the wrappers of newspapers, pamphlets, or magazines, should be found to contain any manuscript or memorandum of any kind, either written or stamped, or marks or signs made in any way, by which information shall be asked or communicated, it should be charged with letter postage. The court said: "A single letter or initial upon the wrapper of a newspaper, is neither a memorandum nor a writing in the sense in which either of those terms are ordinarily used, or as we think they were intended to be used in the 30th section of the act. Both mean something in words to convey intelligence, a remembrance for one's self or to another." And it was held accordingly that the part of the order relating to marks or signs was not justified by the law. Teal v. Felton, 12 How. 284, 291, 13 L. Ed. 990. See, generally, the title POSTAL LAWS.

**Memorandum-check.**—The word memorandum, check, in that part of the schedule of instruments required by the statute of June 30th, 1864 (13 Stat. at Large, p. 298, § 158), to be stamped, which in the printed statute books are printed with a comma between them, should read, memorandum-check, with a hyphen instead of a comma. The court said: "A 'check' was specifically provided for already in the schedule, and it is not to be assumed that congress would, in the same schedule, make two provisions, differing from each

**MEMORY.**—See the title *EVIDENCE*, vol. 5, p. 1050.

**MENTAL ANGUISH.**—See the title *DAMAGES*, vol. 5, p. 188.

**MENTAL CONDITION.**—See the title *INSANITY*, vol. 6, p. 1073.

**MERCANTILE.**—See *MERCHANT—MERCANTILE—MERCHANDISE*.

**MERCANTILE LAW.**—See the title *BILLS, NOTES AND CHECKS*, vol. 3, p. 257.

**MERCANTILE PARTNERSHIP.**—See the title *PARTNERSHIP*.

**MERCHANDISE INSURANCE.**—See the titles *INSURANCE*, vol. 7, p. 66;

*MARINE INSURANCE*, ante, p. 149.

**MERCHANT—MERCANTILE—MERCHANDISE.**—"Merchandise" is a comprehensive term, and may include every article of traffic, whether foreign or domestic, which is properly embraced by a commercial regulation.<sup>1</sup>

other, for the same subject. A *memorandum-check*, however, is an instrument well known in the commercial law, which, it might be claimed, did not come under the general term of a check, and which, therefore, had not been specifically provided for. A *memorandum-check* is in the ordinary form of a bank check, with the word *memorandum* written across its face, and is not intended for immediate presentation, but simply as evidence of an indebtedness by the drawer to the holder." *United States v. Isham*, 17 Walk 496, 502, 21 L. Ed. 728. See, generally, the title *REVENUE LAWS*.

1. **Merchandise.**—*Groves v. Slaughter*, 15 Pet. 449, 506, 10 L. Ed. 800.

**Merchandise subject to duty.**—The denomination of *merchandise*, subject to the payment of duties, is to be understood in a commercial sense, although it may not be scientifically correct; all laws regulating the payment of duties are for practical application to commercial operations, and are to be understood in a commercial sense; and it is to be presumed that congress so used and intended them to be understood. *United States v. One Hundred and Twelve Casks of Sugar*, 8 Pet. 277, 8 L. Ed. 944. See, generally, the title *REVENUE LAWS*.

**Account concerning merchandise.**—As to accounts concerning "trade of *merchandise*," excepted from the operation of a statute of limitations, see the title *LIMITATION OF ACTIONS AND ADVERSE POSSESSION*, vol. 7, p. 932.

**Slaves.**—In *The Amistad*, 15 Pet. 518, 593, 10 L. Ed. 826, a case involving the

*Spanish Treaty of 1821*, the court said: "If these negroes were, at the time, lawfully held as slaves, under the laws of Spain, and recognized by those laws as property, capable of being lawfully bought and sold, we see no reason why they may not justly be deemed, within the intent of the treaty, to be included under the denomination of *merchandise*."

**Merchandise held in trust.**—See the title *INSURANCE*, vol. 7, p. 132.

**Taxation of merchants.**—As to the meaning of the word *merchants* as used in § 23, art. 2, of the constitution of Tennessee, providing for taxation of property, see *American Steel, etc., Co. v. Speed*, 192 U. S. 500, 509, 48 L. Ed. 538. And see the title *TAXATION*.

**Chinese exclusion acts.**—As to the meaning of the word *merchants* as used in the Chinese exclusion acts, see the title *CHINESE EXCLUSION ACTS*, vol. 3, p. 773.

**Merchants' accounts.**—As to the rule that an exception in a statute of limitations in favor of *merchants' accounts* applies as well to actions of *assumpsit* as to actions of account, see the title *LIMITATION OF ACTIONS AND ADVERSE POSSESSION*, vol. 7, p. 933.

**Merchant appraiser.**—See *Auffmordt v. Hedden*, 137 U. S. 310, 325, 34 L. Ed. 674. And see the title *REVENUE LAWS*.

**Mercantile agency.**—As to admissibility of testimony of a representative of a *mercantile agency* to show the rating of a bank president on trial for misappropriation of funds, see the title *EVIDENCE*, vol. 5, p. 1033.

# MERGER.

BY ERNEST P. STEINHAEUER.

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### CROSS REFERENCES.

See the titles JUDGMENTS AND DECREES, vol. 7, p. 544; MORTGAGES AND DEEDS OF TRUST; RES ADJUDICATA.

As to merger of corporation by corporation, see the title CORPORATIONS, vol. 4, p. 773. As to statutory rate of interest governing after debt merger on judgment, see the title INTEREST, vol. 7, p. 217. As to judgment recovered against all copartners merging liability of copartners not served with process and not appearing, see the title RES ADJUDICATA. As to the merger of an executory devise in a precedent estate, see the title WILLS.

### I. Contracts.

**A. Simple Contract by Sealed Instrument.**—A security under seal extinguishes a simple contract debt, because it is of a higher nature; but this effect never has been attributed to a sealed instrument which merely recognizes an existing debt, and provides a mode to ascertain its amount and liquidation.<sup>1</sup>

**Bond Given by Receiver of Public Money.**—The official bond, given by a receiver of public moneys, does not extinguish the simple contract debt arising from a balance of account due from him to the United States. An action of assumpsit for the balance of account, and an action of debt, upon the bond, against the principal and sureties, may be maintained at the same time.<sup>2</sup>

**B. Insurance Contracts.**—The policy issued by an insurance company and accepted by the assured must, in a court of law, be taken as expressing the final agreement of the parties, and as merging all previous verbal stipulations.<sup>3</sup>

### II. Debt Due for Duties.

The debt due to the United States for duties on imported merchandise, is

1. Simple contract by sealed instrument.—*Bank v. Patterson*, 7 Cranch 299, 3 L. Ed. 351.

Collateral covenant.—A covenant, under seal, to come to a settlement, within a limited time, and to pay the balance which might be found due, is merely collateral, and cannot be pleaded as an extinguishment of a simple-contract debt, the period within which the settlement was to be made, having elapsed before the commencement of the suit, and the plea not averring that any such settlement had been made. *Baits v. Peters*, 9 Wheat. 556, 6 L. Ed. 159.

2. *Walton v. United States*, 9 Wheat. 651, 6 L. Ed. 182.

"It may be admitted that a security under seal extinguishes a simple-contract debt; but in the case under consideration, the account and the bond are distinct from each other. The official bond is not given for the balance due; it is a collateral security for the faithful performance of the official duties of the officer, and was executed long before the existence of the balance claimed. It may be asked, how could a bond, in a penalty of \$10,000, extinguish a simple-contract debt of more than \$100,000?" *Walton v. United States*, 9 Wheat. 651, 656, 6 L. Ed. 182.

3. Insurance contracts.—*Insurance Co. v. Mowry*, 96 U. S. 544, 24 L. Ed. 674. See the title INSURANCE, vol. 7, p. 95.



not extinguished, by the giving of bonds, with surety, for the same. The revenue collection act of 1799, ch. 128, requires that the collector should take the bonds for the duties, from all the persons who are the importers, whether they be partners or part owners.<sup>4</sup>

### III. Judgments.

**A. On Note or Contract.**—A judgment on a note or contract merges the note or contract, and no other suit can be maintained on the same instrument.<sup>5</sup>

**B. Judgment on Money Demand.**—A judgment on a money demand merges such demand, and the parties to the action cannot bring another suit for the same demand.<sup>6</sup>

**C. Judgment in Assumpsit on Insurance Policy.**—See the titles INSURANCE, vol. 7, p. 66; RES ADJUDICATA.

**D. Judgment against One of Two Joint Contractors.**—See the title RES ADJUDICATA.

### IV. Of Civil by Criminal Liability.

At common law, the doctrine of merger of criminal actions by civil actions was applicable only to felonies.<sup>7</sup>

**MERITS.**—See note 1.

**MESNE PROCESS.**—See the title SUMMONS AND PROCESS. As to lien of attachments on mesne process, see the title BANKRUPTCY, vol. 2, p. 932. As to rule of decision in federal courts, see the title COURTS, vol. 4, p. 1137.

**MESNE PROFITS.**—See the titles ALIENS, vol. 1, p. 232; EJECTMENT, vol. 5, p. 717; LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 927. As to constitutionality of statute affecting, see the title CONSTITUTIONAL LAW, vol. 4, p. 432.

**MESSAGES.**—See the titles JUDICIAL NOTICE, vol. 7, p. 690; PRESIDENT OF THE UNITED STATES.

**MESSUAGE.**—"A grant of a messuage or messuage with the appurtenances will carry the dwelling house and adjoining buildings, and also its orchards, gardens, and curtilage."<sup>2</sup>

**METAL.**—See note 3.

**4. Debt due for duties.**—*Meredith v. United States*, 13 Pet. 486, 10 L. Ed. 258. See, generally, the title REVENUE LAWS.

**5. On note or contract.**—*Eldred v. Bank*, 17 Wall. 545, 21 L. Ed. 685. See the title RES ADJUDICATA.

Such a judgment, when binding personally, can be introduced in evidence and relied on as a bar to a second suit on the note. *Eldred v. Bank*, 17 Wall. 545, 21 L. Ed. 685.

**6. Judgment on money demand.**—*Gaines v. Miller*, 141 U. S. 395, 28 L. Ed. 466.

**7. Of civil by criminal liability.**—*Manro v. Almeida*, 10 Wheat. 473, 494, 495, 6 L. Ed. 369.

Many trespasses are also public offenses, by common law, or are made so by statute. But the punishment of the public offense is no bar to the remedy for the private injury. *Cotton v. United States*, 44 How. 229, 232, 13 L. Ed. 675.

Where property is taken or injured by a criminal act, a civil remedy lies to recover the property or damages, in addition to the criminal prosecution. *Manro v. Almeida*, 10 Wheat. 473, 6 L. Ed. 369.

The remedy by attachment, in the ad-

miralty, in maritime cases, applies to the case of a piratical capture, and the civil remedy is not merged in the criminal offense. *Manro v. Almeida*, 10 Wheat. 473, 6 L. Ed. 369.

**1. Merits.**—As to necessity that a judgment or decree be rendered on the merits of the case in order to constitute a bar to a subsequent action, see the title RES ADJUDICATA.

**2. Messuage.**—*Sheets v. Seiden*, 2 Wall. 177, 187, 17 L. Ed. 822.

**3. Metals.**—"A metal and its oxide or sulphate are totally distinct and unlike. Any substance subjected to a chemical change by uniting with another substance loses its identity; it becomes a different mineral species. The basis of common clay is the metal aluminium, and the basis of lime is the metal calcium. But no one would think of calling clay and lime metals; nor, if artificially made, would he call them manufactures of metals. They have lost all their metallic qualities. In just the same manner, iron ceases to be iron when it becomes rust, which is oxide of iron; or when it becomes copperas, which is sulphate of iron. None would think of calling blue vitriol copper. So

**METES AND BOUNDS.**—See the title **BOUNDARIES**, vol. 3, p. 472.

**MEXICAN LEAGUE.**—See **LEAGUE**, vol. 7, p. 848.

**MEXICAN PUEBLO.**—A Mexican pueblo is a settlement or town under the Mexican government.<sup>1</sup>

**MEXICO.**—As to Mexican land grants, see the title **PUBLIC LANDS**. As to computation of damages in actions for wrongful death under Mexican laws, see the title **DEATH BY WRONGFUL ACT**, vol. 5, p. 202. As to treaties with, see the titles **INTERNATIONAL LAW**, vol. 7, p. 249; **TREATIES**. As to aliens, see the title **ALIENS**, vol. 1, pp. 215, 231, 233.

**MICHIGAN.**—See the title **BOUNDARIES**, vol. 3, p. 494.

**MIDCHANNEL.**—See **CHANNEL**, vol. 3, p. 673.

**MIDDLE.**—See note 2.

**MIDSHIPMAN.**—A midshipman is an officer and it has been so understood ever since there was a navy. He is not one of the common seamen. His name indicates a middle position, between that of a superior officer and that of the common seaman.<sup>3</sup>

**MIGRATION.**—The words "migration" and "importation" as used in § 9, article 1 of the federal constitution, providing for the migration and importation of persons prior to 1808, referred to the different conditions of the African race as regards freedom and slavery. This clause had exclusive reference to persons of that race. When the free black man came here, he migrated; when the slave came, he was imported.<sup>4</sup>

**MILEAGE.**—See the titles **ARMY AND NAVY**, vol. 2, p. 516; **DISTRICT AND PROSECUTING ATTORNEYS**, vol. 5, p. 402; **UNITED STATES MARSHALS**.

**MILITARY.**—See note 5.

white lead, nitrate of lead, oxide of zinc, and dry or orange mineral, are not **metals**; they have no metallic qualities." *Meyer v. Arthur*, 91 U. S. 570, 577, 23 L. Ed. 455.

1. **Mexican pueblo.**—*San Francisco v. Le Roy*, 138 U. S. 656, 664, 34 L. Ed. 1096.

2. **Middle of the stream.**—In international law and by usage of European nations, the term "middle of the stream," as applied to a navigable river, is the same as the middle of the channel of such stream, and in that sense the terms are used in the treaty of peace between Great Britain, France and Spain, concluded at Paris in 1763. By the language, "a line drawn along the middle of the river Mississippi from its source to the river Iverville," as there used, is meant along the middle of the channel of the river Mississippi. *Iowa v. Illinois*, 147 U. S. 1, 8, 37 L. Ed. 55.

"Middle of the main channel."—See **CHANNEL**, vol. 3, p. 673. See, also, the title **BOUNDARIES**, vol. 3, p. 495.

**Middle thread of the channel.**—See **CHANNEL**, vol. 3, p. 673.

**Middle of the river.**—See **CHANNEL**, vol. 3, p. 673.

3. **Midshipman.**—*United States v. Cook*, 128 U. S. 254, 256, 32 L. Ed. 464. See the title **ARMY AND NAVY**, vol. 2, pp. 499, 511.

4. **Migration.**—*People v. Compagnie Generale Transatlantique*, 107 U. S. 59, 62, 27 L. Ed. 383. See, also, *Dred Scott v. Sanford*, 19 How. 393, 411, 15 L. Ed. 691; *Grove v. Slaughter*, 15 Pet. 449, 514, 10 L. Ed. 800; *Passenger Cases*, 7 How. 283, 476, 12 L. Ed. 702.

**Migration and importation distinguished.**

—The word "migration" in this connection is applied to free persons, and "importation" to slaves. *People v. Compagnie Generale Transatlantique*, 107 U. S. 59, 27 L. Ed. 383.

5. **Military department.**—As to meaning of "military department" in an act allowing double rations to officers commanding "military departments," see the title **ARMY AND NAVY**, vol. 2, p. 519.

**Military expedition and military enterprise.**—See the title **NEUTRALITY**.

**Military post.**—See the title **ARMY AND NAVY**, vol. 2, p. 518.

**Military roads.**—"The only military roads belonging to the United States within the states are in the military reservations." *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 16, 24 L. Ed. 708.

**Military service.**—As to "military service" as used in the provision for longevity pay, see the title **ARMY AND NAVY**, vol. 2, p. 504.

As to persons in the "military service" within the meaning of a statute allowing recovery for loss of property while in the "military service" of the United States, see the title **ARMY AND NAVY**, vol. 2, p. 540.

**Military station.**—See the title **ARMY AND NAVY**, vol. 2, p. 518.

**As to military or usurped power** as used in a fire insurance policy providing that a policy should cover losses caused by military or usurped power, see the title **INSURANCE**, vol. 7, p. 137.

**MILITARY AND NAVAL RESERVATIONS.**—See the title PUBLIC LANDS.

**MILITARY COMMISSION.**—See the title MILITARY LAW.

**MILITARY COURTS.**—See the titles APPEAL AND ERROR, vol. 1, p. 796;  
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## MILITARY LAW.

BY CHAS. W. FOURL.

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As to liability of officer and soldiers for their acts to the government and to third persons, see the title *ARMY AND NAVY*, vol. 2, pp. 521, 523. As to appellate jurisdiction of United States supreme court over courts-martial, see the title *APPEAL AND ERROR*, vol. 1, p. 796. As to the necessity of indictment and presentment of offenders in army and navy, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 1. As to the power of president to dismiss cadet without trial by courts-martial, see the title *ARMY AND NAVY*, vol. 2, p. 527. As to arrest of military deserters, see the title *ARREST*, vol. 2, p. 542. As to the power of congress to provide for removal of causes pending in provisional courts, see the title *COURTS*, vol. 4, p. 1048. As to power of courts to review proceedings of military tribunals by certiorari, see the title *CERTIORARI*, vol. 3, p. 661. As to review of sentence of courts-martial by habeas corpus, see the title *HABEAS CORPUS*, vol. 6, p. 654. As to judicial notice of orders of military commander, see the title *JUDICIAL NOTICE*, vol. 7, p. 672. As to distinction between military law and martial law, see the title *MARTIAL LAW*, ante, p. 272. As to courts-martial for trial of militia, see the title *MILITIA*. As to whether neutrals may consider acts of hostility authorized by war as criminal, see the title *NEUTRALITY*. As to authority of a military governor to order banks to pay over enemy's money to proper receiving officer of the army, see the title *PAYMENT*. As to writ of prohibition to courts-martial, see the title *PROHIBITION*. As to duty of railroads to carry troops free of charge, see the title *RAILROADS*. As to the admissibility of proceedings of courts-martial in evidence, see the title *RECORDS*.

### I. In General—Subordinate to Civil Law.

The military law in general is subordinate to the civil law, except in time of war.<sup>1</sup>

### II. Persons Subject to Military Law.

All persons in the military or naval service of the United States are subject

1. **Military subordinate to civil law.**—12 L. Ed. 581; *Martin v. Mott*, 12 Wheat. Dow v. Johnson, 100 U. S. 158, 169, 25 L. 19, 6 L. Ed. 537. Ed. 632; *Luther v. Borden*, 7 How. 1, 61,

to the military law; the members of the regular army and navy, at all times; the militia, so long as they are in such service.<sup>2</sup> Nothing is better settled than that military law applies only to the military.<sup>3</sup> And an army invading the enemy's country is subject only to the military law, the law of war—and not to the civil law.<sup>4</sup>

### III. Extent of Military Power.

**A. In General.**—It is an unbending rule of law, that the exercise of military power, where the rights of the citizens are concerned, shall never be pushed beyond what the exigency requires.<sup>5</sup> The rights of a lessee of water front granted by a military governor cannot be divested by a subsequent military order forbidding leases beyond the period of military occupation, as the lessee's rights are vested,<sup>6</sup> nor can an officer in command of the United States forces, by a special order annul a decree in chancery rendered by a court of that state, within its jurisdiction.<sup>7</sup>

**B. Power to Take Private Property.**—See the title *ARMY AND NAVY*, vol. 2, pp. 521, 523.

### IV. Liability for Acts of Warfare.

**A. Liability of Military.**—Soldiers and officers are exempt from liability for acts of legitimate warfare,<sup>8</sup> nor can they be called to account civilly or criminally in the tribunals of the enemy for acts of warfare, whether those acts result in the destruction of property or the destruction of life; nor can they be required by those tribunals to explain or justify their conduct upon any aver-

**2. All persons in the army and navy subject to military law.**—*Johnson v. Sayre*, 158 U. S. 109, 114, 39 L. Ed. 914. See post, "Courts-Martial," V, B. See the title *MILITIA*.

**3. Military law applies to military only.**—*Luther v. Borden*, 7 How. 1, 60, 12 L. Ed. 581.

**Military governed by articles of war.**—The present laws for the government of the military in England, also, do not exist in the vague and general form of martial law, but are explicitly restricted to the military, and are allowed as to them only to prevent desertion and mutiny, and to preserve good discipline. So, in this country, legislation as to the military is usually confined to the general government, where the great powers of war and peace reside. And hence, under those powers, congress, by the act of 1806 (2 Stat. at Large, 359), has created the articles of war, "by which the armies of the United States shall be governed," and the militia when in actual service, and only they. *Luther v. Borden*, 7 How. 1, 60, 12 L. Ed. 581.

**4. Army in enemy's country subject to military law only.**—*Dow v. Johnson*, 100 U. S. 158, 170, 25 L. Ed. 632. See post, "Liability for Acts of Warfare," IV.

**5. Exercise of military power never to be pushed beyond what exigency requires.**—*Raymond v. Thomas*, 91 U. S. 712, 716, 23 L. Ed. 434; *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75.

**6. Military governor revoking lease of wharves.**—*New Orleans v. Steamship Co.*, 20 Wall. 387, 393, 22 L. Ed. 354. See post, "Appointment of Judges," V, D, 2.

**7. Military commander cannot annul de-**

**cre in chancery.**—*Raymond v. Thomas*, 91 U. S. 712, 23 L. Ed. 434.

**8. No liability for acts of warfare.**—*Ford v. Surget*, 97 U. S. 594, 605, 24 L. Ed. 1018; *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75; *Bean v. Beckwith*, 13 Wall. 510, 21 L. Ed. 849. See the title *ARMY AND NAVY*, vol. 2, pp. 521, 523.

**Acts of congress gave immunity to all persons for acts of warfare.**—The acts of congress, respectively approved March 3, 1863 (12 Stat. 756), and May 11, 1866 (4 Stat. 46), extended protection to all persons for acts they committed in subordination to the military authorities engaged in conducting the war, and conferred upon them the same exemption from liability to suit which belonged to the president, the secretary of war, and the department commanders. *Beard v. Burts*, 95 U. S. 434, 24 L. Ed. 485.

**Burning of cotton by Confederate officer.**—An order of the Confederate congress ordering its commander to burn all cotton along the Mississippi liable to fall into the hands of United States, although a nullity as an act of the Confederate congress, still as an act of war, it exempted a soldier of the Confederate army who executed the order from liability to the owner of the cotton, who, at the time, was a voluntary resident within the lines of insurrection. *Ford v. Surget*, 97 U. S. 594, 24 L. Ed. 1018.

**Cutting of timber for military purposes.**—An order from a wood agent of the United States permitting A. to cut wood on certain premises for the military railroads, and signed by such wood agent, is *prima facie* sufficient and is a defense to a civil action therefor, and this is so al-

ment of the injured party that the acts complained of were unauthorized by the necessities of war.<sup>9</sup> A constitutional provision exempting persons from suit for acts performed under military authority, is not open to the objection of being a bill of attainder or a bill of pains and penalties.<sup>10</sup>

**B. Liability of Government.**—The government is not liable for private property injured or destroyed during war by the operations of armies in the field, or by measures necessary for their safety or efficiency.<sup>11</sup>

### V. Military Tribunals.

**A. In General.**—In the armies of the United States, military jurisdiction conferred and defined by statute is exercised by courts-martial, while cases which do not come within the "rules and regulations of war," or the jurisdiction conferred by statute or court-martial, are tried by military commissions. These jurisdictions are applicable, not only to war with foreign nations, but to a rebellion, when a part of a country wages war against its legitimate government, seeking to throw off all allegiance to it, to set up a government of its own.<sup>12</sup> And "when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses against the discipline or security of the army or against the public safety."<sup>13</sup> But military tribunals are not courts with jurisdiction in law or equity, within the meaning of those terms as used in article 3 of the constitution.<sup>14</sup>

**B. Courts-Martial**—1. HISTORY.—It is supposed that courts-martial were

though the order is permissive only. *Beard v. Burts*, 95 U. S. 434, 438, 24 L. Ed. 485.

**9. Officers and soldiers not amenable to courts of enemy.**—*Dow v. Johnson*, 100 U. S. 158, 169, 25 L. Ed. 632. See *Coleman v. Tennessee*, 97 U. S. 509, 24 L. Ed. 1118; *Ford v. Surget*, 97 U. S. 594, 24 L. Ed. 1018; *Lamar v. Browne*, 92 U. S. 187, 23 L. Ed. 650.

**Courts of enemy when not suspended, not for persons in military.**—When any portion of the insurgent states was in the occupation of the forces of the United States during the rebellion, the municipal laws, if not suspended or superseded, were generally administered there by the ordinary tribunals for the protection and benefit of persons not in the military service. Their continued enforcement was not for the protection or the control of officers or soldiers of the army. *Dow v. Johnson*, 100 U. S. 158, 25 L. Ed. 632.

**Homicide.**—Where a soldier in the United States service in Tennessee during the late rebellion committed homicide and was convicted and sentenced therefor by a court-martial, he was not subsequently amenable therefor to the courts of Tennessee, as at the time he committed the offense he was not amenable to the laws of Tennessee. *Coleman v. Tennessee*, 97 U. S. 509, 24 L. Ed. 1118.

**10. Provision exempting all persons for acts of warfare not a bill of attainder.**—*Drehman v. Stifle*, 8 Wall. 595, 19 L. Ed. 508. See, generally, the title CONSTITUTIONAL LAW, vol. 4, p. 515.

**11. Liability of government for private property taken or damaged during war.**—*United States v. Pacific Railroad*,

120 U. S. 227, 239, 30 L. Ed. 634, cited in *Montoya v. United States*, 180 U. S. 261, 45 L. Ed. 521.

**Government generally makes compensation for property of loyal citizen taken by military.**—Where property of loyal citizens is taken for the service of our armies, such as vessels, steamboats, and the like, for the transport of troops and munitions of war; or buildings to be used as storehouses and places of deposit of war material, or to house soldiers or take care of the sick or claims for supplies seized and appropriated, it has been the practice of the government to make compensation for the property taken. Its obligation to do so is supposed to rest upon the general principle of justice that compensation should be made where private property is taken for public use, although the seizure and appropriation of private property under such circumstances by the military authorities may not be within the terms of the constitutional clause. *Mitchell v. Harmony*, 13 How. 115, 134, 14 L. Ed. 75; *United States v. Russell*, 13 Wall. 623, 20 L. Ed. 474; *United States v. Pacific Railroad*, 120 U. S. 227, 239, 30 L. Ed. 634.

**12. Kinds of military jurisdiction.**—*Ex parte Vallandigham*, 1 Wall. 243, 249, 17 L. Ed. 589.

**13. Congress has power to decide when and where exigencies require military tribunals.**—*Ex parte Milligan*, 4 Wall. 2, 140, 18 L. Ed. 281.

**14. Military tribunals not courts within § 3 of constitution.**—*In re Vidal*, 179 U. S. 126, 45 L. Ed. 118. See post, "Military Commissions," V. C. And see the title COURTS, vol. 4, p. 885.



intended originally to be a partial substitute for the court of chivalry of former times.<sup>15</sup>

2. **NATURE OF COURTS-MARTIAL.**—A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty, and when the object of its creation has been accomplished, it is dissolved.<sup>16</sup>

3. **CONSTITUTIONAL AUTHORITY.**—The constitutionality of the acts of congress touching army and navy courts-martial in this country are beyond doubt.<sup>17</sup> The power of congress to authorize courts-martial is derived from the provisions of the constitution of the United States, giving congress the power to make laws for the government of the land and naval forces of the United States,<sup>18</sup> and from the authority of the president of the United States as commander in chief of the United States forces,<sup>19</sup> and from the provision of the United States constitution expressly exempting "cases arising in the land and naval forces" of the United States from the operation of the amendment to the United States constitution requiring indictment or presentment by grand jury,<sup>20</sup> and the power to provide for the trial and punishment of military and naval offenses is given independently of the provision of the United States constitution defining the judicial power of the United States.<sup>21</sup>

4. **ORGANIZATION, CONSTITUTION AND DISSOLUTION**—a. *Organization and Constitution*—(1) *Appointment of Court*—(a) *In General.*—The seventy-second article of war provides that any general officer commanding an army, a territorial division, or a department, or a colonel commanding a separate department may appoint a court-martial whenever necessary, but when such commander is the accuser or prosecutor of any officer under his command, the court shall be appointed by the president, and its proceedings and sentence shall be sent directly to the secretary of war, by whom they shall be laid before the president for his approval or orders in the case.

(b) *By President.*—The president of the United States, as commander in chief, has the power to appoint and authorize general courts-martial and he is not restricted in his power of appointment by the seventy-second article of war, to the one case where the commander of an officer charged with an offense is himself the accuser or prosecutor,<sup>22</sup> but the president of the United States is not the accuser or prosecutor within the meaning of the seventy-second article of war, where the accusation is made by a third person to the secretary of the navy, and thereupon the president appoints a court of inquiry to examine the accusations and upon their findings the president appoints a court-martial to hear and pass upon the charges and specifications.<sup>23</sup>

(c) *By Commander of Fleet.*—Article 36 for the government of the navy providing that no commander of a fleet or squadron "in the waters of the United States" shall convene a court-martial without express authority from the president, applies only to the continental limits of the United States, and

15. Courts-martial a substitute for courts of chivalry.—3 Christian's Bl. 68, 108; Bouv. Law Dict. title Courts-Martial; Ex parte Reed, 100 U. S. 13, 20, 25 L. Ed. 538.

16. Court of special and limited jurisdiction.—Runkle v. United States, 122 U. S. 543, 555, 30 L. Ed. 1167; McClaughry v. Deming, 186 U. S. 49, 68, 46 L. Ed. 1049; Wise v. Withers, 3 Cranch 331, 2 L. Ed. 457.

17. Constitutionality of courts-martial beyond doubt.—Ex parte Reed, 100 U. S. 13, 21, 25 L. Ed. 538; Dynes v. Hoover, 20 How. 65, 15 L. Ed. 838.

18. Authority derived from provisions as to government of United States forces.—Art. 1, § 8, U. S. Const. Dynes v.

Hoover, 20 How. 65, 78, 15 L. Ed. 838.

19. Authority derived from president as commander in chief.—Art. 2, § 2, U. S. Const. Dynes v. Hoover, 20 How. 65, 78, 15 L. Ed. 838.

20. Authority derived from the fifth amendment.—Fifth Amendment Const. of United States. Dynes v. Hoover, 20 How. 65, 78, 15 L. Ed. 838.

21. Power independent of grant of judicial power.—Dynes v. Hoover, 20 How. 65, 79, 15 L. Ed. 838.

22. President may appoint courts-martial.—Swaim v. United States, 165 U. S. 553, 558, 41 L. Ed. 823.

23. President appointing board of inquiry not the accuser.—Swaim v. United States, 165 U. S. 553, 558, 41 L. Ed. 823.

does not take into view the dominion or sovereignty of the United States over territory beyond the seas and far removed from the seat of government, but contemplates waters within the United States in the stricter and popular sense of the term.<sup>24</sup>

(2) *Persons Eligible to Sit on Courts-Martial*—(a) *In General*.—The question of who shall act on courts-martial for the trial of offenders belonging to the various branches of the army of the United States is one entirely for congress to determine.<sup>25</sup> Where the whole court-martial is illegally constituted, because in express violation of statute, a challenge to the whole court is not necessary, as there is no court to pass on the challenge and moreover a challenge has not been provided for by statute.<sup>26</sup> Even consent to a trial by an illegally constituted court-martial does not waive the question of invalidity.<sup>27</sup>

(b) *Regular Army Officers*.—As to the incompetency of regular army officers to sit on court-martial for trial of members of other forces, see the title MILITIA.

(3) *Number and Rank of Members*.—Both the army and navy regulations provide that a general court-martial shall consist of not less than five nor more than thirteen commissioned officers, and as many officers not exceeding thirteen as can be convened without injury to the service shall be summoned on every court, but in no case where it can be avoided without injury to the service shall more than one-half, exclusive of the president, be junior to the officer to be tried.<sup>28</sup> But these articles are merely directory to the appointing officer and his decision as to the number of officers who can be convened without injury to the service, being a matter of sound discretion, is conclusive.<sup>29</sup> When his action is attacked collaterally the courts of the United States will assume that he properly exercised his discretion, and the trial of the accused by a court composed of members, more than one-half of whom were juniors in rank, could not be avoided without inconvenience to the service.<sup>30</sup>

b. *Dissolution and Reconvening*.—By the regulations pertaining to courts-martial, the authority who ordered the court may direct it to reconsider its proceedings and sentence for the purpose of correcting mistakes, but the proceedings must be sent back for revision before the court is dissolved. And if it, upon being reconvened, renders a sentence which he approves, such sentence cannot be collaterally impeached for mere errors or irregularities, if any such were committed by the court while acting within the sphere of its authority,<sup>31</sup> and where the president twice returns the proceedings of a court-martial, urging a more severe sentence, and the last sentence results from his action, the sentence is valid.<sup>32</sup>

5. JURISDICTION—a. *In General*.—A court-martial is the creature of statute, and, as a body or tribunal, it must be convened and constituted in entire con-

24. Commander of fleet may convene court-martial in Philippine waters.—United States v. Smith, 197 U. S. 386, 392, 49 L. Ed. 801.

25. Question as to who shall act is one for congress.—McClaghry v. Deming, 186 U. S. 49, 69, 46 L. Ed. 1049.

26. Where whole court is illegal no challenge is necessary.—McClaghry v. Deming, 186 U. S. 49, 65, 46 L. Ed. 1049.

27. Consent does not waive illegal court-martial.—McClaghry v. Deming, 186 U. S. 49, 66, 46 L. Ed. 1049.

28. Art. 75, Rev. Stat. 1342; Art. 39, Rev. Stat. 1624.

29. Provisions as to constitution of courts-martial directory only.—Martin v. Mott, 12 Wheat. 19, 6 L. Ed. 537. See, also, Swaim v. United States, 165 U. S. 553, 559, 41 L. Ed. 823.

Number and rank of members discretionary with court.—The rank and number of the members of a court-martial must necessarily be, and is, left somewhat to the discretion of the officer convening the court. Bishop v. United States, 197 U. S. 334, 340, 49 L. Ed. 780.

30. Presumption as to proper exercise of discretion.—Bishop v. United States, 197 U. S. 334, 340, 49 L. Ed. 780; Mullan v. United States, 140 U. S. 240, 35 L. Ed. 489; Swaim v. United States, 165 U. S. 553, 559, 560, 41 L. Ed. 823.

31. Convening officer must send proceeding back for revision before court is dissolved.—Ex parte Reed, 100 U. S. 13, 22, 25 L. Ed. 538.

32. President twice returning proceedings urging more severe sentence.—



formity with the provisions of the statute, or else it is without jurisdiction.<sup>33</sup> They derive their jurisdiction and are regulated by an act of congress, in which the crimes which may be committed, the manner of charging the accused, and of trial, and the punishments which may be inflicted, are expressed in terms; or they may get jurisdiction by a fair deduction from the definition of the crime that it comprehends;<sup>34</sup> but where jurisdiction has once attached, it cannot be divested by mere subsequent change of status;<sup>35</sup> and when the principal charge against an officer is within the jurisdiction of a court-martial and the other charge, though varying in form, is for the same or similar acts, like a second count in an indictment, and the same sentence may be awarded on the first charge as upon both, a writ of prohibition will not issue to prevent the court taking cognizance of the charges.<sup>36</sup>

b. *Over Places*.—When the territory of the states, which were banded together in hostility to the national government, and making war against it, was in the military occupation of the United States, general courts-martial had, under the act of March 3, 1863, 12 Stat. 736, and under the laws of war, exclusive jurisdiction to try and punish offenses of every grade committed there by persons in the military service.<sup>37</sup>

c. *Over Persons*.—Every one in the army and navy service, and in the militia, when in actual service of the United States, is amenable to trial by court martial, and while serving surrenders his right to be tried by the civil courts.<sup>38</sup>

d. *Over Offenses*—(1) *In General*.—Jurisdiction of general courts-martial, by the sixty-second article of war, extends to all crimes not capital, committed against public law by an officer or soldier of the army within the limits of the

Swaim v. United States, 165 U. S. 533, 564, 41 L. Ed. 823.

33. **Court-martial a creature of statute.**—McClaghry v. Deming, 186 U. S. 49, 62, 46 L. Ed. 1049.

**Courts-martial wholly unlike a permanent court.**—A court-martial is wholly unlike the case of a permanent court created by constitution or by statute and presided over by one who has some color of authority, although not in truth an officer de jure, and whose acts as a judge of such court may be valid where the public is concerned. The court exists even though the judge may be disqualified or not lawfully appointed or elected. But in the case of a court-martial the very power which appoints the members of and convenes the court violated the statute in composing that court. It is one act, appointing the members of and convening the court, and in performing that act the officer plainly violated the law. McClaghry v. Deming, 186 U. S. 49, 64, 46 L. Ed. 1049.

**When statutory conditions are not observed as to constitution and jurisdiction, judgment is void.**—Where there is no law authorizing the court-martial, or where the statutory conditions as to the constitution or jurisdiction of the court are not observed, there is no tribunal authorized by law to render the judgment. Keyes v. United States, 109 U. S. 336, 340, 27 L. Ed. 954.

34. **Jurisdiction as to persons, offences and punishments defined by congress.**—Dynes v. Hoover, 20 How. 65, 82, 15 L. Ed. 838. See ante, "Liability of Government," IV, B; post, "Courts-Martial," V,

B; "Military Commissions," V, C; "Provisional Courts for Trial of Civil Cases," V, D.

**Jurisdiction of courts-martial defined by statute.**—The military jurisdiction of courts-martial is conferred and defined by statute. Ex parte Vallandigham, 1 Wall. 243, 249, 17 L. Ed. 589.

35. **Jurisdiction not divested by change of status.**—Carter v. McClaghry, 183 U. S. 365, 383, 46 L. Ed. 236.

36. **Court having cognizance of one charge, prohibition will not issue.**—Smith v. Whitney, 116 U. S. 167, 182, 29 L. Ed. 601. See the title PROHIBITION.

37. **Courts-martial had exclusive jurisdiction of all military offenses committed in insurrectionary territory.**—Coleman v. Tennessee, 97 U. S. 509, 24 L. Ed. 1118.

38. **All persons in army and naval service are amenable to trial by court-martial.**—Ex parte Milligan, 4 Wall. 2, 123, 18 L. Ed. 281; Ex parte Mason, 105 U. S. 696, 701, 26 L. Ed. 1213; Dynes v. Hoover, 20 How. 65, 15 L. Ed. 838; McClaghry v. Deming, 186 U. S. 49, 46 L. Ed. 1049.

**Navy paymaster's clerk amenable to trial by court-martial.**—A paymaster's clerk is a person in the naval service of the United States, and subject to be tried, convicted, and sentenced to imprisonment, by a general court-martial. Johnson v. Sayre, 158 U. S. 109, 117, 39 L. Ed. 914; Ex parte Reed, 100 U. S. 13, 25 L. Ed. 538.

**Over legal age for enlistment as defense to charge of desertion.**—Where A. was forty years old at the time of his enlistment, though he represented himself to be but twenty-eight years old, it was



territory where he is serving;<sup>39</sup> and, under every system of military law for the government of either land or naval forces, the jurisdiction of courts-martial extends to the trial and punishment of acts of military or naval officers which tend to bring disgrace and reproach upon the service of which they are members, whether those acts are done in the performance of military duties, or in a civil position, or in a social relation, or in private business.<sup>40</sup> Moreover, it is peculiarly for a court-martial to determine whether the crime charged was "to the prejudice of good order and military discipline."<sup>41</sup>

(2) *Exclusive Jurisdiction over Desertion.*—Desertion is exclusively a military crime, triable and punishable, in time of peace, as well as in time of war, by courts-martial only, and not by the civil tribunals; the only qualification being that since 1830 the punishment of death cannot be awarded in time of peace.<sup>42</sup>

(3) *Jurisdiction Not Exclusive over Civil Offenses Committed by Soldiers.*—

held that the enlistment was valid and A. was subject to trial for desertion by the court-martial, notwithstanding the fact that § 116 of Revised Statutes provides that recruits must be between the ages of sixteen and thirty-five at time of enlistment. In re Grimley, 137 U. S. 147, 150, 34 L. Ed. 636.

39. *Jurisdiction extends to all crimes not capital.*—Grafton v. United States, 206 U. S. 333, 348, 51 L. Ed. 1084.

*Courts-martial may try a soldier for homicide where punishable by imprisonment only.*—Courts-martial may take cognizance of an offense, not capital, under the 62nd article of war, and therefore may try a soldier committing homicide in the Philippines where that offense is punishable only by imprisonment under § 404 of the penal code. Grafton v. United States, 206 U. S. 333, 349, 51 L. Ed. 1084.

40. *Jurisdiction extends to officers' acts in private life.*—Smith v. Whitney, 116 U. S. 167, 178, 183, 29 L. Ed. 601; Carter v. McClaughry, 183 U. S. 365, 401, 46 L. Ed. 236.

*Jurisdiction not limited to crimes specified in statutes.*—The jurisdiction of courts-martial, under the articles for the government of the army and navy established by congress, is not limited to the crimes defined or specified in those articles, but extends to any offense which, by a fair deduction from the definition, congress meant to subject to punishment, being "one of a minor degree, of kindred character, which has already been recognized to be such by the practice of courts-martial in the army and navy services of nations, and by those functionaries in different nations to whom has been confided a revising power over the sentences of courts-martial;" or which, though not included, in terms or by construction, within the definition, came within "a comprehensive enactment, such as the 32d article of the rules for the government of the navy, which means that courts-martial have jurisdiction of such crimes as are not specified, but which have been recognized to be crimes and offenses by the usages in the navy of all

nations, and that they shall be punished according to the laws and customs of the sea." Dynes v. Hoover, 20 How. 65, 82, 15 L. Ed. 838; Smith v. Whitney, 116 U. S. 167, 183, 29 L. Ed. 601.

*Failure to pay debts was held to be an offense cognizable by court-martial.*—United States v. Fletcher, 148 U. S. 84, 37 L. Ed. 378.

*Soldier shooting at prisoner in jail.*—Where a soldier on guard at a jail attempted to kill a prisoner by shooting at him through an open window and was tried by a court-martial, it was held that the court-martial had authority to try him, being a military offense as well as a civil offense, and it was not necessary to deliver him to the civil authorities where no demand was made therefore. Ex parte Mason, 105 U. S. 696, 26 L. Ed. 1213.

41. *Province of court to determine whether crime was "to prejudice of good order."*—Carter v. McClaughry, 183 U. S. 365, 400, 46 L. Ed. 236; Swaim v. United States, 165 U. S. 553, 41 L. Ed. 823; Smith v. Whitney, 116 U. S. 167, 178, 29 L. Ed. 601; United States v. Fletcher, 148 U. S. 84, 37 L. Ed. 378.

*Making unlawful contracts as "scandalous conduct tending to destruction of good morals."*—Under the 61st article of war providing that "any officer who is convicted of conduct unbecoming an officer and gentleman shall be dismissed from the service," an officer in the navy who falsified contracts, made unlawful contracts and thus subordinated the interests of the government to that of the contractors, can be convicted by a court-martial of "scandalous conduct tending to the destruction of good morals" and "culpable inefficiency in the performance of duty." Smith v. Whitney, 116 U. S. 167, 171, 29 L. Ed. 601.

42. *Desertion as exclusively a military crime.*—Kurtz v. Moffitt, 115 U. S. 487, 501, 29 L. Ed. 458. See the title ARMY AND NAVY, vol. 2, p. 494.

*Act of 1863 did not divest jurisdiction of the courts of loyal states over military.*—The thirtieth section of the act of March 3, 1863 (12 Stat. 731), entitled "An

Article 58 of the rules of war provides that in times of war, insurrection or rebellion the trial of certain enumerated offenses as burglary, arson, murder, assault and battery, etc., when committed by persons in the military service, shall be by courts-martial, but this jurisdiction is not vested in general courts-martial to the exclusion of the civil courts,<sup>43</sup> and being operative only in time of war, it neither adds to nor takes from the powers which courts-martial have under the sixty-second article in time of peace.<sup>44</sup>

6. *PROCEDURE*—a. *In General*.—The proceedings of courts-martial should be according to the general usage of the military service or what may not unfitly be called the customary military law.<sup>45</sup> And according to military usage and practice, the charge is in effect divided into two parts, the first technically called the "charge," and the second, the "specification." The charge proper designates the military offense of which the accused is alleged to be guilty. The specification sets forth the acts or omissions of the accused which form the legal constituents of the offense. The pleading need not possess the technical nicety of indictments as at common law.<sup>46</sup> Not only do military usage and procedure permit of an indefinite number of offenses being charged and adjudicated together in one and the same proceeding, but the rule is recognized that whenever an officer has been apparently guilty of several or many offenses, whether of a similar character or distinct in their nature, charges and specifications covering them all should, if practicable, be preferred together, and together brought to trial. And it has been repeatedly ruled by the judge advocate general that "a duly approved finding of guilty on one of several charges, a conviction upon which requires or authorizes the sentence adjudged, will give validity and effect to such sentence, although the similar findings on all the other charges are disapproved as not warranted by the testimony."<sup>47</sup>

b. *Conviction of Lesser Offense*.—A soldier may be convicted by a court-martial of the offense of attempting to desert, on a trial for desertion.<sup>48</sup>

c. *Furnishing Copy of Charges to Accused*.—The provision of article 43 of the articles for the government of the navy, which prescribes that "the person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest," refers to the time when he "is arrested for trial" by court-martial, and not to the time of any previous arrest, either by way of punishment, or to await the action of a court of inquiry,<sup>49</sup> and hence is complied with by furnishing him with a copy of the charges and specifications immediately after he has been informed by the secretary of the navy of the report of the board of inquiry and the order for a court-martial, and four days

act for enrolling and calling out the national forces, and for other purposes," did not make the jurisdiction of the military tribunals over the offenses therein designated, when committed by persons in the military service of the United States, and subject to the articles of war, exclusive of that of such courts of the loyal states as were open and in the undisturbed exercise of their jurisdiction. *Coleman v. Tennessee*, 97 U. S. 509, 24 L. Ed. 1118.

43. *Jurisdiction of courts-martial not exclusive*.—*Coleman v. Tennessee*, 97 U. S. 509, 514, 24 L. Ed. 1118; *Grafton v. United States*, 206 U. S. 333, 348, 51 L. Ed. 1084.

44. *Article 58 of rules of war does not affect article 62 of rules of war*.—*Ex parte Mason*, 105 U. S. 696, 699, 26 L. Ed. 1213.

45. *Proceedings should be according to military usage*.—*Martin v. Mott*, 12 Wheat, 19, 35, 6 L. Ed. 537.

46. *Charge divided into two parts*.—

*Carter v. McClaughry*, 183 U. S. 365, 386, 46 L. Ed. 236.

47. *Several offenses may be tried on same trial*.—*Carter v. McClaughry*, 183 U. S. 365, 386, 46 L. Ed. 236.

48. *Conviction of lesser offense*.—*Dynes v. Hoover*, 20 How. 65, 79, 15 L. Ed. 838.

49. *"Arrest" referred to in article 43, navy regulations, refers to the "arrest for trial"*.—*Johnson v. Sayre*, 158 U. S. 109, 117, 39 L. Ed. 914.

*Arrest does not refer to preliminary arrest*.—The word arrest as employed in article 43, § 1624, Revised Statutes, does not relate to the preliminary arrest or detention of an accused person awaiting the action of higher authority to frame charges and specifications and order a court-martial, but to the arrest resulting from the preferring of the charges by the proper authority and the convening of a court-martial. *United States v. Smith*, 197 U. S. 386, 391, 49 L. Ed. 801.



before the court-martial meets.<sup>50</sup>

7. JUDGMENT AND SENTENCE—*a. Requisites for Validity.*—To give effect to the sentences of a court-martial it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law. There are no presumptions in its favor so far as these matters are concerned.<sup>51</sup>

*b. Necessity for Approval of Sentence.*—(1) *In General.*—The sentence of a court-martial must be confirmed by the president of the United States, by the officer ordering the court, or the commanding officer as the case may be, before it can be carried into effect,<sup>52</sup> and when properly confirmed, must be executed unless the president pardons the offender.<sup>53</sup>

(2) *By President.*—(a) *In General.*—All the proceedings of general courts-martial, in cases involving loss of life or dismissal from the service in time of peace, must be submitted to the secretary of war, to be laid before the president of the United States for confirmation or disapproval and for orders in the case,<sup>54</sup> and an officer sentenced to dismissal from the service by the sentence of a court-martial, is not legally out of the service unless the record clearly shows the proceedings have been approved by the president.<sup>55</sup> The president's duty as to the approval of the sentence is judicial, not administrative, and cannot be delegated,<sup>56</sup> but it is not necessary that his judgment be attested by his sign manual in order to be effectual.<sup>57</sup>

(b) *President's Approval Sufficiently Shown.*—The order of the president approving the proceedings and sentence of a court-martial will not be sufficient unless it is authenticated in a way to show otherwise than argumentatively that it is the result of the judgment of the president himself, and that it is not a mere departmental order which might or might not have attracted his personal attention. The fact that the order was his own should not be left to inference only.<sup>58</sup> But where the record discloses that the proceedings of a court-martial have been laid before the president for his orders in the case, the orders subse-

50. Statute complied with by furnishing copy of charges after report of board of inquiry.—*Johnson v. Sayre*, 158 U. S. 109, 118, 39 L. Ed. 914.

Unnecessary to serve copy of charges at time of arrest merely for good order and discipline.—It is not necessary to serve, at the time of arrest, the copy of the charges and specifications required by the act of April 23, 1800 (2 Stat. 45, 50, 51), to be served on a person about to be court-martialed, where the arrest is merely made as a precaution for the maintenance of good order and discipline abroad, but it is sufficient, where the accused is released and restored to duty, if served the day of rearrest, the day before the time appointed for the convening of the court-martial. *Bishop v. United States*, 197 U. S. 334, 339, 49 L. Ed. 780.

51. Jurisdiction must appear affirmatively to validate sentence.—*Runkle v. United States*, 122 U. S. 543, 556, 30 L. Ed. 1167; *McLaughry v. Deming*, 186 U. S. 49, 69, 46 L. Ed. 1049; *Dynes v. Hoover*, 20 How. 65, 80, 15 L. Ed. 838.

52. Sentence must be properly confirmed.—104th, 105th, 106th Articles of War.

53. Sentence when confirmed must be executed unless offender is pardoned.—*Dynes v. Hoover*, 20 How. 65, 81, 15 L. Ed. 838.

54. Act of July 17, 1862, 105th and 106th Articles of War.

Sentence of dismissal need not be confirmed by convening officer.—The sentence of a court-martial dismissing an officer from the service need not be confirmed by the officer convening it, act of July 17, 1862, as such a sentence must be approved by the president. *Bishop v. United States*, 197 U. S. 334, 49 L. Ed. 780.

55. Dismissal not complete until president approves sentence.—*Runkle v. United States*, 122 U. S. 543, 30 L. Ed. 1167.

56. President's duty is judicial and cannot be delegated.—*Runkle v. United States*, 122 U. S. 543, 557, 30 L. Ed. 1167.

57. President need not append his signature.—*United States v. Page*, 137 U. S. 673, 34 L. Ed. 828; *United States v. Fletcher*, 148 U. S. 84, 89, 37 L. Ed. 378.

58. President's approval must appear affirmatively.—*Runkle v. United States*, 122 U. S. 543, 561, 30 L. Ed. 1167.

President's signed approval on proceedings.—The president's approval of the sentence of a court-martial sufficiently appears where the proceedings were forwarded to the secretary of the navy for the president's action and the signed approval of the president appears upon such proceedings and the secretary of the navy notified the officer that the sentence of the court-martial was approved by the



quently issued thereon are presumed to be his, and not those of the secretary by whom they are authenticated.<sup>59</sup>

(c) *President's Disapproval of Some Specification as Invalidating Sentence.*—The disapproval by the president of certain specifications in the sentence of a court-martial does not invalidate the sentence as approved.<sup>60</sup>

c. *Extent of Sentence.*—By the act of congress of Sept. 27, 1890, 26 Stat. 491, c. 908, whenever, by any of the articles of war, the punishment is left to the discretion of the court it shall not be in excess, in time of peace, of a limit which the president may prescribe, but a sentence imposed upon an officer greater than the maximum punishment fixed by the president under the orders given in pursuance of the above act of congress, is not illegal, as the executive orders under the above act relate only to enlisted men and not to officers,<sup>61</sup> but the president of the United States, as commander in chief of the United States forces, may direct that the imprisonment under the sentence of a court-martial shall be in the penitentiary.<sup>62</sup> However, a court-martial cannot punish by confinement in the penitentiary unless the offense is punishable by the laws regulating civil society with confinement in the penitentiary.<sup>63</sup> In addition to confinement in the penitentiary, however, it may provide for dishonorable discharge from the service, as the 97th article of war only limits the discretion of the court-martial as to imprisonment in the penitentiary and has nowhere provided that punishment may not in other respects be greater than the civil courts could inflict.<sup>64</sup>

d. *Punishment Constituting Double Jeopardy.*—The words "arrest, suspension or confinement" in par. 1205 of the navy regulations contemplate an action in the nature of a punishment, and an order which restored an officer to duty, who had been suspended from daylight to evening, for drunkenness, so as to give "time to investigate the case," could not have been intended as punishment or an expiation of the previous offense, and thus prevent a court-martial from taking cognizance of the offense; likewise,<sup>65</sup> a sentence of a court-martial to fine and imprisonment for violation of the 60th article of war on conviction of the charge of "conspiring to defraud the United States" and "causing false and

president and he was therefore dismissed. *Bishop v. United States*, 197 U. S. 334, 49 L. Ed. 780.

59. Proceedings submitted to president, presumption is subsequent orders are his. —*United States v. Page*, 137 U. S. 673, 680, 34 L. Ed. 828.

Secretary of war reciting transmission of proceedings to president and his approval of same.—Where an officer was sentenced to dismissal from the service and the proceedings and sentence of the court-martial were transmitted to the secretary of war for action by the president and the secretary of war wrote on the proceedings that the proceedings had been forwarded for the action of the president and the proceedings, findings and sentence were approved and the sentence will be executed, it was held to be a sufficient authentication of the president's judgment. *United States v. Fletcher*, 148 U. S. 84, 37 L. Ed. 378; *Ide v. United States*, 150 U. S. 517, 37 L. Ed. 1166.

60. Disapproval of some specifications does not invalidate sentence as approved. —*Carter v. McClaughry*, 183 U. S. 365, 384, 46 L. Ed. 236.

61. Act of 1890 applicable only to enlisted men.—*Carter v. McClaughry*, 183 U. S. 365, 382, 46 L. Ed. 236.

62. President may direct imprisonment

shall be in the penitentiary.—*Dynes v. Hoover*, 20 How. 65, 84, 15 L. Ed. 838.

63. Court-martial cannot punish by confinement in penitentiary unless so punishable by common law.—Art. 97, Rules of War.

64. Court-martial may add dismissal to imprisonment in penitentiary.—Ex parte Mason, 105 U. S. 696, 700, 26 L. Ed. 1213.

Sentence of fine and imprisonment with discharge from service not illegal on ground of infliction "after leaving service."—A sentence of fine and imprisonment in conjunction with dismissal from the army is not open to the objection that it is inflicted after leaving the service, as the different provisions of the sentence take effect concurrently and the accused is proceeded against as an officer of the army, and jurisdiction attaches in respect of him as such, which includes not only the power to hear and determine the case, but the power to execute and enforce the sentence of the law. Having being sentenced, his status is that of a military prisoner held by the authority of the United States as an offender against its laws. *Carter v. McClaughry*, 183 U. S. 365, 383, 46 L. Ed. 236.

65. Arrest and suspension from duty temporarily as preventing court-martial from further proceedings.—*Bishop v.*

fraudulent claims to be made against the United States" is not illegal on the ground that it places an officer twice in jeopardy for the same offense, where the sentence on conviction of any one of the offenses charged, taken singly, is limited to fine or imprisonment, because the offenses are not the same. One required evidence which the other did not, and the fact that both charges grew out of one transaction makes no difference.<sup>65a</sup> Nor is punishment of dismissal imposed upon an officer by a court martial for "conduct unbecoming an officer and a gentleman" illegal, on the ground that the officer had been sentenced to fine, and imprisonment for "conspiring to defraud the United States" and "for causing false and fraudulent claims to be made" and that therefore since the offense of "conduct unbecoming an officer and a gentleman," is the same as the two other offenses, three punishments had therefore been imposed where only two offenses had been committed in violation of the 5th amendment providing no person should be twice put in jeopardy for the same offense, for the offense of "conduct unbecoming an officer and a gentleman" is not the same offense as "conspiracy to defraud" or the "causing of false and fraudulent claims to be made," although to be guilty of the latter involves being guilty of the former.<sup>66</sup>

8. REVIEW—*a. In General.*—Courts-martial are lawful tribunals, with authority to finally determine any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced.<sup>67</sup> And when, through mistake or misapprehension, or for any other reason, in-

United States, 197 U. S. 334, 338, 49 L. Ed. 780.

**65a. Sentence of fine and imprisonment on conviction of two charges punishable by fine or imprisonment.**—*Carter v. McClaughry*, 183 U. S. 365, 390, 46 L. Ed. 236.

**66. Three punishments for conviction of two offenses.**—*Carter v. McClaughry*, 183 U. S. 365, 395, 46 L. Ed. 236. See, generally, the title AUTREFOIS, ACQUIT AND CONVICT, vol. 2, p. 751.

**67. Judgment not reviewable except for jurisdiction.**—*Carter v. Roberts*, 177 U. S. 496, 498, 44 L. Ed. 861; *Dynes v. Hoover*, 20 How. 65, 81, 15 L. Ed. 838; *Ex parte Reed*, 100 U. S. 13, 25 L. Ed. 538; *Ex parte Mason*, 105 U. S. 696, 26 L. Ed. 1213; *Keyes v. United States*, 109 U. S. 336, 27 L. Ed. 954; *Wales v. Whitney*, 114 U. S. 564, 29 L. Ed. 277; *Kurtz v. Moffitt*, 115 U. S. 487, 500, 29 L. Ed. 458. See, also, *Wise v. Withers*, 3 Cranch 331, 2 L. Ed. 457; *Swaim v. United States*, 165 U. S. 553, 561, 41 L. Ed. 823; *Smith v. Whitney*, 116 U. S. 167, 177, 29 L. Ed. 601.

**Civil court has no appellate jurisdiction over court-martial.**—If there is no prisoner to release, if there is no custody to be discharged, if there is no such restraint as requires relief, then the civil court has no power to interfere with the military court, or other tribunal over which it has by law no appellate jurisdiction. *Wales v. Whitney*, 114 U. S. 564, 570, 29 L. Ed. 277.

**Jurisdiction may be inquired into.**—Civil tribunals will not revise the proceedings of courts-martial, except for the

purpose of ascertaining whether they had jurisdiction of the person and of the subject matter, and whether, though having such jurisdiction, they have exceeded their powers in the sentences pronounced. *Carter v. McClaughry*, 183 U. S. 365, 46 L. Ed. 236.

**Jurisdiction of court reviewable.**—If a court-martial has no jurisdiction over the subject matter of the charge it has been convened to try, or inflicts a punishment forbidden by the law, though its sentence is approved by the officers having a revisory power of it, civil courts may, on an action by a party aggrieved by it, inquire into the want of the court's jurisdiction, and give him redress. *Dynes v. Hoover*, 20 How. 65, 82, 15 L. Ed. 838.

**Civil courts exercise no supervisory control over court-martial by habeas corpus.**—The civil courts may in any case inquire into the jurisdiction of a court-martial, and if it appears that the party condemned was not amenable to its jurisdiction, may discharge him from the sentence, but it is equally clear that by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial; and that no mere errors in their proceedings are open to consideration. The single inquiry, the test, is jurisdiction. *In re Grimley*, 137 U. S. 147, 150, 34 L. Ed. 636.

**Acts of court-martial disregarding law as to conveying and organization are void.**—Persons belonging to the army and the navy are not subject to illegal or irresponsible courts-martial, when the law for convening them and directing their pro-



justice has been done in removing an officer from service, congress has the power to accord relief, but the courts cannot of their own motion revise the grounds of action taken in the constitutional exercise of executive power.<sup>68</sup>

b. *Collateral Attack*.—A court-martial is an inferior court of limited jurisdiction whose judgments may be questioned collaterally,<sup>69</sup> but where it has jurisdiction, its proceedings cannot be collaterally impeached for any mere error or irregularity.<sup>70</sup> Moreover, the expressed satisfaction with the court-martial as constituted is a clear waiver of any objection to its personnel, where the sentence is collaterally attacked on the ground that as many officers were not summoned as were possible without injury to the service.<sup>71</sup> The invalidity of a court-martial may be raised upon a hearing on habeas corpus;<sup>72</sup> but a soldier cannot be released from jail under a habeas corpus, if the court-martial had jurisdiction to try the offender for the offense charged and the sentence was

ceedings of organization and for trial have been disregarded. In such cases, everything which may be done is void—not voidable, but void; and civil courts have never failed, upon a proper suit, to give a party redress, who has been injured by a void process or void judgment. *Dynes v. Hoover*, 20 How. 65, 81, 15 L. Ed. 838.

**68. Congress may grant relief if removal of officer was wrong.**—*Quackenbush v. United States*, 177 U. S. 20, 25, 44 L. Ed. 654.

**69. Judgments of court-martial may be attacked collaterally.**—*Ex parte Watkins*, 3 Pet. 193, 207, 209, 7 L. Ed. 650, explaining *Wise v. Withers*, 3 Cranch 331, 2 L. Ed. 457.

**Jurisdiction reviewed in action of trespass.**—Jurisdiction of court-martial was reviewed collaterally in an action of trespass against an officer relying on its judgment as a defense for his action. *Wise v. Withers*, 3 Cranch 331, 2 L. Ed. 457.

**70. Judgments cannot be collaterally impeached for mere errors or irregularities.**—*Ex parte Reed*, 100 U. S. 13, 23, 25 L. Ed. 538.

**Judgment not reviewable because prosecutor was a witness and member of court-martial.**—Where the court-martial, as a general court-martial, had cognizance of the charges made, and had jurisdiction of the person of the appellant, and irregularities or errors are alleged to have occurred in the proceedings, the sentence of dismissal must be held valid when it is questioned collaterally on the ground that the prosecutor was a witness and a member of the court-martial. *Keyes v. United States*, 109 U. S. 336, 340, 27 L. Ed. 954.

**When a court-martial has jurisdiction, its judgments not reviewable in collateral action for pay.**—Where a court-martial has jurisdiction, errors in its exercise cannot be collaterally attacked in a proceeding in the court to recover pay by an officer who was dismissed by the sentence of the court-martial. *United States v. Fletcher*, 148 U. S. 84, 93, 37 L. Ed. 378; *Idé v. United States*, 150 U. S. 517, 37 L. Ed. 1166.

**No offense shown by the evidence be-**

**fore court-martial.**—The sentence of a court-martial cannot be collaterally attacked on the ground that no offense under the sixty-second article of war was shown by the facts before the court-martial. *Swaim v. United States*, 165 U. S. 553, 561, 41 L. Ed. 823.

**Court-martial composed of inferiors in rank.**—The sentence of a court-martial cannot be collaterally attacked in an action to recover pay before the court of claims, on the ground that he had been tried by a court-martial composed of officers inferior in rank, contrary to the articles of war which provides no officer shall be tried by a court composed of juniors where it can be avoided, as the presumption is that the president in detailing the officers acted in accordance with law. *Swaim v. United States*, 165 U. S. 553, 560, 41 L. Ed. 823.

**Judge advocate not properly appointed—Errors in admission and exclusion of evidence.**—The action of a court-martial in permitting a person to act as judge advocate who was not appointed by the convening officer as required and who was not sworn to the faithful performance of duty and questions relating to the admission and exclusion of evidence are not reviewable collaterally. *Swaim v. United States*, 165 U. S. 553, 561, 41 L. Ed. 823.

**Officer on court at enmity with accused.**—The decision of a court-martial in determining the validity of a challenge made against an officer on the court whom the accused had criticised and whose enmity had been thereby incurred, could not be reviewed by the Court of Claims in a collateral action to recover pay. *Swaim v. United States*, 165 U. S. 553, 561, 41 L. Ed. 823.

**71. Expressed satisfaction with court-martial is a waiver where attacked collaterally on ground of number convened.**—*Bishop v. United States*, 197 U. S. 334, 339, 49 L. Ed. 780.

**72. Objection to illegal court-martial can be taken on habeas corpus.**—*McClaghry v. Deming*, 186 U. S. 49, 46 L. Ed. 1049. See, generally, the title HABEAS CORPUS, vol. 6, p. 610.



one which the court could render under the law.<sup>73</sup>

9. **DOUBLE PUNISHMENT BY COURT-MARTIAL AS A FEDERAL QUESTION AUTHORIZING DIRECT APPEAL TO UNITED STATES SUPREME COURT.**—A question arising under the United States constitution is raised so as to allow a direct appeal under the act of March 3, 1891, p. 5, from a circuit court of the United States discharging a writ of habeas corpus to the United States supreme court, by the averment in the petition and argument on the return, that a person sentenced by an army court-martial had twice been punished for the same offense.<sup>74</sup> But it has been held that the construction or application of the constitution of the United States, in that the petitioner was twice punished for the same offense by the sentence of a court-martial imposing a fine, imprisonment, and dismissal from the service, is not raised so as to allow a direct appeal to the United States supreme court by an averment in the petition for a writ of habeas corpus that petitioner having suffered the punishment of dismissal and publication, his imprisonment is without authority of law, and his further punishment and detention and the carrying out of said sentence is contrary to law and the provisions of the United States constitution and is illegal.<sup>75</sup>

10. **EFFECT AND CONCLUSIVENESS OF JUDGMENT.**—If a court-martial has jurisdiction to try an officer or soldier for a crime, its judgment will be accorded the finality and conclusiveness as to the issues involved which attend the judgments of a civil court in a case of which it may legally take cognizance. Notwithstanding the civil court, if it had first taken hold of the case, might have tried the accused for the same offense or even one of higher grade arising out of the same facts;<sup>76</sup> but the judgment of a court-martial, where it has no jurisdiction, cannot protect the officer who executes its process.<sup>77</sup>

**C. Military Commissions.**—A military commission is not a court within the meaning of § 14 of the judiciary act of 1789, declaring what courts shall have the power to issue the writs of habeas corpus,<sup>78</sup> and the jurisdiction of military commissions is limited to the theatre of war or of military occupation.<sup>79</sup> Military commissions organized during the late Civil War, in a state not evaded

**73. No release on habeas corpus if court had jurisdiction and sentence was valid.**—*Ex parte Mason*, 105 U. S. 696, 26 L. Ed. 1213.

**74. Former jeopardy as a constitutional question.**—*Carter v. McClaughry*, 183 U. S. 365, 381, 46 L. Ed. 236. See, generally, the title **APPEAL AND ERROR**, vol. 1, p. 433.

**75. Former jeopardy as involving construction or application of federal constitution.**—*Carter v. Roberts*, 177 U. S. 496, 498, 44 L. Ed. 861.

**76. Judgment of court-martial within jurisdiction is conclusive.**—*Grafton v. United States*, 206 U. S. 333, 345, 51 L. Ed. 1084. See the titles **AUTREFOIS, ACQUIT AND CONVICT**, vol. 2, p. 754; **RES ADJUDICATA**.

**Acquittal of soldier of homicide by court-martial as a bar to further action.**—A soldier in the army, having been acquitted of the crime of homicide, alleged to have been committed by him in the Philippines, by a military court of competent jurisdiction, proceeding under the authority of the United States, could not be subsequently tried for the same offense in a civil court exercising authority in a territory. *Grafton v. United States*, 206 U. S. 333, 355, 51 L. Ed. 1084.

**Judgment as defense to action for trespass.**—The judgment of a court-martial in conformity with law, and which has been properly approved, is a valid defense to an action against a marshal for executing it. *Dynes v. Hoover*, 20 How. 65, 83, 15 L. Ed. 838.

**Judgment of court-martial for robbery not conclusive as to amount.**—The judgment of a court-martial trying the robbers of an army paymaster is not conclusive of the amount of the robbery, as that is no essential part of the issue in the trial of the robbers, and it may well be doubted whether a criminal proceeding in a court-martial can be used to establish any collateral fact in a civil proceeding in another court. *United States v. Clark*, 96 U. S. 37, 40, 24 L. Ed. 696.

**77. Judgment where no jurisdiction is no defense to officer.**—*Wise v. Withers*, 3 Cranch 331, 337, 2 L. Ed. 457.

**78. Military commission not a court within meaning of judiciary act.**—*Ex parte Vallandigham*, 1 Wall. 243, 251, 17 L. Ed. 589. See ante, "In General," V, A.

**79. Jurisdiction limited to theatre of war.**—*Ex parte Vallandigham*, 1 Wall. 243, 17 L. Ed. 589.

and not engaged in rebellion, in which the federal courts were open, and in the proper and unobstructed exercise of their judicial functions, had no jurisdiction to try, convict, or sentence for any criminal offense, a citizen who was neither a resident of a rebellious state, nor a prisoner of war, nor a person in the military or naval service. And congress could not invest them with any such power.<sup>80</sup>

**D. Provisional Courts for Trial of Civil Cases**—1. **ESTABLISHMENT AND DURATION.**—The constitution did not prohibit the creation of provisional courts for the trial of civil causes during the Civil War in conquered portions of the insurgent states,<sup>81</sup> and it was within the constitutional authority of the president, as commander in chief, to establish in those portions of the insurgent territory occupied by the national forces, such courts for the hearing and determination of all causes arising under the laws of the state or the United States,<sup>82</sup> as the establishment of such courts was but the exercise of the ordinary rights of conquest.<sup>83</sup> In the absence of proof to the contrary, a court established by proclamation of the commanding general on the occupation of a city by the government forces, will be presumed to have been authorized by the president;<sup>84</sup> but the duration of such courts is limited to the restoration of civil authority in the state.<sup>85</sup>

2. **APPOINTMENT OF JUDGES.**—A military governor, appointed by the president during the Civil War, had authority to appoint a judge in a district which was in insurrection,<sup>86</sup> but such an appointment is purely military, authorized

**80. Power of military commission to try private citizen.**—Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281.

**81. Creation of civil courts in conquered insurrectionary territory.**—Mechanics', etc., Bank v. Union Bank, 22 Wall. 276, 296, 22 L. Ed. 871.

**Jurisdiction of provost court not a federal question.**—Though a provost court ordinarily has cognizance only of minor criminal offenses, a larger jurisdiction may be given to it, by the power which brings it into being. Whether a larger jurisdiction was conferred in any case is not a federal question, but is a question exclusively for the state tribunals. Mechanics', etc., Bank v. Union Bank, 22 Wall. 276, 297, 22 L. Ed. 871. See the title **APPEAL AND ERROR**, vol. 1, p. 333.

**82. President has power to establish courts to hear and decide civil cases in insurgent states.**—The Grapeshot, 9 Wall. 129, 19 L. Ed. 651. See the titles **COURTS**, vol. 4, p. 861; **PRESIDENT OF THE UNITED STATES**.

**83. Establishment of civil courts in conquered territory under right of conquest.**—Mechanics', etc., Bank v. Union Bank, 22 Wall. 276, 22 L. Ed. 871.

**Authority to establish provisional courts in conquered insurgent states the same as the right in conquered foreign territory.**—"The power to establish by military authority courts for the administration of civil as well as criminal justice in portions of the insurgent states occupied by the national forces, is precisely the same as that which exists when foreign territory has been conquered and is occupied by the conquerors." Mechanics', etc., Bank v. Union Bank, 22 Wall. 276, 296, 22 L. Ed.

871; Leitensdorfer v. Webb, 20 How. 176, 15 L. Ed. 891.

**Provisional court for New Mexico.**—Upon the conquest of New Mexico, in 1846, the commanding officer of the conquering army, in virtue of the power of conquest and occupancy, and with the sanction and authority of the president, ordained a provisional government for the country. The ordinance created courts, with both civil and criminal jurisdiction. But though these courts and this judicial system were established by the military authority of the United States, without any legislation of congress, the United States supreme court ruled that they were lawfully established, though there was no express order for their establishment emanating from the president or the commander in chief. Leitensdorfer v. Webb, 20 How. 176, 15 L. Ed. 891.

**84. Presumption as to authorization of provisional courts.**—Mechanics', etc., Bank v. Union Bank, 22 Wall. 276, 22 L. Ed. 871.

**85. Duration of provisional courts.**—Burke v. Miltenberger, 19 Wall. 519, 22 L. Ed. 158.

**Provisional court of Louisiana ceased to exist July 26, 1866.**—The president's proclamation of April 2, 1866, only authorized the dissolution of the provisional court of Louisiana but did not ipso facto dissolve it. It did not cease to exist until July 26, 1866, when congress by statute of that day, provided for the transfer of cases pending in it, and of its judgments and decrees, to the proper courts of the United States.

**86. Military governor may appoint judges.**—Pennvuit v. Eaton, 15 Wall. 380, 382, 384, 21 L. Ed. 72; The Grapeshot, 9 Wall. 129, 19 L. Ed. 651.

only by the necessities of military occupation, and subject to revocation whenever, in the judgment of the military governor, revocation becomes necessary or expedient;<sup>87</sup> and, independent of military control, the appointment ceased of necessity and the office became vacant and the governor of the state had whatever authority the state constitution gave him to fill the office by a new appointment, when the Confederate States adopted a new constitution and it was in full operation.<sup>88</sup>

3. **VALIDITY AND EFFECT OF JUDGMENTS AND DECREES ON APPEAL.**—The judgments and decrees of such court are valid,<sup>89</sup> and when transferred into the circuit court, in pursuance of the act of congress, must be regarded, in respect to appeal, as a decree of the circuit court.<sup>90</sup> A case raising the question as to whether a judgment rendered by a judge appointed by a military governor is valid is a federal question reviewable by the supreme court as it involves a right or privilege claimed under the United States and comes within the 25th section of the judiciary act.<sup>91</sup>

**MILITARY WARRANTS, BOUNTIES AND DONATIONS.**—See the title **PUBLIC LANDS.**

87. Appointment of judges subject to revocation whenever expedient.—*Handlin v. Wickliffe*, 12 Wall. 173, 20 L. Ed. 365.

88. Appointment of judge by military governor ceased when state constitution was in operation.—*Handlin v. Wickliffe*, 12 Wall. 173, 175, 20 L. Ed. 365.

89. Judgments of provisional courts are valid.—*The Grapeshot*, 7 Wall. 563, 19 L. Ed. 83.

90. Decrees of provisional court of

Louisiana must be regarded on appeal as a decree of circuit court.—*The Grapeshot*, 7 Wall. 563, 19 L. Ed. 83. See, generally, the title **APPEAL AND ERROR**, vol. 1, p. 333; vol. 2, p. 1.

91. Whether the judgment of a provisional court is valid is a federal question.—*Pennywit v. Eaton*, 15 Wall. 380, 21 L. Ed. 72. See the title **APPEAL AND ERROR**, vol. 1, p. 333.



# MILITIA.

BY CHAS. W. FOURL.

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As to the general right of the state to restrict unauthorized military organizations, see the title CONSTITUTIONAL LAW, vol. 4, p. 490. As to the necessity of indictment and presentment by grand jury, see the title CONSTITUTIONAL LAW, vol. 4, p. 493. As to amenability of militia to martial law, see the title MARTIAL LAW, ante, p. 272. As to courts-martial generally, see the title MILITARY LAW, ante, p. 343. As to the power of a state to use militia, see the title STATES.

## I. President as Commander in Chief.

The president of the United States is the commander in chief of the militia when called into the service of the United States.<sup>1</sup>

## II. Calling Out Militia.

**A. Authority to Call.**—The president of the United States by the acts or congress of February 28th, 1795, and 3d of March, 1807, is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the gov-

**1. President as commander in chief of militia.**—*Martin v. Mott*, 12 Wheat. 19, 30, 6 L. Ed. 537; *Prize Cases*, 2 Black 635, 17 L. Ed. 459; *Ex parte Milligan*, 4 Wall. 2, 139, 18 L. Ed. 281; *Hamilton v. Dillin*, 21 Wall. 73, 87, 22 L. Ed. 528; *Kurtz v. Moffitt*, 115 U. S. 487, 503, 29 L. Ed. 458; *Johnson v. Sayre*, 158 U. S. 109, 115, 39 L. Ed. 914. See the title ARMY AND NAVY, vol. 2, p. 498.

ernment of a state or of the United States,<sup>2</sup> and congress may subsequently ratify the president's action in calling out the militia by an act "approving, legalizing and making valid all the acts, proclamations and orders of the president, as if they had been issued and done under previous express authority and direction of congress," and such an act is not open to the objection of being *ex post facto*.<sup>3</sup> The authority to decide whether the exigencies contemplated in the constitution of the United States, and the acts of congress have arisen, is exclusively vested in the president, and his decision is exclusive upon all other persons;<sup>4</sup> hence, in case of an insurrection in any state against the government thereof, since the president is to act upon the application of the legislature or of the executive, he must necessarily determine, in case of dispute, what body of men constitute the lawful legislature and who is the governor, before he can act,<sup>5</sup> and his decision is not subject to review by the judicial power.<sup>6</sup>

**B. Manner of Calling Out.**—"There are two ways by which the militia may be called into service; the one is under state authority, the other under authority of the United States," but the possession of this power by the United States does not preclude the general government from leaning upon the state authority to call forth the militia. The general government may command or request,<sup>7</sup> but a requisition by the president upon the government of a state calling forth the militia is, in legal intendment, an order, and must be so interpreted,<sup>8</sup> and since the power to call forth the militia is vested in the president alone, the subordinate and ancillary power of drafting and detaching the militia exist in him also, and can be exercised by him, or under his authority only.<sup>9</sup>

### III. Regulation and Control of Militia.

**A. In General.**—The militia belong to the states, respectively, in which they are enrolled and they are subject, both in their civil and military capacities, to the jurisdiction and laws of such state, except so far as those laws are controlled by acts of congress constitutionally made,<sup>10</sup> but after a detachment of the militia have been called forth, and have entered into the service of the United States, the authority of the general government over such a detachment is exclusive,<sup>11</sup> but this service does not commence until the arrival of the mili-

2. President authorized to call out militia.—Prize Cases, 2 Black 635, 668, 17 L. Ed. 459. See, generally, the title ARMY AND NAVY, vol. 2, p. 494.

Power of president is a limited one.—The power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasions is to provide the requisite force for action, before the invader himself has reached the soil. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a correspondent responsibility. It is, in its terms, a limited power, confined to cases of actual invasion, or of imminent danger of invasion. *Martin v. Mott*, 12 Wheat. 19, 28, 6 L. Ed. 537.

3. Subsequent ratification by congress of calling out of militia.—Prize Cases, 2 Black 635, 670, 671, 17 L. Ed. 459. See the title CONSTITUTIONAL LAW, vol. 4, p. 452.

4. Power of deciding necessity exclusively in president.—*Martin v. Mott*, 12 Wheat. 19, 6 L. Ed. 537.

5. Rival legislatures—Power of president to determine lawful one.—*Luther v. Borden*, 7 How. 1, 43, 12 L. Ed. 581.

6. President's decision as to lawful legislature not reviewable.—*Luther v. Borden*, 7 How. 1, 43, 12 L. Ed. 581. See, generally, the title APPEAL AND ERROR, vol. 1, p. 333.

7. Manner of calling out.—*Houston v. Moore*, 5 Wheat. 1, 36, 5 L. Ed. 19.

Governor need not set forth the president's order at large.—It is unnecessary for the governor to set forth the orders of the president at large in calling out the militia; it is sufficient to state the call was made in obedience to such orders. *Martin v. Mott*, 12 Wheat. 19, 6 L. Ed. 537.

8. Requisition by president interpreted as an order.—*Houston v. Moore*, 5 Wheat. 1, 5 L. Ed. 19; *Martin v. Mott*, 12 Wheat. 19, 33, 6 L. Ed. 537.

9. President may draft and detach militia.—*Houston v. Moore*, 5 Wheat. 1, 43, 5 L. Ed. 19.

10. Militia belongs to the states.—*Houston v. Moore*, 5 Wheat. 1, 20, 5 L. Ed. 19.

11. Exclusive control in United States of militia in actual service.—*Houston v. Moore*, 5 Wheat. 1, 17, 5 L. Ed. 19.

The militia of the several states are subject to the military laws of the United

tia at the place of rendezvous.<sup>12</sup>

**B. Organizing, Arming and Disciplining Militia.**—The power to provide for organizing, arming and disciplining the militia is vested in congress, and this power is unlimited, except in the two particulars of officering and training them, according to the discipline to be prescribed by congress, and may be exercised to any extent that may be deemed necessary by congress,<sup>13</sup> but as state militia, the power of the state governments to legislate on the same subjects, having existed prior to the formation of the constitution, and not having been prohibited by that instrument, it remains with the states, subordinate nevertheless to the paramount law of the general government, operating upon the same subject.<sup>14</sup>

**C. Governing Militia.**—Congress is by article 1, § 8, of the constitution, expressly vested with the power to make rules for the government of the whole regular army and navy at all times; and to provide for governing such part only of the militia of the several states, as, having been called forth to execute the laws of the Union, to suppress insurrections, or to repel invasions, is employed in the service of the United States.<sup>15</sup>

#### IV. Exemption from Militia Duty.

A justice of the peace, within the District of Columbia, is an officer of the United States within the meaning of the act of 1792, exempting judicial and executive officers of the United States from militia duty, and hence is exempt from militia duty.<sup>16</sup>

#### V. Courts-Martial.

**A. Jurisdiction over Persons**—1. **DELINQUENT MILITIAMEN.**—A court-martial called under United States authority has jurisdiction over a militiaman who refuses or fails to obey the orders of the president, calling him into service, although he is not employed in the United States service in the sense of the act of 1795 so as to be subject to the rules and articles of war,<sup>17</sup> nor does the authority of a court-martial, regularly called under the act of 1795, expire with the end of a war then existing, nor is its jurisdiction to try these offenses in any shape dependent upon the fact of war or peace.<sup>18</sup>

2. **PERSONS EXEMPT FROM MILITIA DUTY.**—A court-martial has no jurisdiction over a justice of the peace of the District of Columbia, as, by the act of 1795, he is exempt from militia duty,<sup>19</sup> and the judgment of a court-martial imposing a fine upon a person, exempt from military duty, is without its jurisdiction and cannot protect the officer who executes its process.<sup>20</sup>

**B. Persons Eligible to Sit on Trial of Militiamen**—1. **IN GENERAL.**—Article seventy-seven of the rules of war provides that officers of the regular army are incompetent to sit on courts-martial for the trial of officers and soldiers of "other forces," except as provided in article seventy-eight, which permits<sup>21</sup>

States when in the service of the United States. *Johnson v. Sayre*, 158 U. S. 109, 39 L. Ed. 914.

12. **When state militia becomes national militia.**—*Houston v. Moore*, 5 Wheat. 1, 18, 5 L. Ed. 19.

13. **Power unlimited except as to officering and training.**—*Houston v. Moore*, 5 Wheat. 1, 16, 5 L. Ed. 19.

14. **State may legislate where not in conflict with law of United States.**—*Houston v. Moore*, 5 Wheat. 1, 16, 5 L. Ed. 19.

15. **Congress empowered to govern militia in actual service only.**—*Johnson v. Sayre*, 158 U. S. 109, 114, 39 L. Ed. 914.

16. **Justice of the peace exempt from militia duty.**—*Wise v. Withers*, 3 Cranch 331, 2 L. Ed. 457.

17. **Jurisdiction over delinquent militiaman.**—*Houston v. Moore*, 5 Wheat. 1, 5 L. Ed. 19.

18. **Authority does not expire with end of war.**—*Martin v. Mott*, 12 Wheat. 19, 37, 6 L. Ed. 537. See post, "Number and Rank of Men on Courts-Martial for Trial of Delinquents," V, C; "Constitutionality of State Law Providing for State Courts-Martial of Delinquents," VI.

19. **No jurisdiction over justice of the peace where exempt from militia duty.**—*Wise v. Withers*, 3 Cranch 331, 2 L. Ed. 457. See ante, "Exemption from Militia Duty," IV.

20. **Void judgment of court martial as a defense in trespass.**—*Wise v. Withers*, 3 Cranch 331, 2 L. Ed. 457. See the title FALSE IMPRISONMENT, vol. 6, p. 242.

21. **Militia officer must be tried by court-martial composed of militia officers.**—An officer of militia must be tried by a court-martial composed entirely of officers of



officers of the marine corps to sit with regular army officers on courts-martial for the trial of an offender in the regular army, but article 78 has no reference to a trial of an officer in the volunteer service by a court-martial composed of regular army officers, for the acts of 1898, 30 Stat. 361, and 1899, 30 Stat. 977, relating to the regular and volunteer army, still left the volunteer army as a separate or other force from the regular army of the United States, within the meaning of the 77th article of war, and this was not changed by the fact that the volunteer forces were mustered directly into the service without any reference to state or territory lines;<sup>22</sup> and although the 77th article of war contains no reference to the jurisdiction of courts-martial, but merely provides that regular army officers shall not be competent to sit on courts-martial to try volunteer officers, it does not make a court-martial composed exclusively of regular army officers, called for the trial of a volunteer officer, legal.<sup>23</sup>

2. **ELIGIBILITY OF VOLUNTEER OFFICER ON LEAVE OF ABSENCE FROM REGULAR ARMY.**—A commissioned officer in the volunteer service, on indefinite leave of absence from the regular army in order to accept a commission in the volunteer service, is ineligible to sit on the trial of a militiaman.<sup>24</sup>

**C. Number and Rank of Men on Courts-Martial for Trial of Delinquents.**—Courts-martial for the trial of delinquents under the act of 1795, need not be composed of the same number of officers, and organized in the same manner as the rules and articles of war contemplate for persons in actual service.<sup>25</sup>

## **VI. Constitutionality of State Law Providing for State Courts-Martial of Delinquents.**

The Pennsylvania act of the 28th of March, 1814, providing that officers and privates neglecting or refusing to answer the president's call for service should be liable to the penalties provided by the acts of congress and providing also for trial by a state court-martial was not unconstitutional and the state court-martial had concurrent jurisdiction with the United States court-martial.<sup>26</sup>

**MILK.**—See the title **CONSTITUTIONAL LAW**, vol. 4, p. 376.

the militia, and a trial by officers of the regular army is illegal. *McClaghry v. Deming*, 186 U. S. 49, 46 L. Ed. 1049. See, generally, the title **MILITARY LAW**, ante, p. 343.

22. **Volunteer forces are "other forces" within meaning of 78th article of war.**—*McClaghry v. Deming*, 186 U. S. 49, 62, 46 L. Ed. 1049.

23. **Court-martial of regular army officers trying volunteer officers illegal.**—*McClaghry v. Deming*, 186 U. S. 49, 64, 46 L. Ed. 1049.

24. **Regular officer in volunteer service**

**sitting on court-martial trying a militiaman.**—*United States v. Brown*, 206 U. S. 240, 243, 51 L. Ed. 1046.

25. **Number and rank of men on courts-martial for trial of delinquents.**—*Martin v. Mott*, 12 Wheat. 19, 34, 6 L. Ed. 537.

26. **Constitutionality of state statute providing for state courts-martial for delinquents.**—*Houston v. Moore*, 5 Wheat. 1, 5 L. Ed. 19. See ante, "Jurisdiction Over Persons," V. A; "Number and Rank of Men on Courts-Martial for Trial of Delinquents," V, C.

## MILLS AND MILLDAMS.

### CROSS REFERENCES.

See the titles **INSURANCE**, vol. 7, p. 66; **WORKING CONTRACTS**.

As to whether the taking of private property for the purpose of erecting mills and milldams is without due process of law, see the title **EMINENT DOMAIN**, vol. 5, p. 767. As to estoppel of litigant to raise constitutional question whether he has availed himself of the benefit of the mill act, see the title **CONSTITUTIONAL LAW**, vol. 4, p. 77. As to fishways in dams, see the title **CORPORATIONS**, vol. 4, p. 708. As to the issuance of county bonds to aid a company in the maintenance of a grist mill, see the title **MUNICIPAL, COUNTY, STATE AND FEDERAL AID**. As to withdrawal of waters for milling purposes from canals, see the title **CANALS**, vol. 3, p. 551. As to right of licensee to maintain dam on river, see the titles **CANALS**, vol. 3, p. 547; **LICENSES**, vol. 7, p. 869. As to dams for purposes of irrigation, see the title **WATERS AND WATERCOURSES**. As to contract with mill owner, see the title **FRAUDS, STATUTE OF**, vol. 6, p. 451. As to steam grist mill as internal improvement, see the title **MUNICIPAL, COUNTY, STATE AND FEDERAL AID**. As to damages in suit by owner of milldam against one who has forcibly destroyed it, see the title **DAMAGES**, vol. 5, p. 185.

**Right to Erect.**—Every man, in this country, has an unquestionable right to erect a mill upon his own land; and to use the water, passing through his land, as he pleases.<sup>1</sup>

**Duties of Owner.**—A mill owner must not construct and employ his mill as to injure his neighbor's mill, and after using the water he must return it to its ancient channel.<sup>2</sup>

**Mill Acts.**—General mill acts authorizing lands to be taken or flowed in invitum for the erection and maintenance of mills, exist in a great majority of the states.<sup>3</sup>

**Rights of Tenant in Common.**—Under these acts, the rights of a tenant in common of a mill as to repairs are clearly set forth.<sup>4</sup>

**Right of Lower Owner.**—Under the Massachusetts mill acts no title or easement of any kind is gained over the upper land, and as no title is gained

1. **Right to erect mill.**—Beissell v. Sholl, 4 Dall. 211, 1 L. Ed. 804.

2. **Must not injure neighbor.**—Beissell v. Sholl, 4 Dall. 211, 1 L. Ed. 804. See, generally, the title **WATERS AND WATERCOURSES**.

3. **Mill acts exist in many states.**—Head v. Amoskeag Mfg. Co., 113 U. S. 9, 16, 28 L. Ed. 889.

**The purpose of the mill statutes is to enable any riparian proprietor to erect a mill and use the water power of the stream, provided he does not interfere with an earlier exercise by another of a like right or with any right of the public; and to substitute, for the common-law remedies of repeated actions for damages and prostration of the dam, a new form of remedy, by which any one whose land is flowed can have assessed, once for all, either in a gross sum or by way of annual damages, adequate compensation for the injury.** Head v. Amoskeag Mfg. Co., 113 U. S. 9, 23, 28 L. Ed. 889.

The Nebraska court held, in Traver v. Merrick County, that the legislature had

authority to provide that streams capable of being applied to mill purposes should be so utilized for the benefit of the public; that the right to erect a mill and dam, on paying damages for the injury caused, was granted for the better use of the water power, on considerations of public policy and the general good, with a view to keeping up mills for use; and that, under the act of 1873, water grist mills were mills for the use of the public. Blair v. Cuming County, 111 U. S. 363, 371, 28 L. Ed. 457.

4. **Liability for repairs.**—The statutes of Massachusetts and New Hampshire for many years have provided that any tenant in common of a mill in need of repair may notify a general meeting of all the owners for consultation, and that, if any one refuses to attend, or to agree with the majority, or to pay his share, the majority may cause the repairs to be made, and recover his share of the expenses out of the mill or its profits or earnings. Head v. Amoskeag Mfg. Co., 113 U. S. 9, 22, 28 L. Ed. 889.

to have the water on the upper land, the lower dam owner pays only for the harm actually done from time to time.<sup>5</sup>

**MIND.**—See the title *INSANITY*, vol. 6, p. 1072.

**MINERAL.**—"Webster, in his dictionary, defines the noun mineral as 'any inorganic species having a definite chemical composition,' and ore as 'the compound of a metal and some other substance, as oxygen, sulphur, or arsenic, called its mineralizer, by which its properties are disguised or lost.' The word mineral is evidently derived from mine, as being that which is usually obtained from a mine, and, accordingly, Webster defines the latter as 'a pit or excavation in the earth from which metallic ores or other mineral substances are taken by digging, distinguished from the pits from which stones only are taken and which are called quarries.'"<sup>1</sup>

**MINERAL LANDS.**—See the title *MINES AND MINERALS*.

**5. Right of lower owner.**—*Otis Co. v. Ludlow Mfg. Co.*, 201 U. S. 140, 153, 50 L. Ed. 696.

The right of a lower owner under the Massachusetts mill act only becomes complete when the land above him is flowed and even then it is not a right to maintain the water upon the plaintiff's land, but

merely a right to maintain the dam subject to paying for the harm actually done. *Otis Co. v. Ludlow Mfg. Co.*, 201 U. S. 140, 156, 50 L. Ed. 696.

**1. Mineral.**—*Marvel v. Merritt*, 116 U. S. 11, 12, 29 L. Ed. 550. See the titles *MINES AND MINERALS*; *REVENUE LAWS*.



# **MINES AND MINERALS.**

BY JOHN D. PARKER.

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**CROSS REFERENCES.**

See the titles **CORPORATIONS**, vol. 4, p. 621; **FELLOW SERVANTS**, vol. 6, p. 245; **FRAUD AND DECEIT**, vol. 6, p. 394; **INJUNCTIONS**, vol. 6, p. 1022; **MORTGAGES AND DEEDS OF TRUST**; **NEGLIGENCE**; **OFFICERS AND AGENTS OF PRIVATE CORPORATIONS**; **PARTNERSHIP**; **PLEDGE AND COLLATERAL SECURITY**; **PUBLIC LANDS**; **TAXATION**; **TRADEMARKS, TRADENAMES AND UNFAIR COMPETITION**; **TRUSTS AND TRUSTEES**; **VENDOR AND PURCHASER**.

As to sale of mineral lands by Indians and confirmation thereof, see the title **INDIANS**, vol. 6, p. 922. As to delegation of power to make mining regulations, see the title **CONSTITUTIONAL LAW**, vol. 4, p. 286. As to condemnation of land for private railroad for mines, see the title **EMINENT DOMAIN**, vol. 5, p. 765. As to condemnation of land for purpose of exploiting private mines, see the title **DUE PROCESS OF LAW**, vol. 5, p. 611. As to whether decisions of state courts as to estoppel in reference to mining are reviewable in United States courts, see the title **APPEAL AND ERROR**, vol. 1, p. 734. As to whether questions under federal mining laws give jurisdiction on appeal, see the title **APPEAL AND ERROR**, vol. 1, p. 693. As to constitutionality of regulations and deprivation of rights in natural oil and gas, see the title **DUE PROCESS OF LAW**, vol. 5, p. 569. As to suits to try adverse mining claims, see the title **COURTS**, vol. 4, p. 929. As to duty of providing proper ventilation for mines, see the title **MASTER AND SERVANT**, ante, p. 275. As to constitutionality of statutes providing for inspection of mining property, see the titles **CONSTITUTIONAL LAW**, vol. 4, pp. 371, 374, 379, 380; **DUE PROCESS OF LAW**, vol. 5, p. 596. As to injunction to prevent secretary of interior from leasing oil lands, see the title **INJUNCTIONS**, vol. 6, p. 1022. As to constitutionality of laws regulating hours of employment in mines, see the title **LABOR**, vol. 7, p. 786. As to dower in mining claim, see



the title *DOWER*, vol. 5, p. 489. As to judicial notice of facts in reference to oil and gas, see the title *JUDICIAL NOTICE*, vol. 7, p. 692. As to termination of alienage in suit in reference to a mining claim, see the title *ALIENS*, vol. 1, p. 227. As to transfer of mining claim by locator to alien, see the title *ALIENS*, vol. 1, p. 226. As to stipulation in reference to testimony of witness as to quantity of ore taken from mine, see the title *APPEAL AND ERROR*, vol. 2, p. 221. As to production of plats and models in appellate court, see the title *APPEAL AND ERROR*, vol. 2, p. 220. As to assumption of risk by miner, see the title *MASTER AND SERVANT*, ante, p. 275. As to whether surrender of possession of mine to one who agrees to purchase the land on joint account is a part performance, see the title *FRAUDS, STATUTE OF*, vol. 6, p. 462. As to accounting between co-owners of mines, see the title *JOINT TENANTS AND TENANTS IN COMMON*, vol. 7, p. 533. As to jurisdiction to try adverse mining claim, see the title *COURTS*, vol. 4, p. 929. As to tariff or duties on minerals, see the title *REVENUE LAWS*. As to appeals from proceedings to obtain a patent for mineral lands, see the title *APPEAL AND ERROR*, vol. 1, p. 925. As to sale of mining lease on execution, see the title *SHERIFFS' CONSTABLES' AND MARSHALS' SALES*. As to recovery of improvements on mineral lands in ejectment, see the title *EJECTMENT*, vol. 5, p. 718. And see, generally, the title *IMPROVEMENTS*, vol. 6, p. 896. As to judicial notice of mining laws, see the title *JUDICIAL NOTICE*, vol. 7, p. 672. As to misrepresentation as to the value of a mine, see the title *FRAUD AND DECEIT*, vol. 6, p. 405. As to assignment of contract for delivery of ore, see the title *ASSIGNMENTS*, vol. 2, pp. 566, 567. As to sale of mining land under execution, see the title *SHERIFFS', CONSTABLES' AND MARSHALS' SALES*. As to liability of promoter for misrepresentation as to mining property, see the title *CORPORATIONS*, vol. 4, p. 659. As to mechanics' lien on mines, see the title *MECHANICS' LIENS*, ante, p. 328.

### I. Definitions and Distinctions.

**A. Mineral Lands.**—The term "mineral land" as used in the federal statutes includes not merely metalliferous lands but all such as are chiefly valuable for their deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture.<sup>1</sup> Such deposits must exist in sufficient quantity to justify exploitation.<sup>2</sup>

**B. Placer Claim.**—By the term "placer claim" as used in § 2333 of the Revised Statutes, is meant ground within defined boundaries which contains

#### 1. Northern Pacific grant—Stone, etc.

—The third section of the act of 1861, which granted a large tract of land to the Northern Pacific Railroad, excepted therefrom mineral lands. This exception has been held to include deposits of stone and not to be confined to metal-bearing lands. In the opinion in this case it is said: "The rulings of the land department, to which we are to look for the contemporaneous construction of these statutes, have been subject to very little fluctuation, and almost uniformly, particularly of late years, have lent strong support to the theory of the patentee that the words 'valuable mineral deposits' should be construed as including all lands chiefly valuable for other than agricultural purposes, and particularly as including nonmetallic substances, among which are held to be alum, asphaltum, borax, guano, diamonds, gypsum, resin, marble, mica, slate, amber, petroleum, limestone, building stone and coal." *Northern Pac. R. Co. v. Soderberg*, 188

U. S. 526, 47 L. Ed. 575.

**Coal lands.**—In these cases it was decided that coal lands are "mineral lands" within the meaning of that term as used in the statutes regulating the disposition of the public domain. *Mullan v. United States*, 118 U. S. 271, 277, 30 L. Ed. 170; *Colorado Coal, etc., Co. v. United States*, 123 U. S. 307, 326, 31 L. Ed. 182.

**2. Sufficient to justify exploitation.**—There are vast tracts of country in the mining states which contain precious metals in small quantities, but not to a sufficient extent to justify the expense of their exploitation. It is not to such lands that term mineral in the sense of § 2392, Rev. Stat., which contains the law for sale of town sites and excepts mineral lands therefrom, is applicable. *Davis v. Webbbold*, 139 U. S. 507, 519, 35 L. Ed. 238.

**Petroleum—Exploitation by reasonably prudent man.**—*Chrisman v. Miller*, 197 U. S. 313, 323, 49 L. Ed. 770.

mineral in its earth, sand or gravel; ground that includes valuable deposits not in place, that is, not fixed in rock, but which are in a loose state, and may in most cases be collected by washing or amalgamation without milling.<sup>3</sup>

**C. Lode or Vein**.—1. **IN GENERAL.**—**Vein or Lodes.**—By “vein or lodes,” as used in § 2333 of the Revised Statutes, are meant lines or aggregations of metal embedded in quartz or other rock in place.<sup>4</sup>

2. **KNOWN VEINS.**—As to definition of “known veins,” see post, “Ownership of Vein or Lode in Placer Mine,” VII.

3. **APEX OF VEIN.**—The apex of a vein is not necessarily a point but often a line of great length.<sup>5</sup>

**3. Placer claim.**—United States *v.* Iron Silver Min. Co., 128 U. S. 673, 679, 32 L. Ed. 571.

Placer mines, though said by the statute to include all other deposits of mineral matter, are those in which this mineral is generally found in the softer material which covers the earth's surface, and not among the rocks beneath. The one is only made available by following the vein into its stony case in the bowels of the earth, detaching and bringing it to the surface, and subjecting it to crushing, melting, and other processes by which the precious metal is separated from the ore of which it is a part. In the other, the more usual way is to take the soft earthy matter in which the particles of mineral are loosely mingled, and by filtration separate the one from the other. Reynolds *v.* Iron Silver Min. Co., 116 U. S. 687, 695, 29 L. Ed. 774.

**4. Vein, lode or ledge.**—United States *v.* Iron Silver Min. Co., 128 U. S. 673, 679, 32 L. Ed. 571.

A lode or vein is a body of mineral, or mineral-bearing rock, within defined boundaries in the general mass of the mountain. Iron Silver Min. Co. *v.* Mike & Starr, etc., Min. Co., 143 U. S. 394, 404, 36 L. Ed. 201.

The terms are found together in the statutes, and both are intended to indicate the presence of metal in rock. Yet a lode may and often does contain more than one vein. United States *v.* Iron Silver Min. Co., 128 U. S. 673, 679, 32 L. Ed. 571.

“What constitutes a lode or vein of mineral matter has been no easy thing to define. In this court no clear definition has been given. On the circuit it has been often attempted. Mr. Justice Field, in the Eureka Case, 4 Sawyer 302, 311, shows that the word is not always used in the same sense by scientific works on geology and mineralogy, and by those engaged in the actual working of mines. After discussing these sources of information, he says: ‘It is difficult to give any definition of the term as understood and used in the acts of congress which will not be subject to criticism. A fissure in the earth's crust, an opening in its rocks and strata made by some force of nature, in which the mineral is deposited,

would seem to be essential to a lode in the judgment of geologists. But, to the practical miner, the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock lying within any other well-defined boundaries on the earth's surface and under it, would equally constitute, in his eyes, a lode. We are of opinion, therefore, that the term as used in the acts of congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock.’” Iron Silver Min. Co. *v.* Cheesman, 116 U. S. 529, 533, 29 L. Ed. 712. See, also, Reynolds *v.* Iron Silver Min. Co., 116 U. S. 687, 695, 29 L. Ed. 774; United States *v.* Iron Silver Min. Co., 128 U. S. 673, 679, 32 L. Ed. 571.

“In the case of Iron Silver Min. Co. *v.* Cheesman, 116 U. S. 529, 536, 29 L. Ed. 712, this court sustained an instruction as to what constitutes a lode or vein, given in these words: ‘To determine whether a lode or vein exists, it is necessary to define those terms; and, as to that, it is enough to say that a lode or vein is a body of mineral, or mineral-bearing rock, within defined boundaries in the general mass of the mountain. In this definition the elements are the body of mineral or mineral-bearing rock and the boundaries; with either of these things well established, very slight evidence may be accepted as to the existence of the other. A body of mineral or mineral-bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be. In the existence of such body, and to the extent of it, boundaries are implied. On the other hand, with well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode. Such boundaries constitute a fissure, and if in such fissure ore is found, although at considerable intervals and in small quantities, it is called a lode or vein.’” Iron Silver Min. Co. *v.* Mike & Starr, etc., Min. Co., 143 U. S. 394, 404, 36 L. Ed. 201.

**5. Apex of vein.**—Larkin *v.* Upton, 144 U. S. 19, 23, 36 L. Ed. 330.

4. **SIDE LINES AND END LINES.**—See post, "Right to Pursue Vein," V, B.

**D. Claim and Location Distinguished.**—A mining claim is a parcel of land containing precious metal in its soil or rock. A location is the act of appropriating such parcel, according to certain established rules.<sup>6</sup>

## II. Origin, History and Policy of Mining Laws.

The Spanish government to which California and much other territory, rich in precious metals, once belonged, instituted a system of laws concerning her mines by which private enterprise was invited to develop them and a royalty secured at the same time to the crown. This system Mexico had inherited and perpetuated. After the Mexican war there was a rapid influx of immigrants who engaged in mining these metals.<sup>7</sup> Wherever they went, they carried with them that love of order and system and of fair dealing which are the prominent characteristics of our people. In every district which they occupied they framed certain rules for their government, by which the extent of ground they could severally hold for mining was designated, their possessory right to such ground secured and enforced, and contests between them either avoided or determined. These rules bore a marked similarity, varying in the several districts only according to the extent and character of the mines; distinct provisions being made for different kinds of mining, such as placer mining, quartz mining, and mining in drifts or tunnels. They all recognized discovery, followed by appropriation, as the foundation of the possessor's title, and development by working as the condition of its retention. And they were so framed as to secure to all comers, within practicable limits, absolute equality of right and privilege in working the mines. Nothing but such equality would have been tolerated by the miners, who were emphatically the lawmakers, as respects mining, upon the public lands in the state. The first appropriator was everywhere held to have, within certain well-defined limits, a better right than others to the claims taken up; and in all controversies, except as against the government, he was regarded as the original owner, from whom title was to be traced.<sup>8</sup> But the mines could not be worked without water. Without water the gold would remain for ever buried in the earth or rock. To carry water to mining localities, when they were not on the banks of a stream or lake, became, therefore, an important and necessary business in carrying on mining. Here, also, the first appropriator of water to be conveyed to such localities for mining or other beneficial purposes, was recognized as having, to the extent of actual use, the better right. The doctrines of the common law respecting the rights of riparian owners were not considered as applicable, or only in a very limited degree, to the condition of miners in the mountains. The waters of rivers and lakes were consequently carried great distances in ditches and flumes, constructed with vast labor and

**6. Claim and location distinguished.**—*Smelting Co. v. Kemp*, 104 U. S. 636, 648, 26 L. Ed. 875.

**Often synonymous.**—The location, which is the act of taking the parcel of mineral land, in time became among the miners synonymous with the mining claim originally appropriated. So, now, if the miner has only the ground covered by one location, "his mining claim" and "location" are identical, and the two designations may be indiscriminately used to denote the same thing. But if by purchase he acquires the adjoining location of his neighbor—that is, the ground which his neighbor has taken up—and adds it to his own, then his mining claim covers the ground embraced by both locations, and henceforth he will speak of it as his claim. Indeed, his

claim may include as many adjoining locations as he can purchase, and the ground covered by all will constitute what he claims for mining purposes, or, in other words, will constitute his mining claim, and be so designated. *Smelting Co. v. Kemp*, 104 U. S. 636, 649, 26 L. Ed. 875.

That which is located is called in § 2320 and elsewhere a "claim" or a "mining claim." Indeed, the words "claim" and "location" are used interchangeably. *Del Monte Min., etc., Co. v. Last Chance Min., etc., Co.*, 171 U. S. 55, 74, 43 L. Ed. 72.

**7. Spanish and Mexican laws.**—*Mining Co. v. Consolidated Min. Co.*, 102 U. S. 167, 172, 26 L. Ed. 126.

**8. Rules and customs of miners.**—*Jennison v. Kirk*, 98 U. S. 453, 457, 25 L. Ed. 240.



enormous expenditures of money, along the sides of mountains and through canons and ravines, to supply communities engaged in mining, as well as for agriculturalists and ordinary consumption. Numerous regulations were adopted, or assumed to exist, from their obvious justness, for the security of these ditches and flumes, and the protection of rights to water, not only between different appropriators, but between them and the holders of mining claims. These regulations and customs were appealed to in controversies in the state courts, and received their sanction; and properties to the value of many millions rested upon them.<sup>9</sup> This legislation was without interference by the national government, and under its implied sanction, vast mining interests grew, employing many millions of capital, and contributing largely to the prosperity and improvement of the whole country.<sup>10</sup> Until 1866, no legislation was had looking to a sale of the mineral lands. The policy of the country had previously been, as shown by the legislation of congress, to exempt such lands from sale. In the first section it was declared that the mineral lands of the United States were free and open to exploration and occupation by citizens of the United States, and those who had declared their intention to become citizens, subject to such regulations as might be prescribed by law and the local customs or rules of miners in the several mining districts, so far as the same were not in conflict with the laws of the United States. In other sections it provided for acquiring the title of the United States to claims in veins or lodes of quartz bearing gold, silver, cinnabar, or copper, the possessory right to which had been previously acquired under the customs and rules of miners. In no provision of the act was any intention manifested to interfere with the possessory rights previously acquired, or which might be afterwards acquired; the intention expressed was to secure them by a patent from the government.<sup>11</sup> The act of July 26, 1866, by which title to mineral land may be acquired from the government at nominal prices, forever relinquished the idea of a royalty on the product of the mines.<sup>12</sup> The statutes providing for the disposition of the mineral lands of the United States are framed in a most liberal spirit, and those lands are open to the acquisition of every citizen upon conditions which can be readily complied with. It is the policy of the government to favor the development of mines of gold and silver and other metals, and every facility is afforded for that purpose.<sup>13</sup>

### III. Discovery and Location of Mines and Mining Claims.

#### A. Right to Prospect.—There is no right to prospect on private land.<sup>14</sup>

**9. Water rights.**—*Jennison v. Kirk*, 98 U. S. 453, 458, 25 L. Ed. 240. See post, "Water Rights," IX.

**Regulations and customs of miners.**—For eighteen years—from 1848 to 1866—the regulations and customs of miners, as enforced and moulded by the courts and sanctioned by the legislation of the state, constituted the law governing property in mines and in water on the public mineral lands. *Jennison v. Kirk*, 98 U. S. 453, 458, 25 L. Ed. 240. See, also, *Black v. Elkhorn Min. Co.*, 163 U. S. 445, 41 L. Ed. 221.

**10. Sanction of national government.**—*Del Monte Min., etc., Co. v. Last Chance Min., etc., Co.*, 171 U. S. 55, 62, 43 L. Ed. 72. See, also, *Forbes v. Gracey*, 94 U. S. 762, 24 L. Ed. 313; *Jennison v. Kirk*, 98 U. S. 453, 459, 25 L. Ed. 240; *Broder v. Water Co.*, 101 U. S. 274, 276, 25 L. Ed. 790; *Manuel v. Wulff*, 152 U. S. 505, 510, 38 L. Ed. 532; *Black v. Elkhorn Min. Co.*, 163 U. S. 445, 449, 41 L. Ed. 221.

**11. The United States statutes.**—*Jennison v. Kirk*, 98 U. S. 453, 458, 25 L. Ed.

240. See, also, *Black v. Elkhorn Min. Co.*, 163 U. S. 445, 41 L. Ed. 221.

The land department of the government, and the supreme court also, have always acted upon the rule that all mineral locations were to be governed by the local rules and customs in force at the time of the location, when such location was made prior to the passage of any mineral law by congress. *Glacier, etc., Min. Co. v. Willis*, 127 U. S. 471, 481, 32 L. Ed. 172, citing *Jennison v. Kirk*, 98 U. S. 453, 457, 25 L. Ed. 240; *Broder v. Water Co.*, 101 U. S. 274, 276, 25 L. Ed. 790; *Jackson v. Roby*, 109 U. S. 440, 441, 27 L. Ed. 990; *Chambers v. Harrington*, 111 U. S. 350, 352, 28 L. Ed. 452.

**12. Right to royalties relinquished.**—14 Stat. 251; *Mining Co. v. Consolidated Min. Co.*, 102 U. S. 167, 173, 26 L. Ed. 126.

**13. Policy of the statutes.**—*United States v. Iron Silver Min. Co.*, 128 U. S. 673, 675, 32 L. Ed. 571; *Steel v. Smelting Co.*, 106 U. S. 447, 449, 27 L. Ed. 226.

**14. Right to prospect.**—*Del Monte*

Valuable mineral deposits in town sites on the public domain, which in many instances embrace a much larger tract of country than is included in a patent for such town sites, outside of the patent are equally open to exploration and purchase as those in lands outside of the town site.<sup>15</sup>

**B. Discovery and Appropriation.**—Discovery and appropriation are the source of title to mining claims. This was the rule before congress, by legislation, sanctioned it.<sup>16</sup> What is necessary to constitute a discovery of mineral land is not prescribed by statute, but it is necessary that "the mineral exists in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral." There must be such a discovery of mineral as gives reasonable evidence of the fact either that there is a vein or lode carrying the precious mineral, or if it be claimed as placer ground that it is valuable for such mining.<sup>17</sup> In order to make a location, there must be a discovery; at least, that is the general rule laid down in the statute.<sup>18</sup> Section 2320 of the

Min., etc., Co. v. Last Chance Min., etc., Co., 171 U. S. 55, 43 L. Ed. 72.

**Reservation of right to prospect.**—It was said in *Barden v. Northern Pac. R. Co.*, 154 U. S. 288, 320, 38 L. Ed. 992, in which case the act of 1864 was construed, that the privilege of exploring for mineral lands was in full force at the time of the location of the definite lines of the road, and was a right reserved and excepted out of the grant at that time. *United States v. Oregon, etc., R. Co.*, 176 U. S. 28, 45, 44 L. Ed. 358. See post, "Where Location May Be Made," III, D; "Railroad Grants," VI, A, 2.

A deed for land contained a reservation clause that a railroad company should have a right of way for all time, to pass over, and across it for the purpose of prospecting for and mining minerals other than coal. Held, that the reservation clause made by the railroad company is in itself such an incumbrance as prevents the making of a good and indefeasible title to the land, and a purchaser who buys under representations that the seller has a good and indefeasible title is not compelled to accept the deed, and may rescind the contract. *Adams v. Henderson*, 168 U. S. 573, 580, 581, 42 L. Ed. 584. See, generally, the titles RESCISSION, CANCELLATION AND REFORMATION; VENDOR AND PURCHASER.

**Trespassing on placer claim.**—*Clipper Min. Co. v. Eli Min., etc., Co.*, 194 U. S. 220, 230, 48 L. Ed. 944.

**15. Exploration on town sites.**—*Davis v. Weibbold*, 139 U. S. 507, 529, 35 L. Ed. 238. See post, "Homestead Pre-emption and Town Sites," VI, A, 1.

**16. Source of title.**—*O'Reilly v. Campbell*, 116 U. S. 418, 422, 29 L. Ed. 669; *Jennison v. Kirk*, 98 U. S. 453, 457, 25 L. Ed. 240; *Jackson v. Roby*, 109 U. S. 440, 27 L. Ed. 990; *Erhardt v. Boaro*, 113 U. S. 527, 28 L. Ed. 1113.

**Discovery of gold.**—The locations were held valid in the case of *McKinley Creek Min. Co. v. Alaska United Min. Co.*, 183 U. S. 563, 569, 46 L. Ed. 331, so far as

they depended upon the discovery of gold.

**17. Sufficient to justify exploitation.**—*Chrisman v. Miller*, 197 U. S. 313, 322, 323, 49 L. Ed. 770. See, also, ante, "Mineral Lands," I, A.

**Speculative proceeding.**—A mere posting of a notice on a ridge of rocks cropping out of the earth or on other ground that the poster had located thereon a mining claim without any discovery or knowledge of the existence of metal there, or in its immediate vicinity, would be treated as a speculative proceeding and would not itself initiate any right. There must be something beyond a mere guess on the part of the miner to authorize him to make a location which will exclude others from the ground, such as the discovery of the presence of the precious minerals in it or in such proximity to it as to justify a reasonable proof of their existence. *Erhardt v. Boaro*, 113 U. S. 527, 28 L. Ed. 1113. See post, "Description and Notice," III, E, 4.

**Possession protected.**—Whenever preliminary work is required to define and describe the claim located, the first discoverer must be protected in the possession of the claim until sufficient excavations and development can be made so as to disclose whether a vein or a deposit of such richness exists as to justify work to extract the mineral. *Erhardt v. Boaro*, 113 U. S. 527, 28 L. Ed. 1113.

**The rule respecting sufficiency.**—When there is a controversy between two mineral claimants, the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry, for the reason that where land is sought to be taken out of the category of agricultural lands, the evidence of its mineral character should be reasonably clear, while in respect to mineral lands, in a controversy between claimants, the question is simply which is entitled to priority. *Chrisman v. Miller*, 197 U. S. 313, 323, 49 L. Ed. 770.

**18. Necessity for discovery.**—Enter-

Revised Statutes referring to claims upon veins or lodes provides that no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located.<sup>19</sup> But a discovery subsequent to location is valid if no adverse claims intervene.<sup>20</sup>

**C. Who May Locate Claims.**—1. IN GENERAL.—A location on account of the discovery of a vein or lode can only be made by a discoverer, or one who claims under him.<sup>21</sup>

2. ALIENS.—The mineral lands of the United States are open to exploration and purchase only by citizens of the United States, or by those who have declared their intention to become such.<sup>22</sup>

3. DEPUTY MINERAL SURVEYOR.—It is a question whether a deputy mineral surveyor is not debarred from making a location.<sup>23</sup>

4. CORPORATIONS.—A corporation is competent to locate or join in the location of a mining claim.<sup>24</sup>

**D. Where Location May Be Made.**—The acts of congress relating to town sites recognize the possession of mining claims within their limits, and forbid the acquisition of any mine of gold, silver, cinnabar, or copper within them under proceedings by which title to other lands there situated is secured, thus leaving the mineral deposits within town sites open to exploration, and the land in which they are found to occupation and purchase, in the same manner as such deposits are elsewhere explored and possessed and the lands containing them are acquired.<sup>25</sup> Whenever, therefore, mines are found in lands belonging to the

prise *Min. Co. v. Rico-Aspen Consol. Min. Co.*, 167 U. S. 108, 112, 42 L. Ed. 96.

19. **Statutory provisions.**—*Haws v. Victoria Copper Min. Co.*, 160 U. S. 303, 314, 40 L. Ed. 436.

**Sufficiency of discovery of vein.**—Any portion of the apex of a vein which is not necessarily a point, but often a line of great length, on the course or strike of the vein found within the limits of a claim, is sufficient discovery to entitle the locator to obtain title. *Larkin v. Upton*, 144 U. S. 19, 23, 36 L. Ed. 330.

**Title to discovery.**—The discovered lode must lie within the limits of the location which is made by reason of it. If the title to the discovery fails, so must the location which rests upon it. *Belk v. Meagher*, 104 U. S. 279, 284, 26 L. Ed. 735; *Gwillim v. Donnellan*, 115 U. S. 45, 49, 29 L. Ed. 348.

20. **Subsequent discovery.**—*Creede, etc., Mill. Co. v. Uinta Tunnel Min., etc., Co.*, 196 U. S. 337, 49 L. Ed. 501.

As between the government and the locator, it is not a vital fact that there should be a discovery of mineral before the commencement of any of the steps required to perfect a location, and if at the time of the entry everything has been done which entitled the party to an entry, to writ, a discovery and a perfect location, the government would not be justified in rejecting the application for a patent on the ground that the customary order of procedure had not been followed. In other words, the government does not, by accepting the entry and confirming it by a patent, determine as to the order of proceedings prior to the entry, but only that all required by law have been taken." *Creede, etc., Mill.*

*Co. v. Uinta Tunnel Min., etc., Co.*, 196 U. S. 337, 354, 49 L. Ed. 501.

21. **Discoverer.**—*Belk v. Meagher*, 104 U. S. 279, 284, 26 L. Ed. 735; *Gwillim v. Donnellan*, 115 U. S. 45, 49, 29 L. Ed. 348.

22. **Aliens.**—*O'Reilly v. Campbell*, 116 U. S. 418, 29 L. Ed. 669; *Hammer v. Garfield Min., etc., Co.*, 130 U. S. 291, 299, 32 L. Ed. 964. See, also, the title ALIENS, vol. 1, p. 226.

**Oath as evidence of citizenship.**—Where it was objected that there was no evidence of the citizenship of the locators, it was held that the oath of one of the locators, accompanying the recorded notice of location, as to their citizenship, is prima facie evidence of the fact and it will be deemed sufficient until doubt is thrown upon the accuracy of his statement. *Hammer v. Garfield Min., etc., Co.*, 130 U. S. 291, 298, 299, 32 L. Ed. 964.

Proof of citizenship may consist, in the case of an individual, of his own affidavit thereof, and in case of an association of persons unincorporated, of the affidavit of their authorized agent made upon his own knowledge or information and belief. *Rev. Stat.*, § 2321; *O'Reilly v. Campbell*, 116 U. S. 418, 29 L. Ed. 669.

23. **Deputy mineral surveyor.**—*Lavagnino v. Uhlig*, 198 U. S. 443, 457, 49 L. Ed. 1119.

24. **Corporations.**—*McKinley v. Wheeler*, 130 U. S. 630, 631, 32 L. Ed. 1048; *United States v. Trinidad Coal, etc., Co.*, 137 U. S. 160, 168, 34 L. Ed. 640; *Dahl v. Montana Copper Co.*, 132 U. S. 264, 266, 33 L. Ed. 325; *Compare Stemwinder Min. Co. v. The Emma, etc., Min. Co.*, 37 L. Ed. 941, 942. See the title CORPORATIONS, vol. 4, p. 729.

25. **Town sites.**—*Rev. Stat.*, §§ 2386,



United States, whether within or without town sites, they may be claimed and worked, provided existing rights of others, from prior occupation, are not interfered with.<sup>26</sup> Where a party was in possession of a mining claim situated on an Indian reservation in the Black Hills country, on the 28th of February, 1877, at which date a portion of the reservation was relinquished and ceded to the United States, with the requisite discovery, with the surface boundaries sufficiently marked, with the notice of location posted, and with a disclosed vein of ore, he could, by adopting what had been done, causing a proper record to be made, and performing the amount of labor or making the improvements necessary to hold the claim, date his rights from that day; and such location and labor and improvements would give him the right of possession.<sup>27</sup> As to location of claim on lands covered by grants to railroads, see post, "Railroad Grants," VI, A, 2.

**E. Proceedings Incident to Location**—1. **IN GENERAL**.—The location of a mining claim is the initial step taken by the locator to indicate the place and extent of the surface which he desires to acquire, and is a means of giving notice of said claim.<sup>28</sup> A location is not made by taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the acts of congress and the local laws and regulations.<sup>29</sup> The locator of a claim is not compelled to follow the lines of the government surveys, or to make his location in any manner correspond to such surveys.<sup>30</sup>

2. **LOCAL LAWS AND REGULATIONS**.—Section 2324 of the Revised Statutes makes the manner of locating mining claims and recording them subject to the laws of the state or territory and the regulations of each mining district, when they are not in conflict with the laws of the United States.<sup>31</sup>

3. **LOCATION UPON VEIN OR LODE**.—The top or apex of a vein must be within the boundaries of a claim upon a lode or vein in order to enable the locator to perfect his location.<sup>32</sup> Under an act entitled "An act granting the right of way to ditch and canal companies over the public lands, and for other purposes,"

2392. *Steel v. Smelting Co.*, 106 U. S. 447, 450, 27 L. Ed. 226.

**26. Prior occupation**.—*Steel v. Smelting Co.*, 106 U. S. 447, 27 L. Ed. 226.

Whether there are existing rights of others from prior occupation, with or without a town site interfered with, which should preclude the location of the miner and the issue of a patent to him or his successor in interest, is, when not subjected under the law of congress to the local tribunals, a matter properly cognizable by the land department, when application is made to it for a patent; and the inquiry thus presented must necessarily involve a consideration of the character of the land to which title is sought, whether it be mineral, for which a patent may issue, or agricultural, for which a patent should be withheld, and also as to the citizenship of the applicant. *Steel v. Smelting Co.*, 106 U. S. 447, 450, 27 L. Ed. 226.

**27. Indian lands**.—*Noonan v. Caledonia Min. Co.*, 121 U. S. 393, 403, 30 L. Ed. 1061. See, generally, the title INDIANS, vol. 6, p. 906.

The case of *Noonan v. Caledonia Min. Co.*, 121 U. S. 393, 403, 30 L. Ed. 1061, is distinguished in *Kendall v. San Juan Silver Min. Co.*, 144 U. S. 658, 664, 36 L. Ed. 583, where there is a contrary ruling, the plaintiffs not having relocated their claims until two years after the

reservation was withdrawn and an adverse claim having been located in the meantime. In the opinion it is said: "The plaintiffs now seek, by their writ of error, to recover the residue of the Titusville lode, insisting that, under the decision in *Noonan v. Caledonia Min. Co.*, 121 U. S. 393, 30 L. Ed. 1061, they have a right to all the premises which were covered by their illegal location during the pendency of the Indian treaty. But such is not the proper construction of that decision. There was in that case no new location by different parties, after the removal of the reservation, to interfere with the old location then renewed and with a proper record."

**28. What location consists in**.—*Del Monte Min., etc., Co. v. Last Chance Min., etc., Co.*, 171 U. S. 55, 74, 43 L. Ed. 72.

**29.** *Belk v. Meagher*, 104 U. S. 279, 284, 26 L. Ed. 735.

**30. Lines of government surveys**.—*Del Monte Min., etc., Co. v. Last Chance Min., etc., Co.*, 171 U. S. 55, 75, 43 L. Ed. 72.

**31. Local regulations**.—*Kendall v. San Juan Silver Min. Co.*, 144 U. S. 658, 664, 36 L. Ed. 583. See, also, ante, "Origin, History and Policy of Mining Laws," II.

**32. Apex within boundaries of claim**.—*Larkin v. Upton*, 144 U. S. 19, 21, 36 L. Ed. 330.

approved July 26, 1866 (14 Stat. 251), as well as under that entitled "An act to promote the development of the mining resources of the United States," approved May 10, 1872 (17 id. 91), the location of a mining claim upon a lode or vein of ore should be made along the same lengthwise of the course of its apex at or near the surface. If otherwise laid, it will only secure so much of the lode or vein as it actually covers.<sup>33</sup> The Revised Statutes require the end lines to be parallel<sup>34</sup> but do not command that the side lines of a mining claim shall be parallel, and the regulation that the end lines shall be parallel is for the purpose of bounding the underground extralateral rights which the owner of the location may exercise.<sup>35</sup> The lines of a junior lode location may be laid within, upon or across the surface of a valid senior location for the purpose of defining for or securing to such junior location underground or extralateral rights not in conflict with any rights of the senior location.<sup>36</sup>

4. **DESCRIPTION AND NOTICE.**—Location is a means of giving notice of the claim.<sup>37</sup> It usually consists in placing on the ground, in a conspicuous position, a notice setting forth the name of the locator, the fact that it is thus taken or located, with the requisite description of the extent and boundaries of the

**33. Lengthwise of the lode or vein.**—Mining Co. v. Tabet, 98 U. S. 463, 25 L. Ed. 253.

"The most practicable rule is to regard the course of the vein as that which is indicated by surface outcrop, or surface explorations and workings. It is on this line that claims will naturally be laid, whatever be the character of the surface, whether level or inclined." Mining Co. v. Tabet, 98 U. S. 463, 469, 25 L. Ed. 253.

"We do not mean to say that a vein must necessarily crop out upon the surface, in order that locations may be properly laid upon it. If it lies entirely beneath the surface, and the course of its apex can be ascertained by sinking shafts at different points, such shafts may be adopted as indicating the position and course of the vein; and locations may be properly made on the surface above it, so as to secure a right to the vein beneath. But where the vein does crop out along the surface, or is so slightly covered by foreign matters that the course of its apex can be ascertained by ordinary surface exploration, we think that the act of congress requires that this course should be substantially followed in laying claims and locations upon it. Perhaps the law is not so perfect in this regard as it might be; perhaps the true course of a vein should correspond with its strike, or the line of a level run through it; but this can rarely be ascertained until considerable work has been done, and after claims and locations have become fixed." Mining Co. v. Tabet, 98 U. S. 463, 469, 25 L. Ed. 253; Iron Silver Min. Co. v. Elgin Min., etc., Co., 118 U. S. 196, 208, 30 L. Ed. 98. See post, "Right to Pursue Vein," V, B.

**34. Parallel end lines.**—Del Monte Min., etc., Co. v. Last Chance Min., etc., Co., 171 U. S. 55, 43 L. Ed. 72.

**35. Purpose of requirement of parallel end lines.**—Del Monte Min., etc., Co. v. Last Chance Min., etc., Co., 171 U. S.

55, 84, 43 L. Ed. 72. See post, "Requirement of Parallel End Lines," V, B, 2, b.

**36. Extralateral rights.**—Del Monte Min., etc., Co. v. Last Chance Min., etc., 171 U. S. 55, 43 L. Ed. 72.

The court distinguishes the cases of *Gwillim v. Donnellan*, 115 U. S. 45, 49, 29 L. Ed. 348, and *Belk v. Meagher*, 104 U. S. 279, 284, 26 L. Ed. 735, saying: "The question presented in each of those cases was whether a second location is effectual to appropriate territory covered by a prior subsisting and valid location, and it was held it is not. Of the correctness of those decisions there can be no doubt. A valid location appropriates the surface, and the rights given by such location cannot, so long as it remains in force, be disturbed by any acts of third parties. Whatever rights on or beneath the surface passed to the first locator can in no manner be diminished or affected by a subsequent location. But that is not the question here presented. Indeed, the form in which it is put excludes any impairment or disturbance of the substantial rights of the prior locator. The question is whether the lines of a junior lode location may be laid upon a valid senior location for the purpose of defining or securing 'underground or extralateral rights not in conflict with any rights of the senior location.' In other words, in order to comply with the statute, which requires that the end lines of a claim shall be parallel, and in order to secure all the unoccupied surface to which it is entitled, with all the underground rights which attach to possession and ownership of the surface, may a junior locator place an end line within the limits of the prior location?" *Del Monte Min., etc., Co. v. Last Chance Min., etc., Co.*, 171 U. S. 55, 78, 43 L. Ed. 72. See post, "Validity and Priority," III, F. And see, also, "Priorities," V, B, 2, e.

**37. Notice.**—*Del Monte Min., etc., Co.*,

parcel, according to the local customs, or, since the statute of 1872, according to the provisions of that act. Rev. Stat., § 2324.<sup>38</sup> Section 2324 of the Revised Statutes provides that records of mining claims made subsequent to the date thereof "shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument as will identify the claim." This section of course means when such reference can be made. Mining lode claims are frequently found where there are no permanent monuments or natural objects other than rocks or neighboring hills. Where stakes were placed with a description of the premises by metes and the location of the lode was also indicated by stating its distance from a mine, it was held sufficient.<sup>39</sup>

5. AMOUNT OF LAND WHICH MAY BE INCLUDED.—There is a difference between the amount of land which may be taken up as a placer claim and that which may be appropriated as a lode claim.<sup>40</sup> Section 2320 of the Revised Statutes provides that mining claims upon veins or lodes located prior thereto shall be governed as to length along the vein or lode by the customs, regulations, and laws in force, at the date of their location. Mining claims located after May 10th, 1872, shall not exceed 1,500 feet along the vein or lode. No claim shall extend more than 300 feet on each side of the middle of the vein at the surface.<sup>41</sup> But where a location is laid out for a larger amount, the claim is void

*v. Last Chance Min., etc., Co.*, 171 U. S. 55, 43 L. Ed. 72.

**38. What location consists in.**—*Smelting Co. v. Kemp*, 104 U. S. 636, 648, 26 L. Ed. 875. See, also, ante, "Discovery and Appropriation," III, B.

**Description.**—As to sufficiency of description of mining land, see the title, *EJECTMENT*, vol. 5, p. 708.

**Description in notice of location.**—*Eilers v. Boatman*, 111 U. S. 356, 28 L. Ed. 454.

"The notices in this case constituted a sufficient location; the creek was identified and between it and the stump there was a definite relation which, combined with the measurements, enabled the boundaries of the claim to be readily traced. *Haws v. Victoria Copper Min. Co.*, 160 U. S. 303, 40 L. Ed. 436." *McKinley Creek Min. Co. v. Alaska United Min. Co.*, 183 U. S. 563, 571, 46 L. Ed. 331.

During the intermediate period, from the discovery of the lode or vein and its excavation, a general designation of the claim by notice, posted on a stake placed at the point of discovery, stating the date of the location, the extent of the ground claimed, the designation of the lode and the names of the locators will entitle them to such possession as will enable them to make the necessary excavations and prepare the proper certificate for record. *Erhardt v. Boaro*, 113 U. S. 527, 28 L. Ed. 1113. See, also, ante, "Discovery and Appropriation," III, B.

A written notice posted on a stake at the point of discovery of a lode or vein designated by the locators as "Hawk Lode," declares that they claim fifteen hundred feet on lode, vein or deposit. This was held to be sufficiently definite and gave a right to seven hundred and fifty feet in each direction. Subsequent excavations are to be made within sixty

days after the discovery. Then the location must be distinctly marked on the ground, so that its boundaries can be readily traced, and, within one month thereafter, that is, within three months from the discovery, a certificate of the location must be filed for record in the county in which the lode is situated, containing the designation of the lode, the names of the locators, the date of the location, the number of feet claimed on each side of the centre of the discovery shaft, the general course of the lode, and such a description of the claim, by reference to some natural object or permanent monument, as will identify it with reasonable certainty. Rev. Stat., § 2324; General Law of Colorado, §§ 1813, 1814; *Erhardt v. Boaro*, 113 U. S. 527, 28 L. Ed. 1113.

**39. Reference to natural object or permanent monument.**—*Hammer v. Garfield Min., etc., Co.*, 130 U. S. 291, 298, 299, 32 L. Ed. 964.

**Compromise monument.**—*Stemwinder Min. Co. v. The Emma, etc., Min. Co.*, 37 L. Ed. 941, 942.

**Description in location certificate.**—*Bennett v. Harkrader*, 158 U. S. 441, 445, 39 L. Ed. 1046.

40. Rev. Stat., §§ 2320, 2322, 2325, 2333; *Smelting Co. v. Kemp*, 104 U. S. 636, 651, 26 L. Ed. 875; *Iron Silver Min. Co. v. Reynolds*, 124 U. S. 374, 31 L. Ed. 466; *United States v. Iron Silver Min. Co.*, 128 U. S. 673, 680, 32 L. Ed. 571.

**41. Three hundred feet on each side of vein.**—"The court stated to the jury that at the time of the location measurements must be from the point of discovery—the middle of the point of discovery—unless there is evidence before you that the vein has been actually established and run. But if the evidence is simply that there was a point of dis-



only as to the excess in the absence of fraud or infringement on the rights of third parties.<sup>42</sup>

**Coal Lands.**—Section 2347 of the Revised Statutes in reference to entry on coal lands limits the amount of land to be taken up to 160 acres to an individual and 320 to an association of qualified persons.<sup>43</sup>

6. NECESSITY FOR WORKING AND IMPROVING CLAIMS—*a. In General.*—Development by working mining claims is the condition of their continued possession. This was the rule before congress, by its legislation, sanctioned it.<sup>44</sup> When the price of a mining claim has been paid to the land department of the United States, the equitable rights of the purchaser are complete, and there

covery, then the only knowledge you can have of the vein is that part which crops out at the point of discovery, and the parties must be entitled to 300 feet on each side of the middle of the vein at the point of discovery as they had so located this claim. It must not exceed 300 feet—that is, they are entitled to 300 on each side of the vein. This we think was proper, and was the only charge which could have been given to the jury under the state of the evidence.” *Stemwinder Min. Co. v. The Emma, etc., Min. Co.*, 37 L. Ed. 941, 943.

**Discoverer of new vein.**—Where the law allowed to each locator, who was the discoverer of the vein on which the location was made, two hundred feet additional for his merit as discoverer, and a claim as discoverer had been made in good faith, in the reliance on the actual discovery of a constituent vein and acted on for five years before knowledge of any mistake, it justified the claim for an additional two hundred feet as discoverer, although there was a mistake as to his discovery of a new vein. *Richmond Min. Co. v. Rose*, 114 U. S. 576, 581, 29 L. Ed. 273.

**Rule of mining district.**—Where a rule of a mining district in Utah adopted in 1870, providing that the surface width of any mining location should not exceed two hundred feet, was modified by a rule passed May 4, 1872, which provided that the laws of the United States of America should thereafter govern the surface width and the act of congress of May 10, 1872, allowed a width of 600 feet, it was held that the question as to which of these rules was in force was one of fact determinable by the commissioner of the land office. *Parley's Park Silver Min. Co. v. Kerr*, 130 U. S. 256, 262, 32 L. Ed. 906.

42. **Location of excessive amount.**—*Glacier, etc., Min. Co. v. Willis*, 127 U. S. 471, 481, 32 L. Ed. 172; *Richmond Min. Co. v. Rose*, 114 U. S. 576, 580, 29 L. Ed. 273; *Mining Co. v. Tarbet*, 98 U. S. 463, 464, 25 L. Ed. 253; *Stemwinder Min. Co. v. The Emma, etc., Min. Co.*, 37 L. Ed. 941, 942. See, also, *Haws v. Victoria Copper Min. Co.*, 160 U. S. 303, 315, 40 L. Ed. 436.

Where by law only two hundred feet could be located on a vein the inclusion,

by mistake, of a larger number of lineal feet than two hundred in a mining claim, does not render the location, otherwise valid, totally void, but the excess may be rejected and the claim held good for the remainder unless it interferes with rights previously acquired. *Richmond Min. Co. v. Rose*, 114 U. S. 576, 580, 29 L. Ed. 273.

43. **Coal lands.**—Where a private corporation acquired the patents to the coal lands in dispute pursuant to a scheme whereby the several tracts were to be entered for its benefit, in the name of its officers, stockholders and employees—the title, when thus obtained, to be conveyed to the company, which bore all the expenses attending the entries and purchases from the government—it was held that this was in violation of the Revised Statutes, §§ 2347, 2348, 2350, providing for the sale of the lands of the United States containing coal. *United States v. Trinidad Coal, etc., Co.*, 137 U. S. 160, 166, 34 L. Ed. 640.

**Corporation as association of persons within statute relating to coal lands.**—See the title CORPORATIONS, vol. 4, p. 729.

44. **Working claims.**—*O'Reilly v. Campbell*, 116 U. S. 418, 422, 29 L. Ed. 669; *Jennison v. Kirk*, 98 U. S. 453, 457, 25 L. Ed. 240; *Jackson v. Roby*, 109 U. S. 440, 27 L. Ed. 990; *Erhardt v. Boaro*, 113 U. S. 527, 528, 28 L. Ed. 1113.

Locating upon the land and continuing yearly to do the work provided for by the statute, gives to and continues in the location the right possession as stated in the statute. *Black v. Elkhorn Min. Co.*, 163 U. S. 445, 450, 41 L. Ed. 221. See, also, *Chambers v. Harrington*, 111 U. S. 350, 28 L. Ed. 452.

**Evidence of sufficiency of work.**—Section 2325 of the Revised Statutes makes the certificate of the surveyor general of the United States for the state in which the claims are situated evidence of the sufficiency of the work performed and improvement made upon each of the claims patented. “Their sufficiency, both as to amount and character, were matters to be determined by him from his own observation, or from the testimony of parties having knowledge of the subject; and in such cases, where there are no fraudulent representations to him respect-

is no obligation on his part to do further annual work to have a patent issued.<sup>45</sup>

b. *Co-Owners and Owners of Several Claims*—(1) *In General*.—When several claims to mineral lands, contiguous to each other, are held in common, the work required under the statute to keep all them alive may be done on one of them as provided by § 2324, Rev. Stat.<sup>46</sup> But the expenditure of money or labor must equal in value that which would be required on all the claims if they were separate or independent. The claims also must be contiguous so that each claim thus associated may in some way be benefited by the work done on any one of them.<sup>47</sup>

(2) *Notice to Delinquents*.—The Revised Statutes provide for giving notice to co-owner failing to contribute his share of expenditure whereby his interests may be cut off,<sup>48</sup> and in case of his death, the notice may be addressed to his heirs and administrators.<sup>49</sup> The statute requires due publication

ing them by the patentee, his determination, unless corrected by the land department before patent, must be taken as conclusive. His estimate here in both particulars was subject to be examined by the department before the patents were issued; and any alleged error in it cannot afterwards be made ground for impeaching their validity." *United States v. Iron Silver Min. Co.*, 128 U. S. 673, 683, 32 L. Ed. 571.

45. *After payment of price*.—*Benson Min., etc., Co. v. Alta Min., etc., Co.*, 145 U. S. 428, 430, 36 L. Ed. 762.

46. *Work on one of several claims*.—*Chambers v. Harrington*, 111 U. S. 350, 353, 28 L. Ed. 452.

47. *Chambers v. Harrington*, 111 U. S. 350, 28 L. Ed. 452.

Referring to the case of *Jackson v. Roby*, 109 U. S. 440, 444, 27 L. Ed. 990, the court said: "That was a case of placer mining in which the tailings from one claim were carried by a flume and deposited on another which was contiguous, and it was held this latter claim was not aided, but its development rather injured, by this work. This claim was not, therefore, kept valid by such work, and some remarks were made in the opinion which would not, perhaps, be strictly applicable to discoveries and works done in developing lodes or veins." *Chambers v. Harrington*, 111 U. S. 350, 354, 28 L. Ed. 452.

Labor and improvements, within the meanings of the statute, requiring certain annual expenditures of labor and improvements on mines, are deemed to have been had on a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development, that is, to facilitate the extraction of the metals it may contain, though in fact such labor and improvements may be on ground which originally constituted only one of the locations, as in sinking a shaft, or may be at a distance from the claim itself. *Smelting Co. v. Kemp*, 104 U. S. 636, 655, 26 L. Ed. 875.

On the trial of a case under § 2326 of Revised Statutes, to determine adverse claims to land with mineral deposits the plaintiff gave in evidence a certificate of

location of the claim in controversy made by his grantors, and also showed that they were owners of claims adjoining and contiguous to such claim, and that in prosecuting work on these claims they used a flume which extended over the premises in controversy by means of which the waste material from the claims was carried and deposited on the premises. From them the plaintiff traced his title. With the exception of labor above specified, it was not shown that either he or his grantors ever did any work upon them, or ever had possession of them. It was held that these facts were insufficient to give him the right of possession under that clause of act of 1872, reenacted in Revised Statutes, § 2324, which provides that where several mining claims are held in common, the labor or expenditure required may be made on any one of them. *Jackson v. Roby*, 109 U. S. 440, 443, 27 L. Ed. 990.

48. *Notice by publication*.—Where notice to a co-owner is published according to § 2324 of the statute, which provides that "upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of a year, give such delinquent co-owners personal notice in writing or notice by publication in a newspaper nearest the claim for once a week for ninety days, and upon the failure of such delinquent co-owner to contribute, his interest, becomes the property of his co-owners," his failure to contribute cuts off all of the interests which he may have to the claim. *Elder v. Horseshoe Min., etc., Co.*, 194 U. S. 248, 253, 48 L. Ed. 960.

Claims for more than one year's expenditures may be grouped in our notice. *Elder v. Horseshoe Min., etc., Co.*, 194 U. S. 248, 256, 48 L. Ed. 960.

49. *Notice to heirs and administrators*.—Notice by publication according to U. S. Rev. Stat., § 2324 (U. S. Comp. Stat. 1901, p. 1426), which provides that upon the failure of anyone of several co-owners to contribute his proportion of the expenditures required hereby, the co-

of these notices.<sup>50</sup>

**F. Validity and Priority**—1. **RIGHT TO POSSESSION**.—The right to the possession comes only from a valid location. Consequently, if there is no location there can be no possession under it. Location does not necessarily follow from possession, but possession from location.<sup>51</sup>

2. **NECESSITY FOR ACTUAL POSSESSION**.—There is nothing in § 3 of the act of congress, May 10, 1872, c. 152 (17 Stat. 91), which makes actual possession any more necessary for the protection of a title acquired to a valid location of a claim, than it is for any other grant from the United States.<sup>52</sup>

3. **NECESSITY FOR DEED OR PATENT**.—No written instrument is necessary to create the right granted by the United States to a locator,<sup>53</sup> and the fact that many years have elapsed since the original location of a placer claim and that no patent has yet been issued therefor, does not affect its validity.<sup>54</sup>

4. **RIGHTS OF PRIOR APPROPRIATORS**.—By the custom which has obtained

owners who have performed the labor or made the improvements may, at the expiration of a year, give such delinquent co-owner personal notice in writing, or notice by publication, and upon the failure of such co-owner after the expiration of ninety days to contribute, his interest in the claim shall become the property of his co-owners who have made the required expenditures. Held, that the fact that the notice was addressed to his heirs, administrators, and to all whom it may concern, is sufficient although it did not specifically set out the names of the heirs of the deceased owner, and the absence of an administrator at time of the publication is immaterial. *Elder v. Horseshoe Min., etc., Co.*, 194 U. S. 248, 254, 255, 48 L. Ed. 960.

50. **Due publication**.—Where notice to a co-owner failing to contribute his share of the required expenditures was published every day, except Sunday, in a proper newspaper, beginning Monday, January 7, 1889, and concluding on Tuesday, April 2, 1889, it was held to be a sufficient compliance with the Revised Statutes, § 2324, which provides that notice by publication shall be published "for at least once a week for ninety days" in a proper newspaper. *Elder v. Horseshoe Min., etc., Co.*, 194 U. S. 248, 256, 48 L. Ed. 960.

51. **Right to possession**.—*Belk v. Meagher*, 104 U. S. 279, 284, 26 L. Ed. 735. See post, "Rights of Prior Appropriators," III, F, 4.

**Prima facie evidence of valid location**.—In an action to quiet the title to a mining claim in Montana, the court gave the following instruction to the jury: "If you believe from the evidence in the case that prior to the 31st day of December, A. D. 1882, the plaintiff was in the quiet and undisputed possession of the premises, \* \* \* the validity of the original location of which is not questioned in the pleadings; \* \* \* that the boundaries of said claim were so marked upon the surface as to be readily traced, and that theretofore there had been discovered within said boundaries a vein or

lode of quartz bearing \* \* \* precious metals, then this constitutes a prima facie case for the plaintiff, which can only be overcome by the defendant by proof of subsequent abandonment or forfeiture or other divestiture and the acquisition of a better right or title by the defendant." This was held to be a correct charge. *Hammer v. Garfield Min., etc., Co.*, 130 U. S. 291, 300, 32 L. Ed. 964.

**Possession of cotenant**.—*Mining Co. v. Taylor*, 100 U. S. 37, 40, 25 L. Ed. 541.

52. **Necessity of actual possession**.—*Belk v. Meagher*, 104 U. S. 279, 283, 26 L. Ed. 735.

**Proof of actual possession**.—While the record of a mining district is the best evidence of the rules and customs governing its mining interests, it is not the best or the only evidence of the priority or extent of a party's actual possession. *Campbell v. Rankin*, 99 U. S. 261, 25 L. Ed. 435.

**Record of mining claims**.—The fifth section of the act entitled "An act to promote the development of the mining resources of the United States," approved May 10, 1872 (17 Stat. 91), gives no greater effect to the record of mining claims than is given to the records kept pursuant to the registration laws of the respective states, and does not exclude as prima facie evidence of title proof of actual possession, and of its extent. *Campbell v. Rankin*, 99 U. S. 261, 25 L. Ed. 435.

53. **Necessity for written instrument**.—*Black v. Elkhorn Min. Co.*, 163 U. S. 445, 450, 41 L. Ed. 221. See, also, *Mining Co. v. Taylor*, 100 U. S. 37, 25 L. Ed. 541. See the title DEEDS, vol. 5, p. 245.

54. **Necessity for patent**.—*Clipper Min. Co. v. Eli Min., etc., Co.*, 194 U. S. 220, 224, 48 L. Ed. 944.

Where it does not appear that a patent for a mining claim has been issued but it appears that the claimant has complied with all the proceedings essential for the issue of such a patent he is the equitable owner of the mining ground and the government holds the title in trust for him to be delivered upon the payments



among miners in the Pacific states and territories, where mining for the precious metals is had on the public lands of the United States, the first appropriator of mines, whether in placers, veins, or lodes, is held to have a better right than others to work the mines. The first appropriator who subjects the property to use, or takes the necessary steps for that purpose, is regarded, except as against the government, as the source of title in all controversies relating to the property.<sup>55</sup> A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located.<sup>56</sup> The rights of a subsisting senior locator of mineral land are paramount to those of the owner of a junior location, so far as said junior location conflicts in whole or in part with the prior location,<sup>57</sup> and

specified. *Dahl v. Raunheim*, 132 U. S. 260, 33 L. Ed. 324.

Where no adverse claim was ever filed with the register and receiver of the local land office and the entry was never canceled nor disapproved by the officers of the land department at Washington although the patent was not issued, the certificate of purchase was held to be so far as the acquisition of title by any other party was concerned, equivalent to a patent. The land had then ceased to be the subject of sale by the government. It was no longer its property; it held the legal title only in trust for the holder of the certificate. *Deffebach v. Hawke*, 115 U. S. 392, 29 L. Ed. 423.

Where a claim has been properly located and sufficiently developed, the government holds the title in trust for the locators or their vendees until a patent is issued. *Noyes v. Mantle*, 127 U. S. 348, 350, 32 L. Ed. 168.

When the right to a patent exists, the full equitable title has passed to the purchaser, with all the benefits, immunities and burdens of ownership, and no third party can acquire interests as against him. *Benson Min., etc., Co. v. Alta Min., etc., Co.*, 145 U. S. 428, 36 L. Ed. 762.

**Delay in issuance of patent.**—Delay in the issuance of a patent being a mere matter occurring in the administration of the land department, does not diminish the rights flowing from the purchase or cast any additional burden on the purchaser or expose him to assault by third persons. The patent when issued by relation taking effect as of the date of the purchase. *Benson Min., etc., Co. v. Alta Min., etc., Co.*, 145 U. S. 428, 36 L. Ed. 762. See, also, *Deffebach v. Hawke*, 115 U. S. 392, 29 L. Ed. 423.

**55. Right of first appropriator.**—*Atchison v. Peterson*, 20 Wall. 507, 510, 22 L. Ed. 414; *Basey v. Gallagher*, 20 Wall. 670, 22 L. Ed. 452; *Spring Valley Water-work v. Schottler*, 110 U. S. 347, 374, 28 L. Ed. 173. See ante, "Right to Possession," III, F, 1.

**56. Right of present and exclusive possession.**—*Belk v. Meagher*, 104 U. S. 279, 284, 26 L. Ed. 735; *Gwillim v. Donnellan*, 115 U. S. 45, 49, 29 L. Ed. 348; *Noyes v. Mantle*, 127 U. S. 348, 32 L.

Ed. 168; *Clipper Min. Co. v. Eli Min., etc., Co.*, 194 U. S. 220, 226, 48 L. Ed. 944. See, also, *Del Monte Min., etc., Co. v. Last Chance Min., etc., Co.*, 171 U. S. 55, 43 L. Ed. 72; *McKinley Creek Min. Co. v. Alaska United Min. Co.*, 183 U. S. 563, 571, 46 L. Ed. 331.

Section 2322 of the Revised Statutes gives to the owner of a valid lode location the exclusive right of possession and enjoyment of all the surface included within the lines of the location. That exclusive right of possession forbids any trespass. No one without his consent, or at least his acquiescence, can rightfully enter upon the premises or disturb its surface by sinking shafts or otherwise. It was the judgment of congress that, in order to secure the fullest working of the mines and the complete development of the mineral property, the owner thereof should have the undisturbed possession of not less than a specified amount of surface. That exclusive right of possession is as much the property of the locator as the vein or lode by him discovered and located. *Clipper Min. Co. v. Eli Min., etc., Co.*, 194 U. S. 220, 226, 48 L. Ed. 944.

A prior locator cannot be deprived of his inchoate rights by the tortuous acts of others and no intruders or trespassers can initiate any rights which would defeat the rights of such locator. *Erhardt v. Boaro*, 113 U. S. 527, 28 L. Ed. 1113. See, also, *Clipper Min. Co. v. Eli Min., etc., Co.*, 194 U. S. 220, 48 L. Ed. 944.

Nor is this "exclusive right of possession and enjoyment" limited to the surface, nor even to the single vein whose discovery antedates and is the basis of the location. It extends \* \* \* to "all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically." In other words, the entire body of ground, together with all veins and lodes whose apexes are within that body of ground, becomes subject to an exclusive right of possession and enjoyment by the locator. *Clipper Min. Co. v. Eli Min., etc., Co.*, 194 U. S. 220, 227, 48 L. Ed. 944.

**57. Right of senior locator.**—*Lavag- nino v. Uhlig*, 198 U. S. 443, 452, 49 L.

second location is ineffectual to appropriate territory covered by a prior subsisting and valid location.<sup>58</sup>

**5. EFFECT OF REJECTION OF APPLICATION FOR PATENT.**—Undoubtedly when the land department rejects an application for a patent for a mining location, it can go further and set aside such location and restore the land to the public domain, but a judgment simply rejecting the application for a patent does not render the mining location void. A second or amended application may be filed later and additional testimony offered to prove applicant's right to a patent.<sup>59</sup>

**G. Forfeiture and Abandonment.**—Locations may, of course, be lost by abandonment,<sup>60</sup> with an intention to renounce the right of possession. It cannot be doubted that an actual abandonment of possession by a locator of a mining claim, such as would work an abandonment of any other easement, would terminate all the right of possession which the locator then had,<sup>61</sup> or that it may

Ed. 1119; *Clipper Min. Co. v. Eli Min., etc., Co.*, 194 U. S. 220, 226, 48 L. Ed. 944, and cases cited.

**58. Territory covered by prior location.**—*Del Monte Min., etc., Co. v. Last Chance Min., etc., Co.*, 171 U. S. 55, 78, 43 L. Ed. 72; *Belk v. Meagher*, 104 U. S. 279, 284, 26 L. Ed. 735; *Gwillim v. Donnellan*, 115 U. S. 45, 49, 29 L. Ed. 348. See ante, "Location upon Vein or Lode," III, E. 3.

**Location simply indicated by notice.**—The location of a vein or lode as running in a certain direction, but not marked on the surface for years, nor developed but simply indicated by a notice, will not be allowed to prevail against a claim subsequently located by another party on ground different from that thus indicated, after the latter has been developed by years of labor and large expenditures, without objection by the first locators because subsequent explorations by them disclose the fact that their vein runs in a different direction from what they supposed, and in its true course covers the subsequent claim. *O'Reilly v. Campbell*, 116 U. S. 418, 422, 29 L. Ed. 669.

Where an attempted location was invalid, a subsequent location made peaceably and in good faith was held to establish a better right. *Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 735.

**59. Clipper Min. Co. v. Eli Min., etc., Co.**, 194 U. S. 220, 223, 48 L. Ed. 944.

**60. Abandonment.**—*Hammer v. Garfield Min., etc., Co.*, 130 U. S. 291, 300, 32 L. Ed. 964.

Where the land department refused to issue a patent for two tracts upon the ground that two portions of a lode mining claim separated by a patented placer could not be included within one patent and gave the applicant the privilege to apply for a patent upon either of the segregated tracts and claimant located the north end, this was held an abandonment of the south tract which took effect eo instanti and this notwithstanding the receivers receipts had not been formally canceled. *Brown v. Gurney*, 201 U. S. 184, 50 L. Ed. 717.

**Abandonment and location.**—Certain

persons attempted to make a mineral location upon the tract of land in controversy, which failed because no discovery was made, conveyed whatever interests they had to a third party who abandoned and relinquished all the rights which he acquired by said conveyance. Held, that the land is again open to location, and the party who has relinquished it may locate it by complying with the statute and making proper discovery although the abandoned location was not lapsed by reason of the failure to do the annual work required by the statute. *Chrisman v. Miller*, 197 U. S. 313, 314, 320, 49 L. Ed. 770.

**Town site patent.**—A ledge was known to have contained a gold-bearing lode which had not been located but had been profitably worked by persons who later abandoned it. After this abandonment and when the ledge was considered worthless a town site patent which included it was issued. After the issue of this town site patent the ledge was found to still be valuable as mining land. It was held that it was not excepted from the operation of the town site patent. *Dower v. Richards*, 151 U. S. 658, 663, 38 L. Ed. 305.

**Failure to adverse.**—Section 2326 of the Revised Statutes plainly recognizes that one who, pursuant to other provisions of the Revised Statutes, has initiated a right to a mining claim, has recorded his location notice and performed the other acts made necessary to entitle to a patent and who makes application for the patent publishing the statutory notice, will be entitled to a patent for the land embraced in the location notice, unless adverse rights are set up in the mode provided in the section. Thus clearly providing that if there be a senior locator possessed of paramount rights in the mineral lands for which a patent is sought, he may abandon such rights and cause them in effect to enure to the benefit of the applicant for a patent by failure to adverse, or after adverse, by failure to prosecute such adverse claim. *Lavagnino v. Uhlig*, 198 U. S. 443, 455, 49 L. Ed. 1119.

**61. Actual abandonment.**—*Black v.*

be forfeited for failure to have work performed or improvements made to the amount required by law.<sup>62</sup>

**Conflicting Locations.**—Section 2326 of the Revised Statutes qualifies §§ 2319 and 2324, thereby preventing mineral lands of the United States, which have been the subject of conflicting locations, from becoming quoad the claims of third parties, unoccupied mineral lands, by the mere forfeiture of one of such locations.<sup>63</sup>

**H. Relocation.**—Mining claims are not open to relocation until the rights of a former locator have come to an end. A relocation on lands actually covered at the time by another valid location is void, and conveys no rights of possession.<sup>64</sup>

Elkhorn Min. Co., 163 U. S. 445, 450, 41 L. Ed. 221.

**62. Proof to establish forfeiture.**—A forfeiture of a mining claim cannot be established except upon clear and convincing proof of the failure of the former owner to have work performed or improvements made to the amount required by law. *Hammer v. Garfield Min., etc., Co.*, 130 U. S. 291, 301, 32 L. Ed. 964; *Lockart v. Johnson*, 181 U. S. 516, 527, 45 L. Ed. 979.

**Co-owners.**—*Black v. Elkhorn Min. Co.*, 163 U. S. 445, 41 L. Ed. 221. If, being one among several locators, a person neglects to pay his share for the work which has been done by his co-owners, his right and interest in the claim may be forfeited to such co-owners under the provisions of the statute. See ante, "Co-Owners and Owners of Several Claims," III, E, 6, b.

**63.** *Lavagnino v. Uhlig*, 198 U. S. 443, 456, 49 L. Ed. 1119.

"In text-books (Barringer and Adams, *Law of Mines and Mining of the United States*, p. 306; *Lindley on Mines*, 2d Ed., pp. 650, 651) statements are found which seemingly indicate that in the opinion of the writers, on the forfeiture of a senior mining location, quoad a junior and conflicting location, the area of conflict becomes in an unqualified sense unoccupied mineral lands of the United States without enuring in any way to the benefit of the junior location. But, in the treatises referred to, no account is taken of the effect of the express provisions of Rev. Stat., § 2326. Moreover, when the cases to which the text-writers referred, as sustaining the statements made, are examined, it will be seen that they were decided either before the passage of the adverse claim statutes of 1872, or concerned controversies between the senior and junior locators or depended upon the provisions of state statutes. How far such statutes would be controlling, we are not called upon to say, as it is not claimed that there is any statute in Utah in any way modifying the express provisions of § 2326." *Lavagnino v. Uhlig*, 198 U. S. 443, 456, 49 L. Ed. 1119.

**64. When relocation is void.**—*Belk v. Meagher*, 104 U. S. 279, 284, 26 L. Ed. 735. See, also, *Gwillim v. Donnellan*, 115 U. S. 45, 49, 29 L. Ed. 318.

**When claims are open to relocation.**—

Where the language of an act of congress provides that a locator "shall have the exclusive right of possession and enjoyment of all the surface included within lines of this location," which is to continue until there shall be a failure to do the requisite amount of work within the prescribed time, it was held, that actual possession to the claim is not necessary, and mining claims are not open to relocation until the rights of a former locator have come to an end. *Belk v. Meagher*, 104 U. S. 279, 283, 284, 26 L. Ed. 735.

Where two portions of a mining claim were separated by a placer claim and claimant elected to retain the northern portion but not within the sixty days given by the land officer claimant having instituted proceeding against the placer claimant, the southern portion was not open to relocation until such election. *Brown v. Gurney*, 201 U. S. 184, 50 L. Ed. 717.

Plaintiff took possession Dec. 19, 1876, of a claim not in the actual possession of any one, but the exclusive right of possession and enjoyment was in the defendant, which did not expire until the first day of January, 1877. Plaintiff did only a small amount of work between the date of his entry and February 21, 1877, and had no other possession of the property than such as arose from his supposed location of the claim. On February 21, 1877, defendant again entered on the property peaceably and made another relocation, doing all that was required to perfect his rights, which had been previously established and perfected in 1875. In an ejectment suit, it was held, that plaintiff's claim was invalid when made because the claim was not open to relocation until January 1st, 1877, and he did nothing to perfect his claim between the 1st of January and the 19th of February, and was not entitled to a patent under Rev. Stat., § 2322. *Belk v. Meagher*, 104 U. S. 279, 281, 283, 286, 26 L. Ed. 735.

Where it was assumed that land was restored to the public domain, the relocation and filing of an amended location certificate did not cure a defect in the original location arising from the fact that the land was not then opened to location, where the rights of third persons have intervened. *Brown v. Gurney*, 201 U. S. 184, 50 L. Ed. 717.

**Privy of title.**—The power conferred



**I. Necessity for Adversing Claim.**—The federal statute provides that when application is made for a patent and no adverse claim is filed within the proper time, it shall be assumed that the applicant is entitled to a patent and that no adverse claim exists.<sup>65</sup>

**J. Obtaining and Perfecting Title.**—The federal statutes exact a faithful compliance with the conditions required. There must be a discovery of the mineral and a sufficient exploration of the ground to show this fact beyond question. The form also in which the mineral appears, whether in placers or in veins, lodes or ledges, must be disclosed so far as ascertained. Misrepresentation knowingly made as to these matters by the applicant for a patent will afterwards justify the government in proceeding to set it aside.<sup>66</sup> A certificate of purchase has been held equivalent to a patent so far as the acquisition of title by any other party was concerned.<sup>67</sup>

by § 2324 of the Revised Statutes, to relocate a forfeited mining claim, does not place the locator in privity of title with the owner of the prior and forfeited location. The statute merely provides that when a forfeiture has been occasioned "the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns or legal representatives, have not resumed work upon the claim after failure and before such location." *Lavagnino v. Uhlig*, 198 U. S. 443, 453, 49 L. Ed. 1119.

**Adverse proceedings.**—To say that where there was a conflict of boundaries between a senior and junior location, and the senior location has been forfeited, the person who made the relocation of such forfeited claim has the right in adverse proceedings to assail the title of the junior locator in respect to the conflict area which had previously existed between that location and the abandoned or forfeited claim would abrogate the provisions of § 2326 of the Revised Statutes. *Lavagnino v. Uhlig*, 198 U. S. 443, 49 L. Ed. 1119.

**65. Indisputable presumption.**—*Lavagnino v. Uhlig*, 198 U. S. 443, 445, 49 L. Ed. 1119; *Gwillim v. Donnellan*, 115 U. S. 45, 29 L. Ed. 348; Rev. Stat., § 2325.

Sections 2325 and 2326 of the Revised Statutes, concerning adverse claims, were not intended to affect a party who, before the publication first required, had himself gone through all the regular proceedings required to obtain a patent for mineral land from the United States; had established his right to the land claimed by him, and received his patent; and was reposing quietly upon its sufficiency and validity. *Iron Silver Min. Co. v. Campbell*, 135 U. S. 286, 298, 34 L. Ed. 155.

**Placer ground.**—Where it appeared in an action to quiet title that the land in controversy had been surveyed and returned by the surveyor general of Montana to the local land office as mineral land, and the defendant, in asserting the possession of a lode upon it admitted its mineral character, the court said "that it was placer ground is conclusively estab-

lished in this controversy, against the defendant, by the fact that no adverse claim was asserted by him to the plaintiff's application for a patent of the premises as such ground. That question is not now open to litigation by private parties seeking to avoid the effect of the plaintiff's proceedings." *Dahl v. Raunheim*, 132 U. S. 260, 263, 33 L. Ed. 324.

**Valid compromise.**—Where an application to enter a mining claim is made, and there is embraced therein land claimed by another, it is not the duty of the latter to file an adverse claim, but the parties may make a valid compromise in the absence of statute which can be enforced after the patent is acquired. *St. Louis Min., etc., Co. v. Montana Min. Co.*, 171 U. S. 650, 655, 43 L. Ed. 320. See post, "Effect of Valid Deed or Contract," V, B, 3.

**66. Compliance with conditions.**—*United States v. Iron Silver Min. Co.*, 128 U. S. 673, 675, 32 L. Ed. 571.

**Burden of proof on government.**—*United States v. Iron Silver Min. Co.*, 128 U. S. 673, 32 L. Ed. 571.

**Apex of vein.**—The top or apex of a vein must be within the boundaries of a claim upon a lode or vein in order to enable the locator to obtain title. *Larkin v. Upton*, 144 U. S. 19, 21, 36 L. Ed. 330.

**Blanket vein.**—The title to portions of a horizontal vein or deposit "blanket vein" as it is generally called, may be acquired under the section concerning veins, lodes, etc. *Iron Silver Min. Co. v. Mike & Starr, etc., Min. Co.*, 143 U. S. 394, 404, 36 L. Ed. 201.

**Procedure to obtain patent.**—As to procedure to obtain patent for mining claim, see *Smelting Co. v. Kemp*, 104 U. S. 636, 655, 657, 26 L. Ed. 875.

**67. Certificate of purchase.**—Plaintiff applied to the United States land office to enter the land as a placer mining claim, entry was made by paying the price therefor, no adverse claim was ever filed with the register and receiver of the local land office, and the entry was never canceled nor disproved by the officers of the land department at Washington. It was held that the certificate of purchase which was given to him upon entry was so far

#### IV. Mining Claims as Property.

**A. In General.**—Mining claims are the subject of bargain and sale, and constitute very largely the wealth of the Pacific coast states. They are property in the fullest sense of the word, and their ownership, transfer, and use are governed by a well-defined code or codes of law, and are recognized by the states and the federal government. These claims may be sold, transferred, mortgaged, and inherited, without infringing the title of the United States.<sup>68</sup>

**B. Sale and Transfer.**—As hitherto stated, mining claims may be sold<sup>69</sup> and a conveyance in writing is not necessary to the valid transfer of such claims.<sup>70</sup>

as the acquisition of title by any other party, was concerned, equivalent to a patent, and the land then ceased to be subject of sale by the government, which from that time held the legal title only in trust for holder of certificate. *Deffenback v. Hawke*, 115 U. S. 392, 405, 29 L. Ed. 423.

68. *Forbes v. Gracey*, 94 U. S. 762, 767, 24 L. Ed. 313; *Manuel v. Wulff*, 152 U. S. 505, 510, 38 L. Ed. 532; *Black v. Elkhorn Min. Co.*, 163 U. S. 445, 41 L. Ed. 221; *St. Louis Min., etc., Co. v. Montana Min. Co.*, 171 U. S. 650, 43 L. Ed. 320.

A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent. *Forbes v. Gracey*, 94 U. S. 762, 24 L. Ed. 313; *Belk v. Meagher*, 104 U. S. 279, 283, 26 L. Ed. 735; *Clipper Min. Co. v. Eli Min., etc., Co.*, 194 U. S. 220, 226, 48 L. Ed. 944; *Noyes v. Mantle*, 127 U. S. 348, 353, 32 L. Ed. 168.

Compare *Black v. Elkhorn Min. Co.*, 163 U. S. 445, 449, 41 L. Ed. 221, where it is said: "The interest in a mining claim, prior to the payment of any money for the granting of a patent for the land, is nothing more than a right to the exclusive possession of the land based upon conditions subsequent, a failure to fulfill which forfeits the locator's interest in the claim." See, also, the *DOWER*, vol. 5, p. 489.

**Number of locations which may be acquired.**—A limitation is not put upon the sale of the ground located, nor upon the number of locations which may be acquired by purchase, nor upon the number which may be included in a patent. Every interest in lands is the subject of sale and transfer, unless prohibited by statute, and no words allowing it are necessary. *Smelting Co. v. Kemp*, 104 U. S. 636, 651, 26 L. Ed. 875.

**Ore detached from the soil.**—By the statutes of the United States and the recognized rule of the government, the moment ore becomes detached from the soil in which it is embedded it becomes personal property, the ownership of which is in the man whose labor, capital, and skill has discovered and developed the mine and extracted the ore or other mineral product. *Forbes v. Gracey*, 94 U. S. 762, 765, 24 L. Ed. 313.

69. **Stone quarry.**—A restriction upon absolute ownership in a grant of land hav-

ing on it a quarry, where the grantees agree to deliver to the grantor, his heirs, &c., so long as they might want, a certain number of feet, per annum, of stone of certain kinds, for a partnership purpose (the grantor reserving a right of re-entry and of taking the stone himself, if the grantees do not fulfill their agreement) is not to be raised by implication. Hence, in the case of such a grant, where there is no obvious restriction upon the quantity of stone which the grantees may take out, it cannot be inferred that the grantees were meant to be limited to taking out no more stone than that which they have agreed to deliver to the grantor. *Marble Co. v. Ripley*, 10 Wall. 339, 19 L. Ed. 955.

Where a deed from one owner conveyed quarry lands to his co-owners reserving a right in the grantor if the grantees did not furnish marble from them, to enter and keep possession and take the marble till the grantees should be ready and willing to fulfill the conditions of the contract on their part, such a grant and reservation limited however in the extent to which the grantees were bound to furnish marble, does not leave in the grantor a corporeal interest in the marble "in situ," and hence his interest is not exclusive of the right of the grantees to take marble on their own account "ad libitum." *Marble Co. v. Ripley*, 10 Wall. 339, 19 L. Ed. 955.

**Concealment and misrepresentation.**—Purely surface indications, open to all ordinary observers, and situated on or near the path along which the plaintiffs travelled in going to and from their work, must have been known to them, and are not such as to be made the subject of concealment and misrepresentation by defendant as to justify the setting aside of a conveyance from plaintiffs to defendant. *Synnott v. Shaughnessy*, 130 U. S. 572, 580, 32 L. Ed. 1038. See the title *FRAUD AND DECEIT*, vol. 6, p. 394.

This case was a suit to set aside the conveyance of a mine and it was held that the facts demonstrated that there could have been no such fraudulent concealment, etc., as was charged in the plaintiff's complaint. *Synnott v. Shaughnessy*, 130 U. S. 572, 580, 32 L. Ed. 1038. See generally, the title *VENDOR AND PURCHASER*.

70. **Necessity for conveyance in writing.**—*Mining Co. v. Taylor*, 100 U. S. 37, 23 L. Ed. 541. See, also, *Black v. Elkhorn*

## V. Rights as Effected by Surface Boundaries.

**A. In General**—1. **AT COMMON LAW.**—The general rule of the common law was that, whoever had the fee of the soil, owned all below the surface, and this common law is the general law of the states and territories of the United States, and, in the absence of specific statutory provisions or contracts, the simple inquiry as to the extent of mining rights would be, who owns the surface. Unquestionably at common law the owner of the soil might convey his interest in mineral beneath the surface without relinquishing his title to the surface, but the possible fact of a separation between the ownership of the surface and the ownership of mines beneath that surface, growing out of contract, in no manner abridged the general proposition that the owner of the surface owned all beneath.<sup>71</sup>

2. **UNDER THE SPANISH AND MEXICAN LAW.**—The Spanish and Mexican mining law confined the owner of a mine to perpendicular lines on every side. By the Mexican as by the common law the surface rights limited the rights below the surface.<sup>72</sup> There appears to be under the existing law no limitation to the right of exclusive possession except that of another locator to pursue a vein apexing within his surface on its dip downward through his side line,<sup>73</sup> and the rights given to owners of tunnels.<sup>74</sup> Congress has prescribed the conditions upon which extralateral rights may be acquired and a party must bring himself within those conditions or else be content with simply the mineral beneath the surface of his territory.<sup>75</sup>

**B. Right to Pursue Vein**—1. **THE GENERAL RULE.**—The location as made on the surface by the locator determines the extent of rights below the surface.<sup>76</sup> The general rule is that the owner of a mining right in a lode or vein cannot follow the course of the vein beyond the end lines of his location extended perpendicularly downwards, but that he may follow the dip to an indefinite distance outside of his side lines. This is undoubtedly the general rule of miners' law, and the true construction of the act of congress.<sup>77</sup> The right to follow the dip of the vein is bounded by the end lines of the claim, properly so called; which lines are those which are crosswise of the general course of the vein on the surface.<sup>78</sup>

Min. Co., 163 U. S. 445, 450, 41 L. Ed. 221. Compare the title DEEDS, vol. 5, p. 251.

71. **Common law—local customs in England and Wales.**—*Del Monte Min., etc., Co. v. Last Chance Min., etc., Co.*, 171 U. S. 55, 60, 43 L. Ed. 72.

72. **Spanish and Mexican mining laws.**—*Del Monte Min., etc., Co. v. Last Chance Min., etc., Co.*, 171 U. S. 55, 60, 43 L. Ed. 72; *Mining Co. v. Tarbet*, 98 U. S. 463, 25 L. Ed. 253.

73. **Right to pursue vein.**—*St. Louis Min., etc., Co. v. Montana Min. Co.*, 194 U. S. 235, 237, 238, 48 L. Ed. 953. See, also, *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 182 U. S. 499, 508, 45 L. Ed. 1200. See post, "Right to Pursue Vein," V, B.

74. See post, *Right of Owners of Tunnels*, VIII.

75. **Compliance with conditions.**—*Del Monte Min., etc., Co. v. Last Chance Min., etc., Co.*, 171 U. S. 55, 66, 43 L. Ed. 72.

76. **Rights below surface.**—*Mining Co. v. Tarbet*, 98 U. S. 463, 468, 25 L. Ed. 253.

It is evident from the statutes that the location as made and defined must control not only the rights of the claimant to the vein or lode within its surface lines, but

also any lateral rights. *King v. Amy and Silversmith Min. Co.*, 152 U. S. 222, 227, 38 L. Ed. 419.

77. **The general rule.**—*Mining Co. v. Tarbet*, 98 U. S. 463, 467, 25 L. Ed. 253; *Larkin v. Upton*, 144 U. S. 19, 23, 36 L. Ed. 330; *St. Louis Min., etc., Co. v. Montana Min. Co.*, 194 U. S. 235, 48 L. Ed. 953. See, also, *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 182 U. S. 499, 508, 45 L. Ed. 1200.

"Our laws have attempted to establish a rule by which each claim shall be so many feet of the vein, lengthwise of its course, to any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular." *Mining Co. v. Tarbet*, 98 U. S. 463, 468, 25 L. Ed. 253.

78. *Mining Co. v. Tarbet*, 98 U. S. 463, 468, 25 L. Ed. 253.

"Section 2322 of the Revised Statutes, grants to locators 'The exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, al-



2. **LIMITATIONS UPON THE RULE**—*a. Veins Apexing within Surface.*—The vein must of course apex within the location in order that extralateral rights may be acquired,<sup>79</sup> but a locator is not confined to the vein upon which he bases his location and upon which the discovery was made. "All veins or lodes having their apices within the planes of the surface lines extending downward are his, and possession of the surface is possession of all such veins or lodes within the prescribed limitations."<sup>80</sup>

*b. Requirement of Parallel End Lines.*—Before the act of 1872 it was not required that the end lines should be parallel and there is no such requirement when the patent was issued prior thereto,<sup>81</sup> but the end lines must be

though such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations.'" *St. Louis Min., etc., Co. v. Montana Min. Co.*, 194 U. S. 235, 237, 48 L. Ed. 953.

**Under the act of 1866, 1872, § 2322, Rev. Stat.**, which provides that the "outside parts" of the veins or ledges "shall be confined to such portions thereof as lie between vertical planes drawn downwards through the end lines of their locations," it was held that a patent under these acts restricted the dip of the veins to the end lines of the location. *Walrath v. Champion Min. Co.*, 171 U. S. 293, 306, 311, 43 L. Ed. 170.

Under the act of 1866 the end of a surface vein is the end line of all the veins within the surface boundaries. As included in the act of 1872, § 2322 Rev. Stat., the provision is that the locator's rights "shall be confined to such portions thereof as lie between vertical planes drawn downwards through the end lines of their locations." *Walrath v. Champion Min. Co.*, 171 U. S. 293, 306, 43 L. Ed. 170.

**79. Vein apexing within location.**—*Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 182 U. S. 499, 509, 45 L. Ed. 1200.

"The apex of a vein is not necessarily a point, but often a line of great length. Any portion of the apex on the course or strike of the vein found within the limits of a claim is sufficient discovery to entitle the locator to obtain title." *Larkin v. Upton*, 144 U. S. 19, 23, 36 L. Ed. 330.

"It is obvious that the vein, lode, or ledge of which the locator may have 'the exclusive right of possession and enjoyment' is one whose apex is found inside of his surface lines extended vertically; and this right follows such vein, though in extending downward it may depart from a perpendicular and extend laterally outside of the vertical lines of such surface location." *Iron Silver Min. Co. v. Cheesman*, 116 U. S. 529, 533, 29 L. Ed. 712.

"As said by Lindley (1 Lindley on Mines, 2d Ed., § 71): 'In other words, under the old law he located the lode. Under the new, he must locate a piece of land containing the top, or apex, of the lode. While the vein is still the principal thing, in that it is for the sake of the vein that the location is made, the location

must be of a piece of land including the top, or apex of the vein.'" See, also, *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 182 U. S. 499, 508, 45 L. Ed. 1200. The decisions of the courts in the mining regions are referred to in the opinion of the court of appeals in this case, from which we quote: "This view is in accord with the trend of all the decisions to which our attention has been directed." *St. Louis Min., etc., Co. v. Montana Co.*, 194 U. S. 235, 238, 48 L. Ed. 953.

**80. Title to all veins apexing within surface.**—*Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 182 U. S. 499, 508, 45 L. Ed. 1200. See, also, *Campbell v. Ellet*, 167 U. S. 116, 42 L. Ed. 101; *Del Monte Min., etc., Co. v. Last Chance Min., etc., Co.*, 171 U. S. 55, 43 L. Ed. 72.

Every vein "the top or apex of which lies inside of such surface lines extended downward vertically" becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing he enters beneath the surface of some other proprietor. *Mining Co. v. Tarbet*, 98 U. S. 463, 468, 25 L. Ed. 253.

**Blind veins.**—"The only condition is that the veins shall apex within the surface lines. It is not competent for us to add any other condition. Blind veins are not excepted, and we cannot except them. They are included in the description, 'all veins' and belong to the surface location." *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 182 U. S. 499, 509, 45 L. Ed. 1200.

**81. Prior to acts of 1872.**—*East Central Eureka Min. Co. v. Central Eureka Min. Co.*, 204 U. S. 266, 268, 269, 51 L. Ed. 476.

**The act of 1872.**—The act of May 10, 1872, § 3, is given a broad construction in the interest of the parties who had obtained their patents to mineral land before the passage of said act, which limited the claimant's right to pursue the vein into the unconveyed land of the grantor, in the light of the provisions of § 12 and § 16, the latter of which provides "that nothing in this act shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws." *East Central Eureka Min. Co. v. Central Eureka Min. Co.*, 204 U. S. 266, 270, 51 L. Ed. 476.

Where it was claimed that since plaintiff's patent was granted in 1873 when the

straight.<sup>82</sup> The act of congress of 1872 (Rev. Stat. 2320, 2322, 2324) provides that parallelism of the end lines of surface location is essential to the existence of any right in the locator or patentee of a surface lode claim to follow his vein outside of the vertical planes drawn through the side lines. His lateral right by the statute is confined to such portion of the vein as lies between such planes drawn through the end lines and extended in their own direction; that is, between parallel vertical planes. It can embrace no other portion.<sup>83</sup> There is no command that the side lines shall be parallel and the requisition that the end lines shall be parallel is for the purpose of bounding the underground extralateral rights which the owner of the location may exercise.<sup>84</sup>

*c. Identity and Continuity of Vein.*—The lode, ledge, or vein, which may be possessed and enjoyed outside of the limits of the surface side lines extended vertically, must be the same vein or lode on the apex or outcrop of which the claim of the party has been located. He can only go outside of this imaginary perpendicular wall to possess or enjoy a vein which, being his inside of that artificial line, he has the right to follow or pursue in its extension outside of these lines. The identity of the vein is, therefore, essential to his right to its possession there.<sup>85</sup> Certainly the lode or vein must be continuous in the sense that it can be traced through the surrounding rocks, though slight interruptions of the

act of May 10, 1872, was in force and that therefore since his end lines were not parallel he was not entitled to extralateral rights but the application for the patent was made in 1871 based upon two locations of 1863 and 1865 and the location had been made and the proceedings under the act of 1866 were so far advanced as to exclude adverse claims, it was held that the right granted by the act of 1866 was not diminished by the act of 1872 as far as the requirements of parallel lands was concerned. *East Central Eureka Min. Co. v. Central Eureka Min. Co.*, 204 U. S. 266, 51 L. Ed. 476.

Where the construction of the act of 1872 as indicated by granting a patent by the land office agreed with the decision of the courts unless the meaning thereof is pretty plainly the other way, this consensus of opinion and practice must be accorded considerable weight. *East Central Eureka Min. Co. v. Central Eureka Min. Co.*, 204 U. S. 266, 51 L. Ed. 476.

"The plaintiff is not responsible for the form of the patent. It grants the rights that would have been granted under the act of 1866, and the fact that it also purports to grant all that would have been acquired by a location under the act of 1872 does not import an election by the grantee to abandon the former." *East Central Eureka Min. Co. v. Central Eureka Min. Co.*, 204 U. S. 266, 271, 51 L. Ed. 476.

**82. End lines straight.**—It may be that the end lines of a location of a lode need not be parallel under the act of 1866, may converge, or diverge, and may even do so as to new veins, but the end lines must be straight. *Walrath v. Champion Min. Co.*, 171 U. S. 293, 312, 43 L. Ed. 170.

**83. Essential to existence of extralateral rights.**—*Iron Silver Min. Co. v. Elgin Min., etc., Co.*, 118 U. S. 196, 208, 30 L. Ed. 98.

There is no inherent necessity that the end lines of a mining claim should be parallel, yet the statute has so specifically prescribed. (Section 2320.) It is not within the province of the courts to ignore such provision and hold that a locator, failing to comply with its terms, has all the rights, extralateral and otherwise, which he would have been entitled to if he had complied, and so it has been adjudged. *Iron Silver Min. Co. v. Elgin Min., etc., Co.*, 118 U. S. 196, 30 L. Ed. 98; *Del Monte Min., etc., Co. v. Last Chance Min., etc., Co.*, 171 U. S. 55, 67, 43 L. Ed. 72.

**84. Purpose of the requirement.**—*Del Monte Min., etc., Co. v. Last Chance Min., etc., Co.*, 171 U. S. 55, 84, 43 L. Ed. 72.

**85. Identity of vein.**—*Iron Silver Min. Co. v. Cheesman*, 116 U. S. 529, 534, 29 L. Ed. 712.

"Now, a vein containing the precious metals is by no means always a straight line of uniform dip, or thickness, or richness of mineral matter throughout its course. Generally, the veins are found in what, when the mineral is taken out of them, constitute clefs or fissures in the surrounding rock, with a well-defined wall above and below of different kinds of rock, as porphyry on one side, above or below, and limestone on the other." *Iron Silver Min. Co. v. Cheesman*, 116 U. S. 529, 534, 29 L. Ed. 712.

"So long as these enclosing walls can be distinctly and continuously traced, and the mineral matter of the same character found between them, there can be no doubt that it is the same vein. But sometimes the cleft between the enclosing rocks, called in mining parlance the country rock, diminishes so as to be scarcely perceptible. Sometimes for a short distance the fissure disappears entirely and again is found distinctly to exist a little further on. Again it is seen that, though the un-



mineral-bearing rock would not be alone sufficient.<sup>86</sup> Nor would a short partial closure of the fissure have that effect if a little farther on it recurred again with mineral-bearing rock within it.<sup>87</sup>

d. *Where Claim Is Located Crosswise of the Vein.*—The only exception to the rule that the end lines of the location as the locator places them establish the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed that in fact the location has been placed not along but across the course of the vein. In such case the law declares that those which the locator called his side lines are his end lines, and those which he called end lines are in fact side lines, and this upon the proposition that it was the intent of congress to give to the locator only so many feet of the length of the vein, that length to be bounded by the lines which the locator has established as his location.<sup>88</sup> While each locator is entitled to follow the dip of the lode or vein to an indefinite depth, though it carries him beyond the side lines of the location, this right is based on the hypothesis that they substantially correspond with the course of the lode or vein at the surface; and it is bounded at each end by the end lines of the location, crossing the lode or vein, and extended perpendicularly downwards, and indefinitely in their own direction.<sup>89</sup> A location laid crosswise of a lode or vein, so that its greatest length crosses the same instead of following the course thereof, will secure only so much of the vein as it

derlying and superposing country rock is there, the mineral deposit ceases to be found, but, following the fissure, it reappears again very soon." *Iron Silver Min. Co. v. Cheesman*, 116 U. S. 529, 535, 29 L. Ed. 712.

"It also happens that both fissure and mineral come to an end and are found no more in that direction, or, if found, so far off, or so deflected from the original line as to constitute no part of that vein." *Iron Silver Min. Co. v. Cheesman*, 116 U. S. 529, 535, 29 L. Ed. 712.

"The proposition of the plaintiff is that the evidence before you shows that a lode exists in the ground in controversy as already defined. The defendants deny that proposition, and the case turns on that question. They concede that there is, in the territory open by the works, ore in detached masses or fragments, but so intermingled with the enclosing rocks that it cannot be regarded as a continuous body, or as making the line of a lode or vein. All that has been said by witnesses about rock in place is valuable only as it tends to prove or disapprove the existence of a crevice or opening extending from one claim to the other. Excluding the wash, slide, or debris on the surface of the mountain, all things in the mass of the mountain are in place. A continuous body of mineral or mineral-bearing rock, extending through loose and disjointed rocks, is a lode as fully and certainly as that which is found in more regular formation; but if it is not continuous, or is not found in a crevice or opening which is itself continuous, it cannot be called by that name." *Iron Silver Min. Co. v. Cheesman*, 116 U. S. 529, 537, 29 L. Ed. 712.

**86. Continuity of vein.**—*Iron Silver Min. Co. v. Cheesman*, 116 U. S. 529, 538, 29 L. Ed. 712.

**87. Iron Silver Min. Co. v. Cheesman,**

116 U. S. 529, 538, 29 L. Ed. 712.

**Question for jury.**—*Iron Silver Min. Co. v. Cheesman*, 116 U. S. 529, 532, 29 L. Ed. 712. See, also, post, "Question for Jury," XVI, C, 7.

**88. Across the vein.**—*Del Monte Min., etc., Co. v. Last Chance Min., etc., Co.*, 171 U. S. 55, 89, 43 L. Ed. 72.

**89. Lines should correspond to course of vein.**—*Mining Co. v. Tarbet*, 98 U. S. 463, 25 L. Ed. 253.

The side lines of a mining claim under Revised Statutes, §§ 2320, 2322, properly drawn, would run on each side of the course of the vein or lode distant not more than three hundred feet from the middle of such vein. *King v. Amy and Silversmith Min. Co.*, 152 U. S. 222, 228, 38 L. Ed. 419.

"This view of the controlling effect of the end lines of the surface location is also sustained by the decision of this court in the Flagstaff case. *Mining Co. v. Tarbet*, 98 U. S. 463, 470, 25 L. Ed. 253. There the court said that 'the most practicable rule is to regard the course of the vein as that which is indicated by surface outcrop, or surface explorations and workings,' and that 'it is on this line that claims will naturally be laid, whatever be the character of the surface, whether level or inclined,' and that the end lines of the claim, properly so called, 'are those which are crosswise of the general course of the vein on the surface.' The court suggested that the law might be imperfect in this respect, and that perhaps the true course of the vein should correspond with its strike or the line of a level run through it; but it added that this 'can rarely be ascertained until considerable work has been done, and after claims and locations have become fixed.'" *Iron Silver Min. Co. v. Elgin Min., etc., Co.*, 118 U. S. 196, 208, 30 L. Ed. 98.



actually crosses at the surface, and its side lines will become its end lines, for the purpose of defining the rights of the owners;<sup>90</sup> in other words, a person cannot so locate his claim as to give him a right to indefinitely pursue the vein lengthwise.<sup>91</sup> And if a locator has so laid out his claim his rights must be subordinated to the rights of those who have properly located.<sup>92</sup> The court cannot make his location for him,<sup>93</sup> but if the apex of a vein crosses one end line and one side

#### 90. When side lines constitute end lines.

—*Mining Co. v. Tarbet*, 98 U. S. 463, 25 L. Ed. 253; *Argentine Min. Co. v. Terrible Min. Co.*, 122 U. S. 478, 30 L. Ed. 1140; *King v. Amy and Silversmith Min. Co.*, 152 U. S. 222, 38 L. Ed. 419; *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, 39 L. Ed. 859.

"The Amy claim had no lateral right by virtue of the extension of the vein through what was called the north side of its claim, as that side line so called was in fact one of its end lines." *King v. Amy and Silversmith Min. Co.*, 152 U. S. 222, 38 L. Ed. 419.

#### 91. Pursuit of claim beyond end lines.

—The litigation in respect to the Flagstaff mine in Utah illustrates this. There was a local custom giving to the locator of a mine fifty feet in width on either side of the course of the vein, and the Flagstaff patent granted a superficies one hundred feet wide by twenty-six hundred feet long, with the right to follow the vein described therein to the extent of twenty-six hundred feet. It turned out that the vein, instead of running through this parallelogram lengthwise, crossed the side lines, so that there was really but a hundred feet of the length of the vein within the surface area. On either side of the Flagstaff ground were other locations, through which the vein on its course passed. As against these two locations the owners of the Flagstaff claimed the right to follow the vein on its course or strike to the full extent of twenty-six hundred feet. This was denied by the supreme court of Utah. *McCormick v. Varnes*, 2 Utah 355. In that case the controversy was with the location on the west of the Flagstaff. The decision of that court in respect to the controversy with the location on the east of the Flagstaff is not reported, but the case came to the federal supreme court. *Mining Co. v. Tarbet*, 98 U. S. 463, 25 L. Ed. 253. In the course of the opinion (pages 467, 468) it was said: "It was not the intent of the law to allow a person to make his location crosswise of a vein so that the side lines shall cross it, and thereby give him the right to follow the strike of the vein outside of his side lines. That would subvert the whole system sought to be established by the law. If he does locate his claim in that way, his rights must be subordinated to the rights of those who have properly located on the lode. Their right to follow the dip outside of their side lines cannot be interfered with by him. His right to the lode

only extends to so much of the lode as his claim covers. If he has located crosswise of the lode, and his claim is only one hundred feet wide, that one hundred feet is all he has a right to." These decisions show that while the express purpose of the statute was to grant the vein for so many feet along its course, yet such grant could only be made effective by a surface location covering the course to such extent. This act of 1866 remained in force only six years, and was then superseded by the act of May 10, 1872, c. 152, 17 Stat. 91, found in the Revised Statutes, § 2319, and following. This is the statute which is in force today, and under which the controversies in this case arise. Section 2319, Rev. Stat. (corresponding to § 1 of the act of 1872), reads: "All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the law of the United States." *Del Monte Min., etc., Co. v. Last Chance Min., etc., Co.*, 171 U. S. 55, 65, 43 L. Ed. 72. See, also, *Argentine Min. Co. v. Terrible Min. Co.*, 122 U. S. 478, 485, 30 L. Ed. 1140.

**92. Consequences of failure to make proper location.**—"As was said by this court in *Iron Silver Min. Co. v. Elgin Min., etc., Co.*, 118 U. S. 196, 207, 30 L. Ed. 98: 'If the first locator will not or cannot make the explorations necessary to ascertain the true course of the vein, and draws his end lines ignorantly, he must bear the consequences.'" *King v. Amy and Silversmith Min. Co.*, 152 U. S. 222, 238, 38 L. Ed. 419. See, also, *O'Reilly v. Campbell*, 116 U. S. 418, 422, 29 L. Ed. 669.

**93. Where lines are inaccurate.**—"The court cannot become a locator for the mining claimant and do for him what he alone should do for himself. The most that the court can do, where the lines are drawn inaccurately and irregularly, is to give to the miner such rights, as his imperfect location warrants, under the statute. It cannot relocate his claim and make new side lines or end lines. Where it finds, as in this case, that what are

line of a lode mining claim as located thereon, the locator of such vein can follow it upon its dip beyond the vertical line of his location.<sup>94</sup>

e. *Priorities*.—Where there is an apex or outcropping of the same vein within the boundaries of two claims, the one first located necessarily carries the right to work the vein.<sup>95</sup> The lines of a junior lode location may be laid within, upon or across the surface of a valid senior location for the purpose of defining for or securing to such junior location underground or extralateral right not in conflict with any right of the senior location.<sup>96</sup>

3. *EFFECT OF DEED OR CONTRACT*.—It is probably not necessary to specify extralateral rights in order that a conveyance shall be operative to transfer them. The custom has grown up of naming them for the sake of avoiding the possibility of dispute.<sup>97</sup>

called side lines are in fact end lines, the court, in determining his lateral rights, will treat such side lines as end lines and such end lines as side lines; but the court cannot make a new location for him, and thereby enlarge his rights. He must stand upon his own location, and can take only what it will give him under the law." *King v. Amy and Silversmith Min. Co.*, 152 U. S. 222, 228, 38 L. Ed. 419.

**94. Vein crossing one end line and one side line.**—*Del Monte Min., etc., Co. v. Last Chance Min., etc., Co.*, 171 U. S. 55, 86, 43 L. Ed. 72, reviewing *Mining Co. v. Tarbet*, 98 U. S. 463, 25 L. Ed. 253; *Iron Silver Min. Co. v. Elgin Min., etc., Co.*, 118 U. S. 196, 30 L. Ed. 98; *King v. Amy and Silversmith Min. Co.*, 152 U. S. 222, 38 L. Ed. 419; *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, 39 L. Ed. 859; *Clark v. Fitzgerald*, 171 U. S. 92, 93, 43 L. Ed. 87.

**95. Vein outcropping within two claims.**—*Argentine Min. Co. v. Terrible Min. Co.*, 122 U. S. 478, 484, 30 L. Ed. 1140.

**96. Lines within senior location.**—*Del Monte Min., etc., Co. v. Last Chance Min., etc., Co.*, 171 U. S. 55, 43 L. Ed. 72, distinguishing *Belk v. Meagher*, 104 U. S. 279, 284, 26 L. Ed. 735; *Gwillim v. Donnellan*, 115 U. S. 45, 49, 29 L. Ed. 348.

"The law requires that the end lines of the claim shall be parallel. It will often happen that locations which do not overlap are so placed as to leave between them some irregular parcel of ground. Within that, it being no more than one locator is entitled to take, may be discovered a mineral vein and the discoverer desire to take the entire surface and yet it be impossible for him to do so and make his end lines parallel unless, for the mere purposes of location, he be permitted to place those end lines on territory already claimed by the prior locators." *Del Monte Min., etc., Co. v. Last Chance Min., etc., Co.*, 171 U. S. 55, 75, 43 L. Ed. 72.

"In 1 Lindley on Mines, § 363, the author says: 'As a mining location can only be carved out of the unappropriated public domain, it necessarily follows that a subsequent locator may not invade the surface territory of his neighbors and include within his boundaries any part of a prior valid and subsisting location.

But conflicts of surface area are more than frequent. Many of them arise from honest mistake, others from premeditated design. In both instances the question of priority of appropriation is the controlling element which determines the rights of the parties. Two locations cannot legally occupy the same space at the same time. These conflicts sometimes involve a segment of the same vein, on its strike; at others, they involve the dip-bounding planes underneath the surface. More frequently, however, they pertain to mere overlapping surfaces. The same principles of law apply with equal force to all classes of cases. Such property rights as are conferred by a valid prior location, so long as such location remains valid and subsisting, are preserved from invasion, and cannot be infringed or impaired by subsequent locators. To the extent, therefore, that a subsequent location includes any portion of the surface lawfully appropriated and held by another, to that extent such location is void.'" *Del Monte Min., etc., Co. v. Last Chance Min., etc., Co.*, 171 U. S. 55, 79, 43 L. Ed. 72. See, also, ante, "Validity and Priority," III, F.

**97. Effect upon extralateral rights.**—*Montana Min. Co. v. St. Louis Min., etc., Co.*, 204 U. S. 204, 217, 51 L. Ed. 441.

A bond in which it was agreed to proceed as rapidly as possible to obtain a patent, and then to execute a good and sufficient deed of conveyance of the mineral land together with all the mineral therein contained, with all the dips, spurs, angles and all the metals, ores, etc., was held not to be simply a location of the boundary line between the two claims, leaving all subsurface rights to be determined by the ordinary rules recognized in the mining districts and embraced by the statute of congress, but was construed to include all the mineral below the surface and the right to obtain access to the mineral in the vein extending on the unconveyed land of the adversary. *Montana Min. Co. v. St. Louis Min., etc., Co.*, 204 U. S. 204, 205, 214, 219, 220, 51 L. Ed. 441.

Mineral land adjoining another's land was conveyed, by a conveyance containing a clause describing the land, and ad-



## VI. Grants and Patents.

**A. Reservation of Mineral Lands**—1. **HOMESTEAD, PRE-EMPTION AND TOWN SITES.**—Mineral lands are excepted from homestead, pre-emption or town site entries.<sup>98</sup> This means lands known to contain mineral at the time of the grant.<sup>99</sup> No title from the United States to land known at the time of sale to

ding, "together with all the mineral therein contained. This was held to include the mineral in a vein which extended into the un conveyed land of his grantor against the contention that the conveyance was simply to locate the boundaries between the two claims leaving all subsurface rights to be determined by the ordinary rules recognized in the mining districts and enforced by the statutes of congress. *Montana Min. Co. v. St. Louis Min., etc., Co.*, 204 U. S. 204, 217, 218, 51 L. Ed. 441.

Controversies arising between two companies as to their rights under their respective claims, which resulted in a compromise, by which a dividing line was established which extended downward to the center of the earth and one mining company agreed to convey to the other mining company all the mining ground and claim lying on the northwesterly side of this certain line, including all veins, lodes, etc., in consideration that the latter mining company agreed to convey to the former, with warranty against its own acts, all its right, title, and interest in and to the mining ground situated on the southeasterly side of the line, and in and to all ores, precious metals, veins, lodes, ledges, deposits, dips, spurs, or angles on, in, or under the land or mining ground, or any part thereof; held, that the conclusion is irresistible that the line was to be extended downwards through the property in its course towards the center of the earth. *Richmond Min. Co. v. Eureka Min. Co.*, 103 U. S. 839, 842, 843, 846, 26 L. Ed. 557.

There was a conflict as to area claimed by applicants for a patent which terminated in adverse proceedings in the land office, and the entering into a compromise agreement by which a dividing line between the parties were drawn at right angles with the general course of the lode, and patents were issued in accordance with the aforesaid agreement which fixed the rights of the parties at length on the lode and so involved the extralateral right as between them, thereby estopping either party from asserting any right to the ore body on the adverse side of the established line. *Kennedy Min., etc., Co. v. Argonaut Min. Co.*, 189 U. S. 1, 6, 7, 47 L. Ed. 685. See, also, post, "Estoppel," XVI, A, 2.

**Right of way of grantor query.**—*Montana Min. Co. v. St. Louis Min., etc., Co.*, 204 U. S. 204, 218, 51 L. Ed. 441.

**98. Mineral lands excepted.**—*Shaw v. Kellogg*, 170 U. S. 312, 332, 42 L. Ed. 1050; *Colorado Coal, etc., Co. v. United*

*States*, 123 U. S. 307, 325, 31 L. Ed. 182; *McLaughlin v. United States*, 107 U. S. 526, 27 L. Ed. 621. See, also, *Polk v. Wendall*, 9 Cranch 87, 3 L. Ed. 665; *Minter v. Crommelin*, 18 How. 87, 15 L. Ed. 279; *Reichart v. Felps*, 6 Wall. 160, 18 L. Ed. 849; *Morton v. Nebraska*, 21 Wall. 660, 22 L. Ed. 639. See, generally, the title **PUBLIC LANDS**.

**99. Lands known to be mineral.**—*Shaw v. Kellogg*, 170 U. S. 312, 332, 42 L. Ed. 1050.

**Mines known to exist.**—The declaration of § 2392 of the Revised Statutes, touching the acquisition of title to mineral lands within the limits of town sites, that "no title shall be acquired" under the provisions relating to town sites, "to any mine of gold, silver, cinnabar or copper; or to any valid mining claim or possession held under existing laws," must be held, merely to prohibit the passage of title under the provisions of the town site laws to mines of gold, silver, cinnabar or copper, which are known to exist, on the issue of the town site patent, and to mining claims and mining possessions, in respect to which such proceedings have been taken under the law or the custom of miners, as to render them valid, creating a property right in the holder. *Davis v. Weibbold*, 139 U. S. 507, 518, 35 L. Ed. 238.

**Subsequent discovery of minerals.**—When the entry of a town site was had, and the patent issued, and the sale was made to the defendant of the lots held by him, if it was not known that there were any valuable mineral lands within the town site, the defendant cannot be deprived of the premises purchased and occupied by him because of a subsequent discovery of minerals in them and the issue of a patent to the discoverer. *Davis v. Weibbold*, 139 U. S. 507, 518, 35 L. Ed. 238. See, also, *Moran v. Horsky*, 178 U. S. 205, 44 L. Ed. 1033.

**Circumstances showing existence of known mines.**—If a mining patent states any initiatory steps in acquiring title which antedate the title of a town site, that may suffice, in an action at law, to show that the existence of mines was known at the time the patent for the town site was issued. In the absence of such statement, the development and working of a mine would be a controlling fact; so also, perhaps, would be the location of the claim patented, and notice thereof required by law, or the custom of miners. *Davis v. Weibbold*, 139 U. S. 507, 526, 35 L. Ed. 238.



be valuable for its minerals of gold, silver, cinnabar, or copper can be obtained under the pre-emption or homestead laws or the town-site laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands, except in the states of Michigan, Wisconsin, Minnesota, Missouri and Kansas.<sup>1</sup> The exceptions of mineral lands from pre-emption and settlement and from grants to states for schools, etc., are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant.<sup>2</sup> If the mineral is subsequently discovered, it will

**1. Land known to be valuable for minerals.**—*Deffeback v. Hawke*, 115 U. S. 392, 404, 29 L. Ed. 423; *Colorado Coal, etc., Co. v. United States*, 123 U. S. 307, 327, 31 L. Ed. 182. See, also, *Moran v. Horsky*, 178 U. S. 205, 44 L. Ed. 1038.

"Whilst we hold that a title to known valuable mineral land cannot be acquired under the town site laws, and, therefore, could not be acquired to the land in controversy under the entry of the town site of Deadwood by the probate judge of the county in which that town is situated, we do not wish to be understood as expressing any opinion against the validity of the entry, so far as it affected property other than mineral lands, if there were any such at the time of the entry. The acts of congress relating to town sites recognize the possession of mining claims within their limits; and in *Steel v. Smelting Co.*, 106 U. S. 447, 449, 27 L. Ed. 226, we said that 'land embraced within a town site on the public domain, when unoccupied, is not exempt from location and sale for mining purposes; its exemption is only from settlement and sale under the pre-emption laws of the United States. Some of the most valuable mines in the country are within the limits of incorporated cities, which have grown up on what was, at its first settlement, part of the public domain; and many of such mines were located and patented after a regular municipal government had been established. Such is the case with some of the famous mines of Virginia City, in Nevada. Indeed, the discovery of a rich mine in any quarter is usually followed by a large settlement in its immediate neighborhood, and the consequent organization of some form of local government for the protection of its members.' It would seem therefore, that the entry of a town site, even though within its limits mineral lands are found, would be as important to the occupants of other lands as if no mineral lands existed. Nor do we see any injury resulting therefrom, nor any departure from the policy of the government, the entry and the patent being inoperative as to all lands known at the time to be valuable for their minerals, or discovered to be such before their occupation or improvement for residences or business under the town site title." *Deffeback v. Hawke*, 115 U. S. 392, 406, 29 L. Ed. 423.

**2. Sufficient to justify exploitation.**—*Davis v. Weibbold*, 139 U. S. 507, 519, 35 L. Ed. 238; *Deffeback v. Hawke*, 115 U. S. 392, 404, 29 L. Ed. 423. See, also, *quære* in *McLaughlin v. United States*, 107 U. S. 526, 528, 27 L. Ed. 621.

"To constitute the exemption contemplated by the pre-emption act under the head of 'known mines,' there should be upon the land ascertained coal deposits of such an extent and value as to make the land more valuable to be worked as a coal mine, under the conditions existing at the time, than for merely agricultural purposes." *Colorado Coal, etc., Co. v. United States*, 123 U. S. 307, 328, 31 L. Ed. 182; *Davis v. Weibbold*, 139 U. S. 507, 524, 35 L. Ed. 238. See ante, "Mineral Lands," I, A.

"It would seem from this uniform construction of that department of the government specially intrusted with supervision of proceedings required for the alienation of the public lands, including those that embrace minerals, and also of the courts of the mining states, federal and state, whose attention has been called to the subject, that the exception of mineral lands from grant in the acts of congress should be considered to apply only to such lands as were at the time of the grant known to be so valuable for their minerals as to justify expenditure for their extraction. The grant or patent, when issued, would thus be held to carry with it the determination of the proper authorities that the land patented was not subject to the exception stated. There has been no direct adjudication upon this point by this court, but this conclusion is a legitimate inference from several of its decisions. It was implied in the opinion in *Deffeback v. Hawke*, 115 U. S. 392, 29 L. Ed. 423, already referred to, and in the cases of the *Colorado Coal, etc., Co. v. United States*, 123 U. S. 307, 328, 31 L. Ed. 182, and *United States v. Iron Silver Min. Co.*, 128 U. S. 673, 683, 32 L. Ed. 571." *Davis v. Weibbold*, 139 U. S. 507, 524, 35 L. Ed. 238. See, also, *Dower v. Richards*, 151 U. S. 658, 663, 38 L. Ed. 305.

**Surface indications.**—*Colorado Coal, etc., Co. v. United States*, 123 U. S. 307, 328, 31 L. Ed. 182.

"It is not sufficient, in our opinion, to constitute 'known mines' of coal, within the meaning of the statute, that there should merely be indications of coal beds

pass absolutely to the grantee.<sup>3</sup> The laws of congress provide that valuable mineral deposits in lands of the United States shall be open to exploration and purchase. They do not provide that such mineral deposits in lands which have ceased to be public, and become the property of private individuals, can be patented under any proceedings before the land department, or otherwise. Proceedings for the acquisition of title to a mining claim within a town site, commenced before the issue of a town-site patent, could undoubtedly be prosecuted to completion afterwards and the right initiated by the location of the mining claim would not be defeated by a subsequent conveyance of the title to the land in which the mining claim was situated. But no jurisdiction exists under the laws of the United States to grant a patent for a mine on lands owned by private individuals.<sup>4</sup>

2. **RAILROAD GRANTS.**—It was decided that lands known to be mineral were excepted from the grants under the Pacific Railroad acts<sup>5</sup> and later decided that mineral lands were excepted, whether known or unknown at the time of the

or coal fields of greater or less extent and of greater or less value, as shown by outcroppings." *Colorado Coal, etc., Co. v. United States*, 123 U. S. 307, 328, 31 L. Ed. 182.

3. **Mineral subsequently discovered.**—*Shaw v. Kellogg*, 170 U. S. 312, 333, 42 L. Ed. 1050, explaining and reconciling *Barden v. Northern Pac. R. Co.*, 154 U. S. 288, 38 L. Ed. 992. See, also, *quære* in *McLaughlin v. United States*, 107 U. S. 526, 528, 27 L. Ed. 621.

As was said in *Deffebach v. Hawke*, 115 U. S. 392, 404, 29 L. Ed. 423, where this matter was considered: "We also say lands known at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which, years afterwards, rich deposits of mineral may be discovered. It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and patented by the government under the pre-emption laws, may be found, years after the patent has been issued, to contain valuable minerals. Indeed, this has often happened. We, therefore, use the term known to be valuable at the time of sale, to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued." See, also, *Colorado Coal, etc., Co. v. United States*, 123 U. S. 307, 31 L. Ed. 182; *Shaw v. Kellogg*, 170 U. S. 312, 333, 42 L. Ed. 1050.

In *Deffebach v. Hawke*, 115 U. S. 392, 29 L. Ed. 423, the mining patentee's rights antedated those of the occupants under the town site law, and wherever such is the case his rights will be enforced against the pretensions of the town site holder; but where the latter has acquired his rights in advance of the discovery of any mines and the initiation of proceedings for the acquisition of their title or possession, his rights will be deemed superior to those of the mining claimant.

*Davis v. Weibbold*, 139 U. S. 507, 526, 35 L. Ed. 238.

"Whenever \* \* \* mines are found in lands belonging to the United States, whether within or without town sites, they may be claimed and worked, provided existing rights of others, from prior occupation, are not interfered with." *Steel v. Smelting Co.*, 106 U. S. 447, 27 L. Ed. 226; *Davis v. Weibbold*, 139 U. S. 507, 528, 35 L. Ed. 238.

"It was in reference to mines in unoccupied public lands in unpatented town sites that the language in *Steel v. Smelting Co.*, 106 U. S. 447, 27 L. Ed. 226, was used, and to them and to mines in public lands in patented town sites outside of the limits of the patent it is only applicable." *Davis v. Weibbold*, 139 U. S. 507, 529, 35 L. Ed. 238.

4. **When title has been acquired.**—*Davis v. Weibbold*, 139 U. S. 507, 528, 35 L. Ed. 238.

5. **Land known to be mineral.**—A patent was made under the acts of congress granting to the Union Pacific, Central Pacific, and Western Pacific Railroad Companies the alternate sections of public land within certain limits on each side of their respective roads, and authorizing the issue of patents for the same when the work should be done and the sections ascertained. There were excepted out of this grant, among others, such sections or parts of sections as were mineral lands. Held, that the said grant cannot contain lands known to be mineral when the patent was issued. *McLaughlin v. United States*, 107 U. S. 526, 27 L. Ed. 621. See, generally, the titles **PUBLIC LANDS; RAILROADS.**

**Improvements.**—The improvements of bona fide settlers on land returned or denominated mineral lands, and the timber necessary to support the miners' improvements, and any other lawful claim, are unaffected by the grant to the Central Pacific Railroad made in 1866. Of course, this means any honest claim evidenced by improvements or other acts of possession.



grant.<sup>6</sup> As to what are mineral lands within the meaning of the federal statutes, see ante, "Mineral Lands," I, A.

3. **SCHOOL LANDS.**—When the state of Michigan was admitted into the Union, it was upon the condition that every section numbered sixteen in every township of the public lands, and where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, should be granted to the state for the use of schools. Though land which contained salt springs or lead mines, was reserved to the United States in the sale of other lands no such reservation was made in the appropriation of section sixteen for schools.<sup>7</sup> When title to school lands has become absolute, no rights can be acquired to them.<sup>8</sup>

*Broder v. Water Co.*, 101 U. S. 274, 277, 25 L. Ed. 790.

6. **Whether known or unknown.**—In construing the act of July 2, 1864, which granted public land to the Northern Pacific Railroad Company the court said: "It seems to us as plain as language can make it that the intention of congress was to exclude from the grant actual mineral lands, whether known or unknown and not merely such as were at the time known to be mineral." And further the court said: "Mineral lands were not conveyed, but by the grant itself and the subsequent resolution of congress cited were specifically reserved to the United States and excepted from the operations of the grant. Therefore, they were not to be located at all, and if in fact located they could not pass under the grant." *Barden v. Northern Pac. R. Co.*, 154 U. S. 288, 316, 38 L. Ed. 992, distinguishing *Davis v. Webbald*, 139 U. S. 507, 35 L. Ed. 238; *Deffebach v. Hawke*, 115 U. S. 392, 29 L. Ed. 423; *St. Paul, etc., R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1, 19, 35 L. Ed. 77; *Deseret Salt Co. v. Tarpey*, 142 U. S. 241, 247, 35 L. Ed. 999. See, also, *Toltec Ranch Co. v. Cook*, 191 U. S. 532, 541, 48 L. Ed. 291; *Adams v. Henderson*, 168 U. S. 573, 42 L. Ed. 584. See, also, *quære* in *McLaughlin v. United States*, 107 U. S. 526, 528, 27 L. Ed. 621.

In *Northern Pac. R. Co. v. Sanders*, 166 U. S. 620, 41 L. Ed. 1139, the lands in controversy were claimed as mineral lands, and applications for entry of them as such were pending in the land department. The court had held in *Barden v. Northern Pac. R. Co.*, 154 U. S. 288, 38 L. Ed. 992, that mineral lands did not pass under the grant to the railroad company, and that whether they were known or not known to be mineral lands, at the time of the filing of the map of definite location, was immaterial. Of course, it followed that whether they were known or not known to be mineral lands at the time of the filing of the map of definite location was immaterial. *Nelson v. Northern Pac. R. Co.*, 188 U. S. 108, 152, 47 L. Ed. 406.

**Valid claim.**—Where an application was made in due form and in compliance with ch. 6, U. S. Rev. Stat., title XXXII, relating to "mineral lands and mining resources" in 1880-1881, it was held that this

constituted a valid "claim" within the meaning of the act of July 2d, 1864, § 3 (13 Stat. at L. 365, ch. 217), granting lands to aid in the construction of a railroad line on the northern route of the Pacific coast "all lands not sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed." *Northern Pac. R. Co. v. Sanders*, 166 U. S. 620, 622, 41 L. Ed. 1139.

**Grant to aid railroad in Arkansas and Missouri.**—The acts of Feb. 9th, 1853, and of July 28th, 1866, which makes certain grants to aid in building a railroad in Arkansas and Missouri except therefrom all mineral lands within their respective limits and also make patents necessary for the transfer of title from the United States. In the opinion it is said this shows an intention to take advantage of the breach of the conditions of the original grant so far as is necessary to reassert title to and reclaim possession of any mineral lands that may have been included in that grant, and to change the mode of passing title but it does not go further. *St. Louis, etc., R. Co. v. McGee*, 115 U. S. 469, 475, 29 L. Ed. 446.

7. **Lands in Michigan.**—*Cooper v. Roberts*, 18 How. 173, 15 L. Ed. 338. See, generally, the titles PUBLIC LANDS; SCHOOLS.

The act of March 1, 1847 (9 Stats. at Large 146), providing for the sale of mineral lands, does not include section sixteen, which remains subject to the compact with Michigan. *Cooper v. Roberts*, 18 How. 173, 15 L. Ed. 338.

Under the operation of the act of March 1st, 1847 (9 Stats. at Large 146), and also the act of September, 1850 (9 Stats. at Large 472), a lease made in 1845, by the secretary of war, of some mineral lands (including section sixteen), did not confer a right upon the mining company, who were the assignees of the lease, to enter their lands and obtain a patent for section sixteen. *Cooper v. Roberts*, 18 How. 173, 15 L. Ed. 338.

8. **When title in state had become absolute.**—Where the title of the state, to the demanded premises, which was a part of a school section, had become absolute, May 19, 1866, a mining company could, under the act of July 26, 1866 (14 Stat.



4. **LOUISIANA TERRITORY.**—The policy of the government, since the acquisition of the Northwest Territory and the inauguration of our land system, to reserve salt springs from sale has been uniform. This policy has been applied to the "Louisiana Territory," acquired by us from France in 1803, and probably would apply to the territory of Nebraska, on general principles. Whether or not, it does apply under the act of July 22d, 1854, "to establish the offices of surveyor-general of New Mexico, Kansas, and Nebraska." It applies at least so far as to render void an entry where the salines at the time had been noted on the field books, were palpable to the eye, and were not first discovered after entry.<sup>9</sup>

**B. Validity and Priority**—1. **IN GENERAL.**—While the amount of land which may be embraced within a location is limited, more than one location may be included within a claim and a patent may issue therefor.<sup>10</sup> While the government may bring suit to cancel or annul a patent,<sup>11</sup> where it has issued a

253), acquire no right to them. *Water & Min. Co. v. Bugbey*, 96 U. S. 165, 24 L. Ed. 621.

**School lands in California.**—The act of March 3, 1853 (10 Stat. 244), granted for school purposes to California the public lands within sections 16 and 36 in each congressional township in that state, except so much of them whereon an actual settlement had been made before they were surveyed, and the settler claimed the right of pre-emption within three months after the return of the plats of the surveys to the local land office. If he failed to make good his claim, the title to the land embraced by his settlement vested in the state as of the date of the completion of the surveys. *Water & Min. Co. v. Bugbey*, 96 U. S. 165, 24 L. Ed. 621.

**Coal lands.**—Where the land in controversy was mineral land within the meaning of the act of March 3, 1853, 10 Stat. 247, under which the state of California undertook to acquire title, it was held that the land was not open to the state for selection. *Mullan v. United States*, 118 U. S. 271, 278, 30 L. Ed. 170, citing *Mining Co. v. Consolidated Min. Co.*, 102 U. S. 167, 26 L. Ed. 126.

9. *Morton v. Nebraska*, 21 Wall. 660, 22 L. Ed. 639. See post, "Spanish and Mexican Mining Laws and Grants," XVII. And see the title **PUBLIC LANDS**.

10. **Several locations.**—*Smelting Co. v. Kemp*, 104 U. S. 636, 26 L. Ed. 875; *Tucker v. Masser*, 113 U. S. 203, 204, 28 L. Ed. 979; *Reynolds v. Iron Silver Min. Co.*, 116 U. S. 687, 29 L. Ed. 774.

"The case of the defendants rests on the correctness of their assertion that a patent cannot issue for a mining claim which embraces over one hundred and sixty acres. Assuming that the words 'more or less,' accompanying the statement of the acres contained in the claim are to be disregarded, and that the patent is construed as for one hundred and sixty-four acres and a fraction of an acre, there is nothing in the acts of congress which prohibits the issue of a patent for that amount. They are silent as to the extent of a mining claim. They speak of locations and limit the extent of mining

ground which an individual or an association of individuals may embrace in one of them. There is nothing in the reason of the thing, or in the language of the acts, which prevents an individual from acquiring by purchase the ground located by others and adding it to his own. The difficulty with the court below, as seen in its charge, evidently arose from confounding 'location' and 'mining claim,' as though the two terms always represent the same thing, whereas they often mean very different things." *Smelting Co. v. Kemp*, 104 U. S. 636, 648, 26 L. Ed. 875. See ante, "Amount of Land Which May Be Included," III, E, 5.

11. **Cancellation of patent.**—"The government has the same right to demand a cancellation of the conveyances of the United States when obtained by false and fraudulent representations as a private individual when a conveyance of his lands is obtained in like manner. In this respect the United States, as a landed proprietor, stand upon the same footing with the private citizen. The burden of proof in such cases is upon the government. The presumption attending the patent, even when directly assailed, that it was issued upon sufficient evidence that the law had been complied with by the officers of the government charged with the alienation of public lands, can only be overcome by clear and convincing proof." *United States v. Iron Silver Min. Co.*, 128 U. S. 673, 676, 32 L. Ed. 571, citing and approving *Maxwell Land-Grant Case*, 121 U. S. 325, 30 L. Ed. 949.

**Annulment of title.**—In the trial of a case to set aside a listing of coal lands to the state of California it was held that since the land in controversy was in fact listed to the state by the proper officers of the government, the selection can be vacated and the titles under it annulled in a suit in equity brought by the United States directly for that purpose. *Mullan v. United States*, 118 U. S. 271, 278, 30 L. Ed. 170.

**Patent fraudulently obtained by corporation.**—Where a private corporation fraudulently obtained patents to certain vacant coal lands of the United States in

patent it cannot by the authority of its own officers, invalidate that patent by the issuing of a second one for the same property.<sup>12</sup> Nor can such officers enlarge or diminish the rights which a patent carries with it.<sup>13</sup>

**Priority of the United States.**—The legislative act of Nevada, of Feb. 13, 1867, recognized the validity of the claim of the United States to the mineral lands within that state.<sup>14</sup>

2. **DISPOSITION OF LEAD MINES**—a. *In General.*—The land containing lead mines, in the districts made by the act of 1834, are not subject to pre-emption and sale under any of the existing laws of congress.<sup>15</sup> The 4th section of the act of 1834 does in no way repeal any part of the 5th section of the act of the 3d of March, 1807, by which the lands containing lead mines were reserved for the future disposal of the United States, by which grants for lead-mines tracts, discovered to be such before they may be bought from the United States, are declared to be fraudulent and null, and which authorized the president to lease any lead mine which had been, or might be, discovered in the Indiana territory, for a term not exceeding five years.<sup>16</sup> The act of congress entitled "An act to create additional land districts in the states of Illinois and Missouri, and in the territory north of the state of Illinois," approved June 26th, 1834, does not require the president of the United States to cause to be offered for sale the public lands containing lead mines situated in the land districts created by said act.<sup>17</sup> The lands containing lead mines in the Indiana territory, or in that part of it made into new land districts by the act of the 26th of June, 1834, was not subject, under any of the pre-emption laws which have been passed by congress, to a pre-emption by settlers upon the public lands.<sup>18</sup>

violation of §§ 2347, 2348, 2350, of the Revised Statutes, it was held that the defendant corporation need not be reimbursed for the amount expended by it in procuring the legal title to such lands before it could be required to surrender them. *United States v. Trinidad Coal, etc., Co.*, 137 U. S. 160, 171, 34 L. Ed. 640.

12. **Issue of second patent.**—*Iron Silver Min. Co. v. Campbell*, 135 U. S. 286, 292, 293, 34 L. Ed. 155.

13. **Enlargement of diminution of rights.**—The patent of a mining claim carries with it such rights to the land which includes the claim as the law confers, and no others, and these rights can neither be enlarged nor diminished by any reservations of the officers of the land department, resting for their fitness only upon the judgment of those officers. *Davis v. Weibbold*, 139 U. S. 507, 528, 35 L. Ed. 238; *Deffeback v. Hawke*, 115 U. S. 392, 406, 29 L. Ed. 423.

"The position that the patent to the plaintiff should have contained a reservation excluding from its operation buildings and improvements not belonging to him, and all rights necessary or proper to the possession and enjoyment of the same, has no support in any legislation of congress." *Deffeback v. Hawke*, 115 U. S. 392, 406, 29 L. Ed. 423.

**Final certificate.**—A final certificate issued after the submission of final proof and payment of the purchase price, where such is required, has been repeatedly held to be for many purposes the equivalent of a patent. *Brown v. Gurney*, 201 U. S. 184, 193, 50 L. Ed. 717. See ante, "Obtaining and Perfecting Title," III, J.

14. **Minerals in Nevada.**—*Heydenfeldt v. Daney Gold, etc., Min. Co.*, 93 U. S. 634, 23 L. Ed. 995.

A qualified person, whose settlement on mineral lands in Nevada which embrace a part of either of §§ 16, 36, was prior to the survey of them by the United States, and who, on complying with the requirements of the act approved July 26, 1866 (14 Stat. 251), received a patent for such lands from the United States, has a better title thereto than has the holder of an older patent therefor from the state. *Heydenfeldt v. Daney Gold, etc., Min. Co.*, 93 U. S. 634, 23 L. Ed. 995. See ante, "School Lands," VI, A, 3.

15. **Not subject to pre-emption and sale.**—*United States v. Gear*, 3 How. 120, 11 L. Ed. 523.

16. **Act of 1807 not repealed.**—*United States v. Gear*, 3 How. 120, 11 L. Ed. 523, citing *Wilcox v. McConnell*, 13 Pet. 498, 513, 10 L. Ed. 264.

17. **Sale of land containing lead mines.**—*United States v. Gear*, 3 How. 120, 11 L. Ed. 523.

The said act does not require the president to cause said lands, containing lead mines, to be sold, because the 5th section of the act of the March 3d, 1807, entitled "An act making provision for the disposal of the public lands situated between the United States military tract and the Connecticut reserve, and for other purposes," is still in full force. *United States v. Gear*, 3 How. 120, 11 L. Ed. 523.

18. **Not subject to pre-emption.**—*United States v. Gear*, 3 How. 120, 11 L. Ed. 523.



b. *Leasing of Lead Mines.*—As to leasing of lead mines, see post, "Contracts and Leases," X.

3. **COLLATERAL ATTACK.**—Patents are not open to collateral attack,<sup>19</sup> unless there is no jurisdiction to grant them.

The patents of the land department when assailed collaterally in actions at law, assert their unassailability in the strongest terms. They are conclusive in such actions of all matters of fact necessary to their issue, where the department had jurisdiction to act upon such matters, and to determine them; but if the lands patented were not at the time public property, the department had no jurisdiction to transfer the land, and their attempted conveyance by patent is inoperative and void, no matter with what seeming regularity the forms of law have been observed.<sup>20</sup>

## VII. Ownership of Vein or Lode in Placer Mine.

**A. In General.**—The applicant for a placer patent who is at the time in possession of a vein or lode included within its boundaries should state such fact.<sup>21</sup>

**B. Right to Prospect and Obtain Title on Prior Location.**—One party cannot go upon a prior valid placer location to prospect for unknown lodes and obtain title to lode claims thereafter discovered and located in this manner, unless the placer owner has abandoned his claim, or waives the trespass. Because no one can initiate a right to a placer claim by means of a trespass, as such

19. **Collateral attack.**—*Steel v. Smelting Co.*, 106 U. S. 447, 27 L. Ed. 226; *Smelting Co. v. Kemp*, 104 U. S. 636, 26 L. Ed. 875; *Brown v. Gurney*, 201 U. S. 184, 193, 50 L. Ed. 717; *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 182 U. S. 499, 510, 45 L. Ed. 1200.

Where an ejectment suit was brought by a party claiming under a patent from the government, and the defendant asserting his rights to the said claim sets forth that he has both the prior right and actual possession to the premises, and also, that the patent was obtained from the government by fraud and bribery, it was held, that the validity of a patent from the government cannot be assailed collaterally because false and perjured testimony may have been used to secure the patent from the land department. *Steel v. Smelting Co.*, 106 U. S. 447, 27 L. Ed. 226.

20. *Davis v. Weibbold*, 139 U. S. 507, 529, 530, 35 L. Ed. 238.

21. **Vein or lode in placer claim.**—When one applies for a placer patent, who is at the time in the possession of a vein or lode included within its boundaries, he must state the fact, and then, on payment of the sum required for a vein claim and twenty-five feet on each side of it at \$5.00 an acre, and \$2.50 an acre for the placer claim, a patent will issue to him covering both claim and lode. Rev. Stat., § 2333. *Noyes v. Mantle*, 127 U. S. 348, 352, 32 L. Ed. 168; *Reynolds v. Iron Silver Min. Co.*, 116 U. S. 687, 29 L. Ed. 774; *Iron Silver Min. Co. v. Reynolds*, 124 U. S. 374, 31 L. Ed. 466.

Section 2333 can have no application to lodes or veins within the boundaries of a placer claim which have been previously located under the laws of the United States, and are in possession of the loca-

tors or their assigns; for, as already said, such locations, when perfected under the law, are the property of the locators, or parties to whom the locators have conveyed their interest. It is not, therefore, subject to the disposal of the government. The section can apply only to lodes or veins not taken up and located so as to become the property of others. *Noyes v. Mantle*, 127 U. S. 348, 353, 32 L. Ed. 168; *Iron Silver Min. Co. v. Mike & Starr, etc.*, Min. Co., 143 U. S. 394, 400, 36 L. Ed. 201; *Reynolds v. Iron Silver Min. Co.*, 116 U. S. 687, 29 L. Ed. 774; *Iron Silver Min. Co. v. Reynolds*, 124 U. S. 374, 31 L. Ed. 466; *Sullivan v. Iron Silver Min. Co.*, 143 U. S. 431, 433, 36 L. Ed. 214; *Sullivan v. Iron Silver Min. Co.*, 109 U. S. 550, 27 L. Ed. 1028. See, also, *Belk v. Meagher*, 104 U. S. 279, 283, 26 L. Ed. 735.

**Subsequent grant of patent.**—A decree holding that the title to a lode mining claim had passed to the grantors of the plaintiffs by their discovery and location under the statute and that the subsequent patent to the defendant of a placer claim did not affect their title to the lode claim for that title, was not then subject to the disposition of the government, was held sound in the case of *Noyes v. Mantle*, 127 U. S. 348, 32 L. Ed. 168.

**"Blanket vein."**—Title to portions of a horizontal vein, or deposit "blanket" vein, as it is generally called, may be acquired under the section concerning vein, lodes, etc. *Iron Silver Min. Co. v. Mike & Starr, etc.*, Min., Co., 143 U. S. 394, 400, 36 L. Ed. 201.

**Placer and lode patents distinguished.**—The price per acre to be paid to the government when patents are obtained for placer claims and for lode claims are different. And the rights conferred by the respective patents and the conditions



placer locator is entitled to the exclusive possession and enjoyment under the United States Revised Statutes, §§ 2322, 2329 (U. S. Comp. Stat. 1901, pp. 1425, 1432) and as it is provided by § 2333 (U. S. Comp. Stat. 1901, p. 1433), that in an application for a placer patent the applicant shall include any vein or lode of which he has possession, but if no vein or lode within the placer claim is known to exist at the time the patent is issued, then the patentee takes title to any which may be subsequently discovered.<sup>22</sup>

**C. Where Existence Is Unknown.**—Where the existence of a vein or lode in a placer claim is not known at the time of the application for a patent, that instrument will convey all valuable mineral and other deposits within its boundaries.<sup>23</sup>

**D. Where Existence Is Known.**—Where a vein or lode is known to exist at the time within the boundaries of the placer claim, the application for a patent therefor, which does not also include an application for the vein or lode, will be construed as a conclusive declaration that the claimant of the placer claim has no right of possession to the vein or lode.<sup>24</sup>

**E. Meaning of Knowledge.**—A known vein or lode, within the meaning of § 2333, Rev. Stat., must either have been known to the applicant for the placer patent,<sup>25</sup> or imputed.

“Where a location of a vein or lode has been made under the law, and its boundaries have been specifically marked on the surface, so as to be readily traced, and notice of the location is recorded in the usual books of record within the district, we think it may safely be said that the vein or lode is known to exist, although personal knowledge of the fact may not be possessed by the applicant for a patent of a placer claim. The information which the law requires the locator to give to the public must be deemed sufficient to acquaint

upon which they are held are different. Rev. Stat., §§ 2320, 2322, 2325, 2333. *Smelting Co. v. Kemp*, 104 U. S. 636, 651, 26 L. Ed. 875; *Iron Silver Min. Co. v. Reynolds*, 124 U. S. 374, 31 L. Ed. 466; *United States v. Iron Silver Min. Co.*, 128 U. S. 673, 680, 32 L. Ed. 571.

**22. Prior valid placer location.**—*Clipper Min. Co. v. Eli Min., etc., Co.*, 194 U. S. 220, 228, 229, 230, 48 L. Ed. 944. See, also, *Erhardt v. Boaro*, 113 U. S. 527, 28 L. Ed. 1113.

**23. All valuable minerals.**—*Noyes v. Mantle*, 127 U. S. 348, 352, 32 L. Ed. 168; *Reynolds v. Iron Silver Min. Co.*, 116 U. S. 687, 29 L. Ed. 774; *Iron Silver Min. Co. v. Reynolds*, 124 U. S. 374, 31 L. Ed. 466; *Sullivan v. Iron Silver Min. Co.*, 143 U. S. 431, 36 L. Ed. 214; *United States v. Iron Silver Min. Co.*, 128 U. S. 673, 680, 32 L. Ed. 571.

**24. Failure to include known vein in application.**—*Noyes v. Mantle*, 127 U. S. 348, 352, 32 L. Ed. 168; *Reynolds v. Iron Silver Min. Co.*, 116 U. S. 687, 29 L. Ed. 774; *Iron Silver Min. Co. v. Reynolds*, 124 U. S. 374, 31 L. Ed. 466; *United States v. Iron Silver Min. Co.*, 128 U. S. 673, 680, 32 L. Ed. 571.

Where the applicant for a placer claim knows of the existence of a lode or vein therein, the title remains in the United States and he has no such interest in it as authorized him to disturb anyone else in the peaceable possession and mining of the vein or lode whether defendant had title or is a mere trespasser. *Reynolds v. Iron Silver Min. Co.*, 116 U. S. 687, 29 L.

Ed. 774; *Iron Silver Min. Co. v. Reynolds*, 124 U. S. 374, 31 L. Ed. 466.

An action was brought by the patentee of a placer mining claim to obtain possession of a lode or vein or deposit of mineral ore in rock. The answer alleged that at the time of location of said placer claim, and at time the patentee's application was filed, he knew a lode or vein existed, and did not include in his application any claim whatever for a patent of or to said lode or vein, within its boundaries aforesaid, and the fact was well pleaded, according to § 2333 of the Revised Statutes, which precludes him from having any right to the lode or vein. *Sullivan v. Iron Silver Min. Co.*, 109 U. S. 550, 554, 555, 27 L. Ed. 1028.

**Patents as evidence.**—Where a patent was issued for a vein within the limits of a placer claim patented prior thereto, the issue of the patent for the vein does not raise a conclusive presumption of the existence of the vein and the knowledge thereof. *Iron Silver Min. Co. v. Campbell*, 135 U. S. 286, 34 L. Ed. 155.

**25. Known veins or lodes.**—*Iron Silver Min. Co. v. Mike & Starr, etc., Min. Co.*, 143 U. S. 394, 402, 36 L. Ed. 201.

“It is not enough that there may have been some indications by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as ‘known’ veins or lodes.” *United States v. Iron Silver Min. Co.*, 128 U. S. 673, 683, 32 L. Ed. 571; *Iron Silver Min. Co. v. Mike & Starr, etc., Min. Co.*,

the applicant with the existence of the vein or lode."<sup>26</sup> Or the existence of the vein or lode must be known to the community generally, or else discovered by workings, and obvious to any one making a reasonable and fair inspection of the premises for the purpose of obtaining title from the government.<sup>27</sup> To justify their designation as "known" veins or lodes, the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation, according to Rev. Stat., §§ 2320-2325.<sup>28</sup> Mere speculation and belief<sup>29</sup> or the intent to acquire a vein or lode which may

143 U. S. 394, 404, 36 L. Ed. 201; *Chrisman v. Miller*, 197 U. S. 313, 321, 49 L. Ed. 770.

"It is undoubtedly true, that not every crevice in the rocks, nor every outcropping on the surface, which suggests the possibility of mineral, or which may, on subsequent exploration, be found to develop ore of great value, can be adjudged a known vein or lode within the meaning of the statute." *Iron Silver Min. Co. v. Mike & Starr, etc.*, Min. Co., 143 U. S. 394, 404, 36 L. Ed. 201.

"Knowledge of the existence of a lode or vein within the boundaries of a placer claim may be obtained from its outcrop within such boundaries; or from the developments of the placer claim previous to the application for a patent; or by the tracing of the vein from another lode; or perhaps from the general condition and developments of mining ground adjoining the placer claim. It may also be obtained from the information of others who have made the necessary explorations to ascertain the fact, and perhaps in other ways. We do not speak of the sufficiency of any of these modes, but mention them merely to show that such knowledge may be had without making hopes and beliefs on the subject its equivalent. As well observed by the court, when the case was here before, it is better that all questions as to what kind of evidence is necessary, and we may add sufficient, to prove the knowledge required by the statute, should be settled as they arise." *Iron Silver Min. Co. v. Reynolds*, 124 U. S. 374, 384, 31 L. Ed. 466. See, also, *Reynolds v. Iron Silver Min. Co.*, 116 U. S. 687, 29 L. Ed. 774; *Noyes v. Mantle*, 127 U. S. 348, 353, 32 L. Ed. 168; *Dahl v. Raunheim*, 132 U. S. 260, 262, 33 L. Ed. 324.

In an action for the determination of what constitutes a "known" vein, a civil engineer testified as to the tunnel, describing the various fissures and veins, and produced before the jury some ore taken from the said vein, and the jury were also advised as to its dimensions, and as to the actual results of several assays. It was held, that the finding of the jury that this was a "known" vein within the scope of § 2333 was based upon sufficient testimony, and cannot be disturbed. *Iron Silver Min. Co. v. Mike & Starr, etc.*, Min. Co., 143 U. S. 394, 405, 406, 36 L. Ed. 201.

The term "known vein" as named in § 2333 of the Revised Statutes is not synonymous with "located vein," but the term

refers to a vein or lode whose existence is known, as contradistinguished from one which has been appropriated by location. *Noyes v. Mantle*, 127 U. S. 348, 353, 32 L. Ed. 168; *Iron Silver Min. Co. v. Mike & Starr, etc.*, Min. Co., 143 U. S. 394, 400, 36 L. Ed. 201. See, also, *Sullivan v. Iron Silver Min. Co.*, 143 U. S. 431, 36 L. Ed. 214. See ante, "In General," IV, A.

26. *Noyes v. Mantle*, 127 U. S. 348, 354, 32 L. Ed. 168. See, also, *Iron Silver Min. Co. v. Reynolds*, 124 U. S. 374, 383, 31 L. Ed. 466.

An applicant for a placer patent, if chargeable with notice of the existence of a tunnel underneath the surface of the ground, is also chargeable with notice of whatever a casual inspection of that tunnel would disclose. He would not be heard to say, I did not enter and examine this tunnel, and, therefore, know nothing of the veins apparent in it. *Iron Silver Min. Co. v. Mike & Starr, etc.*, Min. Co., 143 U. S. 394, 403, 36 L. Ed. 201.

27. **Reasonable and fair inspection.**—*Iron Silver Min. Co. v. Mike & Starr, etc.*, Min. Co., 143 U. S. 394, 402, 36 L. Ed. 201.

28. **Sufficient to justify exploitation.**—*Iron Silver Min. Co. v. Mike & Starr, etc.*, Min. Co., 143 U. S. 394, 404, 36 L. Ed. 201; *United States v. Iron Silver Min. Co.*, 128 U. S. 673, 683, 32 L. Ed. 571; *Chrisman v. Miller*, 197 U. S. 313, 321, 49 L. Ed. 770.

The amount of the ore, the facility for reaching and working it, as well as the product per ton, are all to be considered in determining whether the vein is one which justifies exploitation and working. *Iron Silver Min. Co. v. Mike & Starr, etc.*, Min. Co., 143 U. S. 394, 405, 36 L. Ed. 201.

29. **Speculation and belief.**—The purport of the evidence in an action of ejectment was that it was commonly believed that underlying all the country in that vicinity was a nearly horizontal vein or deposit; and that the parties who were instrumental in securing this placer patent shared in that belief, and obtained the patent with a view to thereafter developing such underlying vein. But the placer patentees had no knowledge in respect thereto up to the time the patent was obtained. It was merely a matter of speculation and belief, based on the fact that quite a number of shafts sunk elsewhere in the district had disclosed horizontal deposits of a particular kind of ore. It



or may not exist, does not constitute knowledge.<sup>30</sup>

**F. Time of Knowledge.**—The time at which the vein or lode within the placer must be known in order to be excepted from the grant of the patent is, by § 2333, the time at which the application is made. Its language is: "An application for a patent for such placer claim, which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim."<sup>31</sup>

### VIII. Right of Owners of Tunnels.

**A. In General.**—The owner of a tunnel never receives a patent for it. There is no provision in the statute for one, and none is in fact ever issued. No discovery of mineral is essential to create a tunnel right or to maintain possession of it. A tunnel is only a means of exploration. As the surface is free and open to exploration, so is the subsurface. The citizen needs no permit to explore on the surface of government land for mineral. Neither does he have to get one for exploration beneath the surface for like purpose. Nothing is said in § 2323 as to what must be done to secure a tunnel right. That is left to the miners' customs or the state statutes, and the statutes of Colorado provide for a location and the filing of a certificate of location.<sup>32</sup> The right to a vein discovered in a tunnel dates by nature back to the time of the location of the tunnel site, and the right of locating the claim to the vein arises upon its discovery in the tunnel.<sup>33</sup> Until a discovery is made there is no right to locate a claim in respect to the vein, and the time to determine where and how it shall be located arises only upon the discovery—whether such discovery be made on the surface or in the tunnel.<sup>34</sup> The right to this vein discovered in the tunnel is by the statute de-

was held that such a belief is not the knowledge required by § 2333 of the Revised Statutes. *Sullivan v. Iron Silver Min. Co.*, 143 U. S. 431, 435, 36 L. Ed. 214.

**30. Belief after examination.**—Section 2333 of the Revised Statutes excepts from the grant of a patent for a placer claim any vein or lode of quartz or other rock bearing gold, etc., "known to exist," the knowledge here spoken of by the statute is the acquiring of a patent with a knowledge of the existence of a vein or lode within the boundaries of the claim for which a patent is sought, not the effect of the intent of the party to acquire a lode which may or may not exist, of which he has no knowledge, and belief after the examination, in the existence of a lode, does not constitute knowledge of the fact. *Iron Silver Min. Co. v. Reynolds*, 124 U. S. 374, 384, 31 L. Ed. 466.

**31. Time of knowledge.**—*Iron Silver Min. Co. v. Mike & Starr, etc.*, Min. Co., 143 U. S. 394, 402, 36 L. Ed. 201; *Iron Silver Min. Co. v. Reynolds*, 124 U. S. 374, 31 L. Ed. 466; *United States v. Iron Silver Min. Co.*, 128 U. S. 673, 680, 32 L. Ed. 571.

"The exception from grant in each patent of any vein or lode of quartz or other rock in place bearing gold, silver, copper, cinnabar, lead, tin, or other valuable deposit, 'claimed or known to exist' at the date of the patent within the described premises, is in terms broader than the language of the statute under which the patents were issued. The exception of

the statute cannot be thus enlarged. The statute does not except veins or lodes 'claimed or known to exist,' but only such as are known to exist at the time the application is made for the patent, and not at the date of the patent." *United States v. Iron Silver Min. Co.*, 128 U. S. 673, 680, 32 L. Ed. 571.

On the trial of an action to quiet the title of a party to certain placer mining grounds, the court instructed the jury to the effect that if they believed that at the time of the plaintiff's application for a patent there was no known lode or vein within the boundaries of the premises claimed, their verdict should be for the plaintiff. The jury found a general verdict for the plaintiff, and it was held that they must be deemed to have found that no such lode as claimed by the defendant existed when the application of the plaintiff for a patent was filed. *Dahl v. Raunheim*, 132 U. S. 260, 262, 33 L. Ed. 324.

**32. Nature of tunnel rights.**—*Creede, etc., Mill. Co. v. Uinta Tunnel Min., etc.*, Co., 196 U. S. 337, 355, 49 L. Ed. 501.

**33. Right to vein and location.**—*Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.*, 167 U. S. 108, 113, 42 L. Ed. 96. See, also, *Campbell v. Ellet*, 167 U. S. 116, 118, 42 L. Ed. 101.

**34. Right arises upon discovery.**—*Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.*, 167 U. S. 108, 112, 42 L. Ed. 96, distinguishing *Erhardt v. Boaro*, 113 U. S. 527, 28 L. Ed. 1113. See, also, *Campbell v. Ellet*, 167 U. S. 116, 120, 42 L. Ed. 101.



clared to be "to the same extent as if discovered from the surface." If discovered from the surface, the discoverer might, under Rev. Stat. § 2320, claim "one thousand five hundred feet in length along the vein or lode." The clear import of the language is to give to the tunnel owner, discovering a vein in the tunnel, a right to appropriate fifteen hundred feet in length of that vein.<sup>35</sup>

**B. Necessity for Location upon the Surface.**—The discovery of the vein in the tunnel, worked according to the provisions of the statute, gives a right to the possession of the vein to the same length as if discovered from the surface, and a location on the surface is not essential to a continuance of that right.<sup>36</sup>

**C. Necessity for Adversing.**—Where a lode claimant applies for a patent to a location embracing a lode which has previously been discovered in the tunnel, the tunnel claimant will be compelled to adverse to protect his rights. A right in the particular lode enures to the tunnel proprietor immediately upon its discovery in the tunnel, which right is essentially adverse to the lode applicant.<sup>37</sup> The provisions of § 2325 of the Revised Statutes substantially are that when a person makes his application for a patent, if no adverse claim is filed within sixty days from publication of notice, it shall be assumed that the applicant is entitled to a patent and that no adverse claim exists. These provisions have no application where the owner of a tunnel has not discovered a vein and has no knowledge that his vein would cross the territory for which the patent is asked. The reason of this is that the obvious contemplation of the law in respect to these adverse proceedings is that there shall be a present, tangible and certain right and not a mere possibility.<sup>38</sup>

**35. Extent of right.**—*Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.*, 167 U. S. 108, 112, 42 L. Ed. 96; *Creede, etc., Mill. Co. v. Uinta Tunnel Min., etc., Co.*, 196 U. S. 337, 355, 49 L. Ed. 501. See, also, *Campbell v. Ellet*, 116 U. S. 116, 120, 42 L. Ed. 101.

The right of locating a claim to a vein discovered in a tunnel may be exercised by locating the claim the full length of 1,500 feet on either side of the tunnel, or in such proportion thereof on either side as the locator may desire. *Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.*, 167 U. S. 108, 113, 42 L. Ed. 96. See, also, *Campbell v. Ellet*, 167 U. S. 116, 120, 42 L. Ed. 101.

The fact that a tunnel site was 5,000 feet in length by 500 feet in width did not render the whole claim void; the location would be good to the extent of 3,000 feet at least. *Glacier, etc., Min. Co. v. Willis*, 127 U. S. 471, 32 L. Ed. 172. See, also, ante, "Amount of Land Which May Be Included," III, E, 5.

Where it was contended that the act passed by the territorial legislature of Colorado in 1861, *Mills Ann. Stats.*, § 3141, limits the right of the tunnel owner to veins discovered in the tunnel to 250 feet on each side of the tunnel, it was said by the court that if that section has not been in terms repealed by the legislature of Colorado, it was superseded by the legislation of congress as found in the Revised Statutes. *Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.*, 167 U. S. 108, 42 L. Ed. 96.

**36. Location on surface.**—*Campbell v. Ellet*, 167 U. S. 116, 120, 42 L. Ed. 101.

"We do not mean to hold that such

right of possession can be maintained without compliance with the provisions of the local statutes in reference to the record of the claim, or without posting in some suitable place, conveniently near to the place of discovery, a proper notice of the extent of the claim—in other words, without any practical location. For in this case notice was posted at the mouth of the tunnel, and no more suitable place can be suggested, and a proper notice was put on record in the office named in the statute." *Campbell v. Ellet*, 167 U. S. 116, 120, 42 L. Ed. 101.

**37. Lode previously discovered in tunnel.**—*Creede, etc., Mill. Co. v. Uinta Tunnel Min., etc., Co.*, 196 U. S. 337, 359, 49 L. Ed. 501, quoting *Lindley*, § 725.

**38. Prior to discovery of vein in tunnel.**—*Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.*, 167 U. S. 108, 115, 42 L. Ed. 96. See, also, *Campbell v. Ellet*, 167 U. S. 116, 120, 42 L. Ed. 101.

Where a surface lode claimant applies for a patent to a location where there has been no discovery of a lode or a vein in the tunnel, and it cannot be demonstrated that the lode will be cut by the tunnel bore, there is no necessity for an adverse claim. Adverse proceedings are only called for when one mineral claimant contests the right of another mineral claimant. A tunnel is not a mining claim but is only a means of exploration. And as the date of discovery of the vein in a tunnel dates back to the commencement of the tunnel he may claim a right to a vein discovered subsequent to the discovery of such vein by the owner of the patent as shown by the certificate of location. The failure to institute adverse

**D. Where Tunnel Intersects Prior Location.**—It has been held that under §§ 2322, 2323, and 2336, of the Revised Statutes, a tunnel could not be run across a prior location,<sup>39</sup> though there is a right of way for the convenient working of the mine.<sup>40</sup> The junior locator is not entitled to cross veins opening within the boundaries of the prior location nor to blind veins;<sup>41</sup> to wit, veins or lodes not appearing on the surface and not known to exist prior to the date of the location of the tunnel site;<sup>42</sup> nor to the ore taken out at the point of intersection.<sup>43</sup>

## IX. Water Rights.

**A. In General.**—On the mineral lands of the public domain in the Pacific states and territories, the doctrines of the common law, declaratory of the rights of riparian proprietors respecting the use of running waters, are inapplicable or applicable only in a very limited extent to the necessities of miners, and inadequate to their protection; there prior appropriation gives the better right to running waters to the extent, in quantity and quality, necessary for the uses to which the water is applied.<sup>44</sup> By the act of congress of July 26th, 1866, which provides "that whenever by priority of possession rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same," the customary law with respect to the use of water, which had grown up among occupants of the public land under the peculiar necessities of their condition, is recognized as valid. That law may be shown by evidence of the local customs, or by the legislation of the state or territory, or the decisions of the courts. The union of the three conditions in

proceedings does not affect his right. *Creede, etc., Mill. Co. v. Uinta Tunnel Min., etc., Co.*, 196 U. S. 337, 359, 360, 49 L. Ed. 501.

**39. Through prior location.**—*Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 182 U. S. 499, 504, 45 L. Ed. 1200.

Section 2322 gives to a prior locator "the exclusive right of possession and enjoyment of all the surface included within the lines" of a location and "of all veins, lodes and ledges throughout the entire depth, the top or apex of which lies inside of such surface lines extending downward vertically." A junior locator may not, under § 2323, run a tunnel through such location. *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 182 U. S. 499, 507, 45 L. Ed. 1200.

**40. Calhoun Gold Min. Co. v. Ajax Gold Min. Co.**, 182 U. S. 499, 507, 45 L. Ed. 1200.

**Convenient working of mine.**—*Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 182 U. S. 499, 507, 45 L. Ed. 1200.

**Right of way.**—To what extent, however, there may be some ambiguity; whether only through the space of the intersection of the veins, as held by the supreme courts of California, Arizona and Montana, or through the space of intersection of the claims, as held by the supreme court of Colorado in the case at bar. It is not necessary to determine between these views. One of them is certainly correct. *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 182 U. S. 499, 505, 45 L. Ed. 1200.

Section 2336 provides that where two or more veins intersect or cross each other, priority of title shall govern, and such prior locator shall be entitled to all ore or minerals contained within the space of intersection, but the subsequent location shall have the right of way through the space of intersection for the purpose of the convenient working of the mine. This section does not conflict with § 2322 but supplements it. Section 2336 imposes the servitude upon the senior location but does not otherwise affect the exclusive rights given to senior locator. It gives the right of way to the junior location. *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 182 U. S. 499, 507, 45 L. Ed. 1200.

**41. Cross veins and blind veins.**—*Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 182 U. S. 499, 505, 45 L. Ed. 1200.

**42. Blind veins.**—*Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 182 U. S. 499, 507, 45 L. Ed. 1200.

**43. Ore at the point of intersection.**—*Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 182 U. S. 499, 504, 45 L. Ed. 1200.

**44. Common law inapplicable.**—*Atchison v. Peterson*, 20 Wall. 507, 22 L. Ed. 414.

**Custom of miners.**—By the custom which has obtained among miners in the Pacific states and territories where mining for the precious metals is had on the public lands of the United States, the first appropriator of water in the streams on mining lands for mining purposes is



any particular case is not essential to the perfection of the right by priority and in case of conflict between a local custom and a statutory regulation, the latter, as of superior authority, will control.<sup>45</sup> Water rights may, of course, be acquired by contract.<sup>46</sup>

**B. Restrictions upon Rights.**—This right to water is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual.<sup>47</sup> While, by the customary law of miners, the owner of a mining claim and the owner of a water right in California hold their respective properties from the dates of their appropriation, the first in time being the first in right; where both rights can be enjoyed without interference with or material impairment of each other, the enjoyment of both is allowed.<sup>48</sup> What diminution of quantity, or deterioration in quality, will constitute an invasion of the rights of the first appropriator will depend upon the special circumstances of each case; and in controversies between him and parties subsequently claiming the water, the question for determination is whether his use and enjoyment of the water to the

held to have a better right than any other to the use of the water. The first appropriator who subjects the water to use or takes necessary steps for that purpose is regarded, except as against the government, as the source of title in all controversies relating to water. *Atchison v. Peterson*, 20 Wall. 507, 510, 22 L. Ed. 414; *Basey v. Gallagher*, 20 Wall. 670, 681, 22 L. Ed. 452.

**45. Act of 1866.**—*Basey v. Gallagher*, 20 Wall. 670, 22 L. Ed. 452; *Atchison v. Peterson*, 20 Wall. 507, 22 L. Ed. 414; *Broder v. Water Co.*, 101 U. S. 274, 276, 25 L. Ed. 790. See, also, *Forbes v. Gracey*, 94 U. S. 762, 24 L. Ed. 313; *Jennison v. Kirk*, 98 U. S. 453, 25 L. Ed. 240.

The ninth section of the act of congress of July 26, 1866, "granting the right of way to ditch and canal owners over the public lands, and for other purposes," enacted, "that whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purposes aforesaid, is hereby acknowledged and confirmed: Provided, however, that whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage." Held, that this section only confirmed to the owners of water rights and of ditches and canals on the public lands of the United States the same rights which they held under the local customs, laws, and decisions of the courts, prior to its passage. That the proviso conferred

no additional rights upon the owners of ditches subsequently constructed, but simply rendered them liable to parties on the public domain whose possessions might be injured by such construction. *Jennison v. Kirk*, 98 U. S. 453, 25 L. Ed. 240.

**46. Contract rights.**—The dam built by appellee, having the effect as it did of raising the flow of water in its canal so as to destroy the water power obtained by appellant through the construction of its canal, was not an infringement of the rights secured to appellant by the contract of January 10, 1891. *Consolidated Canal Co. v. Mesa Canal Co.*, 177 U. S. 296, 302, 44 L. Ed. 777.

**Finding of fact by lower court.**—*Consolidated Canal Co. v. Mesa Canal Co.*, 177 U. S. 296, 302, 44 L. Ed. 777.

**47. Exercise of right.**—*Basey v. Gallagher*, 20 Wall. 670, 683, 22 L. Ed. 452.

**48. Owners of claims and water rights.**—*Jennison v. Kirk*, 98 U. S. 453, 25 L. Ed. 240.

By that law, a person cannot construct a ditch to convey water across the mining claim of another, taken up and worked according to that law before the right of way was acquired by the ditch owner, so as to prevent the further working of the claim in the usual manner in which such claims are worked, nor so as to cut off the use of water previously appropriated by the miner for working the claim, or for other beneficial purposes. *Jennison v. Kirk*, 98 U. S. 453, 25 L. Ed. 240.

Accordingly, where the owner of a mining claim worked by the method known as "the hydraulic process," cut and washed away a portion of a ditch so as to let out the water flowing in it, the ditch having been so constructed across the claim previously acquired as to prevent it from being further worked by that method, and to prevent the use of water previously appropriated by him, held, that the cutting and washing away of the ditch,



extent of the original appropriation have been impaired by the acts of the other parties.<sup>49</sup>

**C. Rights Acquired Prior to Grant under Pre-Emption Laws and Pacific Railroad Acts.**—The right of way for a canal acquired prior to a grant under the pre-emption laws and under the Pacific Railway acts is not thereby impaired.<sup>50</sup>

## X. Contracts and Leases.

**A. Contracts.**—Where a contract provides that the ore from the first level of a mine should contain at least 56 per cent of metallic iron, and the contract was later extended to include the second and third level of the mine, with the condition that to be accepted it must contain at least 58 per cent of metallic iron, it was held, that the stipulation as to the increased per cent was applicable only to the ore taken from the second and third levels, while as to the first level there was no change.<sup>51</sup> Where a contract contains a provision that the defendant is at liberty to terminate the contract whenever the continuation of the said contract becomes "prejudicial to the future welfare and development of the mine," the defendant has no right to arbitrarily terminate the contract, but can only terminate it when it has determined that the system used is "prejudicial to the future welfare and development of the mine."<sup>52</sup>

**Water Rights.**—As to contracts in reference to water rights, see ante, "Water Rights," IX.

**B. Leases**—1. **LEASES OF MINES ON INDIAN LANDS.**—In a case where the question was whether the act of congress approved June 28, 1898, known as the Curtis act, operated to deprive the lessors of coal mines in the Choctaw Nation of the royalties due and owing to them for coal mined under valid leases, prior to the date named, the court said that congress by the Curtis act neither at-

it having been done in order that the claim might be worked and the water used as before, was not an injury for which damages could be recovered. *Jenkinson v. Kirk*, 98 U. S. 453, 25 L. Ed. 240.

**49. Invasion of right of first appropriator.**—*Atchison v. Peterson*, 20 Wall. 507, 22 L. Ed. 414.

**Injunction.**—Whether, upon a petition or bill asserting that the prior rights of the first appropriator have been invaded, a court of equity will interfere to restrain the acts of the party complained of, will depend upon the character and extent of the injury alleged, whether it be irremediable in its nature, whether an action at law would afford adequate remedy, whether the parties are able to respond for damages resulting from the injury, and other considerations which ordinarily govern a court of equity in the exercise of its preventive process of injunction. *Atchison v. Peterson*, 20 Wall. 507, 22 L. Ed. 414. See, also, post, "Injunction and Specific Performance," XVI, G.

**50. Canal right.**—A., a water and mining company, constructed in 1853, over public lands in California, a canal, and its right, which it has ever since exercised, to use the water for mining, agricultural, and other purposes has been uniformly recognized by the local customs, laws, and the decisions of the courts of that state. B. is now the owner of lands through which the canal runs. He acquired title to one portion of them by a pre-eminent settlement made after the passage of the act of July

26, 1866 (14 Stat. 251), and to another portion under the grant made to the Central Pacific Railroad Company, by the amended Pacific Railroad Act of July 2, 1864. 13 Stat. 356. In his suit against A., B. seeks the recovery of damages, and also prays that the canal may be declared a nuisance, and as such abated. Held, that B.'s title under the pre-emption laws is subject to A.'s right of way under said act of 1866. That said act expressly confirmed to the owners of such canals a pre-existing right, which the government had by its policy theretofore recognized. A. had, therefore, within the meaning of said act of 1864, a "lawful claim" to the continued use of the water, which was not defeated or impaired by the grant of the lands to said railroad company. *Broder v. Water Co.*, 101 U. S. 274, 25 L. Ed. 790.

**51. Contract for ore.**—*Anvil Min. Co. v. Humble*, 153 U. S. 540, 548, 549, 38 L. Ed. 814. See, generally, the title **CONTRACTS**, vol. 4, p. 552.

**52. Termination of contract.**—*Anvil Min. Co. v. Humble*, 153 U. S. 540, 547, 38 L. Ed. 814.

Whenever one party to a contract is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform, and may recover as damages the profits which he would have received through full performance. *Anvil Min. Co. v. Humble*, 153 U. S. 540, 551, 38 L. Ed. 814.

tempted nor intended to interfere with the rights of lessors to royalties due them under their leases at the date of the passage of the act.<sup>53</sup>

**Lease of Mineral Lands to Indians.**—See the title *INDIANS*, vol. 6, p. 930.

2. **LEASES OF LEAD MINES.**—The authority given to the president of the United States to lease certain lead mines in Illinois is limited to a term not exceeding five years; this limitation, however, is not to be construed as a prohibition to renew the leases from time to time, if he thinks proper so to do; the authority is limited to a short period, so as not to interfere with the power of congress to make other dispositions of the mines, should they think the same necessary.<sup>54</sup> The law of 1807, authorizing the leasing of the lead mines, was passed before Illinois was organized as a state; she cannot now complain of any disposition or regulation of the lead mines, previously made by congress; she surely cannot claim a right to the public lands within her limits.<sup>55</sup>

3. **OIL AND GAS LEASES.**—When a tract of land containing forty acres, excepting reserved therefrom ten acres upon which no well should be drilled without the consent of the lessor, was leased for the purpose of boring and mining for oil and gas, it was held that this lease gave a right to all the gas and oil under the entire forty acres, but its only purpose was to forbid the drilling of wells upon the ten acres excepted.<sup>56</sup>

4. **RECOVERY OF RENT.**—Where an action was brought to recover certain rents alleged to be due under a lease of mines, whereby defendant engaged to pay, as rent, in each year, the royalties fixed in the lease, and if, in any year, the royalties fell below the sum of one thousand dollars, it was to make up the deficit, so that the latter sum should, in any event, be paid annually as rent, it was held, that the plaintiff might recover the rent each year as stipulated in the lease, and the fact that the workings of the mine did not produce that sum, and that there was a right reserved to the plaintiff to terminate the lease, if defendant failed in any year to pay that sum as rent, was immaterial.<sup>57</sup>

## XI. Right to the Use of Timber on Mineral Lands.

The act of June 3, 1878, provides that bona fide residents of certain states named therein "shall be and are hereby permitted to fell and remove for building, agricultural, mining or other domestic purposes any timber" on mineral lands. This statute gives the right to the use of timber whether for roasting or for smelting and a ruling of the secretary of the interior to the contrary is invalid as it has no power to abridge or enlarge the statute, in spite of the pro-

**53. Indian lands.**—*Southwestern Coal Co. v. McBride*, 185 U. S. 499, 46 L. Ed. 1010.

**54. Authority of president—Lease or license.**—*United States v. Gratiot*, 14 Pet. 526, 10 L. Ed. 573.

The United States instituted an action on a bond given by the defendants, conditioned that certain of the obligors, who had taken from the agent of the United States, under the authority of the president of the United States, a license for smelting lead ore, bearing date September 1st, 1834, should fully execute and comply with the terms and conditions of a license for purchasing and smelting lead ore, at the United States' lead mines, on the Upper Mississippi river, in the state of Illinois, for the period of one year. The defendants demurred to the declaration, and the question was presented to the circuit court of Illinois, whether the president of the United States had power, under the act of congress of 3d of March, 1807, to make a contract for purchasing and smelting lead ore, at the lead mines

of the United States, on the Upper Mississippi; this question was certified from the circuit, to the supreme court of the United States. Held, that the president of the United States had power, under the act of congress of 3d of March, 1807, to make the contract on which this suit was instituted. *United States v. Gratiot*, 14 Pet. 526, 10 L. Ed. 573.

In this case it was held that a contract which purported to be "a license for smelting lead ore" was not a license but a lease. *United States v. Gratiot*, 14 Pet. 526, 10 L. Ed. 573. See the title *LANDLORD AND TENANT*, vol. 7, p. 827.

**55. Public lands in Illinois.**—*United States v. Gratiot*, 14 Pet. 526, 10 L. Ed. 573. See, generally, the title *PUBLIC LANDS*.

**56. Drilling of wells.**—*Brown v. Spilman*, 155 U. S. 665, 668, 670, 39 L. Ed. 304. See post, "Gas and Oil," XII. See, also, generally, the title *GAS*, vol. 6, p. 545.

**57. Recovery of rent.**—*Lehigh Zinc & Iron Co. v. Bamford*, 150 U. S. 665, 672, 37 L. Ed. 1215. See, also, generally, the title



vision that such right shall be "subject to such rules and regulations as the secretary of the interior may prescribe for the protection of the timber," etc.<sup>58</sup>

## XII. Gas and Oil.

Petroleum gas and oil are substances of a peculiar character, and decisions in ordinary cases of mining, for coal and other minerals which have a fixed situs, cannot be applied to contracts concerning them without some qualifications. They belong to the owner of the land, and are part of it, so long as they are on it or in it, or subject to his control, but when they escape and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land and taps a deposit of oil or gas, extending under his neighbor's field, so that it comes into his well, it becomes his property.<sup>59</sup>

## XIII. Mining Corporations.

A mining company was created under the laws of California (Civil Code, § 354) which conferred upon the said company the power "to enter into any obligations or contracts essential to the transaction of its ordinary affairs, or for the purposes for which it was created." It was held, that, as incident to the general powers conferred by law upon the company, the board of directors had the power to borrow money for the said company and to invest certain officers of the company with the authority to negotiate loans, to execute notes, and to sign checks drawn against its bank account.<sup>60</sup>

## XIV. Taxation.

The land granted under the Pacific Railroad acts has been held subject to taxation when there is a controversy whether they contain minerals or not. The possibility that certain lands may turn out to be mineral and thus be excluded from the grant does not defeat the right of taxation so long as the possession is claimed by the railroad.<sup>61</sup> Although the title to mineral lands may remain in

LANDLORD AND TENANT, vol. 7, p. 827.

58. *United States v. United Verde Copper Co.*, 196 U. S. 207, 49 L. Ed. 449.

**Timber on placer claim.**—*United States v. Iron Silver Min. Co.*, 128 U. S. 673, 32 L. Ed. 571.

59. *Brown v. Spilman*, 155 U. S. 665, 669, 39 L. Ed. 304; *Ohio Oil Co. v. Indiana* (No. 1), 177 U. S. 190, 203, 44 L. Ed. 729. See, also, the title INDIANS, vol. 6, p. 930.

The rule of general law in the state of Indiana is that although in virtue of his proprietorship the owner of the surface may bore wells for the purpose of extracting natural gas and oil, until these substances are actually reduced by him to possession, he has no title whatever to them as owner. That is, he has the exclusive right on his own land to seek to acquire them, but they do not become his property until the effort has resulted in dominion and control by actual possession. *Ohio Oil Co. v. Indiana* (No. 1), 177 U. S. 190, 208, 44 L. Ed. 729.

**Sufficiency of discovery.**—The court refused to overthrow a finding of the lower court that there was no discovery when there was not enough in what was claimed to have been seen to have justified a prudent person in the expenditure of money and labor in exploitation for petroleum. *Chrisman v. Miller*, 197 U. S.

313, 323, 49 L. Ed. 770. See ante, "Mineral Land," I, A; "Discovery and Appropriation," III, B.

60. **Power of board of directors.**—*Mining Co. v. Anglo-Californian Bank*, 104 U. S. 192, 194, 26 L. Ed. 707. See, generally, the titles CORPORATIONS, vol. 4, p. 621; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

**Authority of subordinate officers.**—Where a corporation has been empowered (under § 354 of Civil Code of California), to enter into certain contracts and transactions for the purposes for which it was created, and to confer certain authority upon subordinate officers, it was held, that such authority in the subordinate officers may, in the absence of express statutory prohibition, be shown otherwise than by the official record of the proceedings of the board. *Mining Co. v. Anglo-Californian Bank*, 104 U. S. 192, 194, 26 L. Ed. 707. See, generally, the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

61. **Pacific railroad grants.**—"It is further claimed that no lands granted to this road can be taxed prior to the issue of the patent, because the grant excludes mineral lands; not only minerals but mineral lands; that the right and power to ascertain which of the lands are mineral and which non mineral is vested exclusively in the officers of the government,



the United States, the ores, when dug or detached from the lands under a mining claim, are free from any lien, claim, or title of the United States, and, becoming personal property, are, as such, subject to state taxation in like manner

and can be proved only by the issue of a patent, as held by this court in *Barden v. Northern Pac. R. Co.*, 154 U. S. 288, 38 L. Ed. 992. It is argued that, if the railroad company paid taxes upon these lands, it might never own or acquire them, and the tax would consequently be paid on property it never owned or could own; and that, upon the other hand, if the company should not pay the taxes, and the lands be sold under the judgment appealed from, the title to the lands, if the assessment were valid, would pass to the purchaser, whether they were mineral or not. But, if the railroad has a possessory claim to these lands, they are taxable under the statute of Nevada, and it is this and this only which the state has assumed to tax. If it has no possessory claim, because the lands are mineral, it certainly cannot be injured by a sale of the lands to pay the tax, and whether the sale of such lands would pass the title or not is a question in which the railroad company is not interested. The company has an enormous land grant, embracing every alternate section of land within twenty miles on each side of the road, with a reservation of mineral lands from the operation of the act. Can it possibly have been intended that these lands should remain wholly untaxed, until the mineral lands, which it may be assumed represent but a very small portion of the total grant, have been identified and excepted? Clearly not. There is no presumption that the land is mineral, and if it be so, and the railroad company disclaims title to it for that reason, it would probably be a good defense to a suit for taxes. But the possibility that certain lands may turn out to be mineral lands surely cannot be a defense to a claim for taxes applicable to the entire grant, so long as the railroad company lays claim to the right of the possession of such lands." *Central Pac. R. Co. v. Nevada*, 162 U. S. 512, 525, 40 L. Ed. 1057.

"It is true that in the *Barden* case we held that mineral lands were excluded from the operation of the Pacific Railroad land grants, whether such minerals were known or unknown at the date of the grant, because the statutes had excepted them in the most unequivocal terms; but nothing was said in that case to impugn the authority of previous cases which had held that these grants were in present of lands to be afterwards located. They became so located when they were surveyed. 'Then the grants attached to them, subject to certain specified exceptions' (p. 313), one of which was that minerals should be discovered upon them before the issue of a patent, when as to such lands the title of the company failed. 'The possibility, however, that minerals

might be discovered upon certain sections of these lands, as to which the title of the railway company might be defeasible, would not impair their title to the great bulk of the grant, or enable the company with respect thereto to evade its just obligations to the state. Should the company disclaim a right to the possession of any portion of these lands by reason of the discovery of minerals thereon, there would remain no right to tax them under the statutes of Nevada, but so long as the company asserts a possessory claim to them it implies a corresponding obligation to pay the taxes upon them. *State v. Central Pacific Railroad*, 20 Nevada 372." *Central Pac. R. Co. v. Nevada*, 162 U. S. 512, 526, 40 L. Ed. 1057.

**Lands not patented.**—In the case of the *Northern Pac. R. Co. v. Myers*, 172 U. S. 589, 43 L. Ed. 564, where it was sought to tax land granted to the company under the act of 1864 and not certified or patented and as to the nature of which, whether mineral or not, there was a controversy, it was held, that the tax was valid. In the opinion it is said: "A similar claim was denied by the circuit court of appeals for the ninth circuit in *Northern Pacific R. R. v. Wright*, 7 U. S. App. 502, and by this court in *Central Pac. R. Co. v. Nevada*, 162 U. S. 512, 40 L. Ed. 1057. It is, however, now conceded that the railroad has a taxable interest, counsel for appellant saying: 'The question for decision is not whether the railway company has any interest in its grant, or in the lands in question, which may be subjected to some form of taxation, but whether the lands themselves are taxable; whether the present assessment which is on the lands themselves can be sustained. We may well concede that the taxing power is broad enough to reach in some form the interest of the railway company in its grant; that interest becomes confessedly a vested interest upon construction of the road. It then becomes property, and may well be held subject to some form of taxation. But here the legislature authorizes a tax upon, and the assessor makes an assessment upon, the land itself by specific description; the whole legal title to each parcel being specifically and separately assessed. When the plain fact is, that neither the assessor or the railway company can place its hand on a single specific parcel and say whether it belongs to the company or to the United States.' The question which was submitted therefore by the stipulation, namely, 'whether the lands described in the bill were subject to taxation under the laws of the United States and of the state of Montana,' if not evaded by the concession of appellant, has changed its form; but even in the new form it seems

as other personal property.<sup>62</sup> A mining claim is property in the fullest sense of the word. It is subject to a lien for taxes, and may be sold for the nonpayment of them, without infringing the title of the United States.<sup>63</sup>

### **XV. Regulation of Mines.**

The use and enjoyment of mining property being subject to the reasonable exercise of the police power of the state, the rights, privileges and immunities of a mine owner as a citizen of the United States are not invaded by the regulations of the Illinois mining act of 1899 which imposes upon mine owners the obligation to employ as mine managers and examiners only persons licensed by the state, and the imposition of liability upon such owners for the violation of such regulations and liability for the defaults of such persons being an appropriate exercise of the police power is not wanting in due process.<sup>64</sup>

### **XVI. Procedure.**

**A. Evidence**—1. **PATENTS AND LOCATION CERTIFICATES.**—It was obviously the purpose of congress in the act of May 17, 1884, ch. 53, § 8, 23 Stat. 24, to secure to those parties who were in actual possession of mining claims in the territory of Alaska the privilege of acquiring full title thereto and this, notwithstanding their failure to take all the steps required by the mining laws of the United States with reference to the location of such claims. Therefore it was held proper to introduce a location certificate though defective in form for the purpose of showing the time when the possession was taken and to point out so far as it did the property which was taken possession of.<sup>65</sup> Patents are proof of discovery and relate back to the date of location of the claims.<sup>66</sup>

to have the same foundation as the contention rejected in the Nevada case, *supra*, that because title may not attach to some of the lands it does not attach as to any." See, generally, the title **RAILROADS; TAXATION**.

**62. Tax upon ores.**—*Forbes v. Gracey*, 94 U. S. 762, 24 L. Ed. 313. See, generally, the title **TAXATION**.

**Lien of the tax.**—The words "mines or mining claims" in the sixth section of the act of the legislature of Nevada of Feb. 28, 1871, imposing a tax upon such ores, and making it "a lien on the mines or mining claims from which the ores or minerals bearing gold or silver are extracted for reduction," were evidently intended to distinguish between cases in which the minor is the owner of the soil, and therefore has a perfect title to the mine, and those in which he works under a mining claim, the title to the land remaining in the United States. In the first case, the tax is a valid lien on the mine itself; but in the second, only upon his possessory right, under existing laws and regulations, to work and explore the mine. *Forbes v. Gracey*, 94 U. S. 762, 24 L. Ed. 313.

**63. Sale for taxes.**—*Forbes v. Gracey*, 94 U. S. 762, 24 L. Ed. 313.

**64. Constitutional—Reasonably safe place to work.**—*Wilmington Star Min. Co. v. Fulton*, 205 U. S. 60, 70, 73, 51 L. Ed. 708. See, generally, the titles **CONSTITUTIONAL LAW**, vol. 4, p. 1; **DUE PROCESS OF LAW**, vol. 5, p. 499; **MASTER AND SERVANT**, ante, p. 275; **NEGLIGENCE**.

**65. Defective location certificate.**—*Ben-*

*nett v. Harkrader*, 158 U. S. 441, 445, 39 L. Ed. 1046.

**66. Patents as proof of discovery.**—*Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 182 U. S. 499, 510, 45 L. Ed. 1200. See also, *Deffebach v. Hawke*, 115 U. S. 392, 29 L. Ed. 423; *Benson Min., etc., Co. v. Atla Min., etc., Co.*, 145 U. S. 428, 36 L. Ed. 762.

**Right to vein or lode.**—To meet the defense that a lode or vein was known to exist at the time of the application for a patent and to establish title to the demanded premises, the plaintiff offered in evidence a patent of the United States for certain mining claims and a deed of them to the plaintiff from the patentees, for the purpose of showing that the lode which, since the issue of the patent of the placer claim, has been ascertained to dip into and extend within the boundaries of that claim, has its apex or outcrop within the boundaries of these lode claims; but the court refused to admit the patent, and the plaintiff excepted. In this ruling there was plain error. If the fact thus sought to be established existed, it would force the defendants from their position of intruders without title, and compel them to show prior title in themselves to the premises or to surrender them to the plaintiff. *Iron Silver Min. Co. v. Reynolds*, 124 U. S. 374, 31 L. Ed. 466.

In an action between the patentee of a placer claim and the patentee of a lode discovered within the bounds of such claim, it is said by the court: "We are satisfied that in any conflict between the title conferred by two patents, whether it be in law or in equity, the holder of the



2. **ESTOPPEL.**—The rule that a tenant may not dispute his landlord's title applies to mining leases.<sup>67</sup>

**B. Laches.**—Persons having claims to mining property are bound to the utmost diligence in enforcing them, and there is no class of cases in which the doctrine of laches has been more relentlessly enforced.<sup>68</sup>

**C. Recovery of Mining Claims.**—1. **IN GENERAL.**—In adverse suits preliminary to a patent of mining lands, not merely questions of law arising under the statutes of the United States but questions arising under local rules and customs and state statutes are open for consideration.<sup>69</sup> The form of action in reference to adverse mining claims is not provided for by the federal statutes.<sup>70</sup>

2. **TITLE NECESSARY TO SUPPORT ACTION.**—a. *In General.*—In actions to recover mining claims, the plaintiff must recover on the strength of his own title

title under the elder patent has a right to require that the existence of the lode, and the knowledge of its existence on the part of the grantee of the elder patent should be established." *Iron Silver Min. Co. v. Campbell*, 135 U. S. 286, 34 L. Ed. 155.

67. **Estoppel.**—*Lowry v. Silver City Gold, etc.*, Min. Co., 179 U. S. 196, 45 L. Ed. 151. See, also, *Eustis v. Bolles*, 150 U. S. 361, 37 L. Ed. 1111; *De Lamar's, etc.*, Min. Co. v. Nesbitt, 177 U. S. 523, 44 L. Ed. 872.

Lessees in the case of *Lowry v. Silver City Gold, etc.*, Min. Co., 179 U. S. 196, 45 L. Ed. 151, were held estopped to locate a new claim including part of the location covered by the lease. See, generally, the title **LANDLORD AND TENANT**, vol. 7, p. 827.

68. *Patterson v. Hewitt*, 195 U. S. 309, 321, 49 L. Ed. 214. See, also, *O'Reilly v. Campbell*, 116 U. S. 418, 422, 29 L. Ed. 669.

**Uncertain character of mining property.**—"The duty of inquiry was all the more peremptory in this case from the fact that the property of itself was of uncertain character, and was liable, as is most mining property, to suddenly develop an enormous increase in value." *Johnston v. Standard Min. Co.*, 148 U. S. 360, 370, 37 L. Ed. 480.

**Delay of eight years.**—In the case of *Patterson v. Hewitt*, 195 U. S. 309, 49 L. Ed. 214, mining property was placed in the hands of a trustee under an agreement that such trustee should make a deed to such of the parties holding interests therein as should contribute their part to the work, labor and expenses necessary to obtain a patent. It was also agreed that each of the appellants contributing his share of the expenses should receive a one-eighth interest in the location. Appellant contributed nothing and performed no labor and defendants worked the mines. On a bill filed to enforce the trust, it was held that a delay of eight years was inexcusable laches.

**Delay of twenty years.**—In the case of *Gildersleeve v. New Mexico Min. Co.*, 161 U. S. 573, 40 L. Ed. 812, which was a suit in reference to a mining claim in which the collateral heirs fail to assert

their claim during twenty years, between the passage of the act of 1854 and the issue of the patent during the greater portion of which a mining company was expending labor and expenses in obtaining letters patent and letting persons, including the mining company, to remain in undisturbed possession of the property and to engage in large outlay for its development without, so far as appears, even claiming the rights in themselves until more than four years had elapsed from the final granting of the patent; it was said by the court that the record exhibits such gross laches on the part of the complainant, or those with whom he is in privity, and upon whose right his own must depend, as effectually to bar him from a right to the relief which he seeks.

**Loss of right by laches.**—It is not for the officers of the land department but for the court, while it has jurisdiction of a proceeding, under Rev. Stat., § 2326, to determine adverse claims to mineral lands, to decide whether either party has lost or waived his right by laches or failure to proceed with diligence and consequently while this is being decided by the court, the land office cannot resume control of the case upon the idea which might be there entertained of an implied waiver of a claim from delay in the court and its action and its patents granted to defendant so far as it affects the rights of the plaintiff are void. *Richmond Min. Co. v. Rose*, 114 U. S. 576, 585, 29 L. Ed. 273.

69. *Shoshone Min. Co. v. Rutter*, 177 U. S. 505, 44 L. Ed. 864.

70. **Form of action.**—Referring to § 2326 in reference to adverse mining claims, it is said by the court: "The determination of the right of possession as between the parties is referred to a court of competent jurisdiction in aid of the land office, but the form of action is not provided for by the statute and apparently an action at law or a suit in equity would lie, as either might be appropriate under the peculiar circumstances, an action to recover possession when plaintiff is out of possession, and a suit to quiet title when he is in possession." *Perego v. Dodge*, 163 U. S. 160, 41 L. Ed. 113. See, also, *Hammer v. Garfield Min., etc., Co.*, 130 U. S. 291, 32 L. Ed. 964.



and cannot recover on the weakness of the title of the defendant.<sup>71</sup> "In adverse proceedings each party is practically a plaintiff and must show his title."<sup>72</sup> Where the right to part of a vein is in contest between the parties in reference to certain mining claims, the decision of a controversy under Rev. Stat., § 2326, cannot be rendered nugatory by the introduction of a new claim by one of the parties, whose claim of right from the government for this same location is initiated while this litigation is going on.<sup>73</sup>

b. *Necessity for Actual Possession.*—Actual possession is not necessary under the federal statutes to maintain an action.<sup>74</sup>

**71. Strength of plaintiff's title.**—*Reynolds v. Iron Silver Min. Co.*, 116 U. S. 687, 691, 29 L. Ed. 774.

Where the land office permitted the claimant to enter two tracts as one claim, but refused to issue a patent therefor upon the ground that two portions of a lode mining claim, separated by a patented placer, could not be included within one patent, but the land office granted applicant the privilege to apply for a patent upon either of the tracts he would take, and upon his default to elect as to what tract he would take within sixty days from the date of the order, the claim would be canceled without further notice, after the election to take a certain claim, the land department canceled the entry as to the other claim, and subsequently, after the land department refused the patent there were three other entries for the patent, the suits all being combined, it was held, in adverse proceedings each party is practically a plaintiff and must recover upon the strength of his own title and not upon the weakness of his adversaries. *Brown v. Gurney*, 201 U. S. 184, 185, 190, 50 L. Ed. 717.

**Sufficiency of title to support ejectment.**—*Glacier, etc., Min. Co. v. Willis*, 127 U. S. 471, 32 L. Ed. 172. See, generally, the title EJECTMENT, vol. 5, p. 695.

**72. Each party plaintiff.**—*Brown v. Gurney*, 201 U. S. 184, 190, 50 L. Ed. 717; *Jackson v. Roby*, 109 U. S. 440, 27 L. Ed. 990; *Perego v. Dodge*, 163 U. S. 160, 167, 41 L. Ed. 113.

"By the act of congress of March 3, 1881, 21 Stat. 505, c. 140, it was provided that if in an adverse suit 'title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict.' Under that act it is held that before the applicant for a patent can have judgment he must prove his claim of title to the ground. The object of the statute was, as we said in *Perego v. Dodge*, supra (163 U. S. 160, 41 L. Ed. 113), to provide, in the case of a total failure of proof of title, for an adjudication 'that neither party was entitled to the property, so that the applicant could not go forward with his proceedings in the land office simply because the adverse claimant had failed to make out his case, if he had also failed.' 2 *Lindlev on Mines*, § 763, and cases cited." *Brown v. Gurney*, 201 U. S. 184, 190, 50 L. Ed. 717.

**Valid as against United States.**—"To entitle the plaintiff to recover in this suit, therefore, it was incumbent on him to show that he was the owner of a valid and subsisting location of the lands in dispute, superior in right to that of the defendants. His location must be one which entitles him to possession against the United States, as well as against another claimant. If it is not valid as against the one, it is not as against the other. The location is the plaintiff's title. If good, he can recover; if bad, he must be defeated." *Gwillim v. Donnellan*, 115 U. S. 45, 50, 29 L. Ed. 348.

**Failure to work.**—Where in a suit under § 2326 of the Revised Statute to determine adverse claims to lands with mineral deposits, it appeared that no work had been done by either plaintiff or defendant as required by § 2324 of the Revised Statute on the premises in controversy, it was held, that the court properly instructed the jury to find against both. *Jackson v. Roby*, 19 U. S. 440, 441, 27 L. Ed. 990.

**Failure to adverse.**—A party is not precluded from maintaining a bill to enforce a mining claim by reason of the fact that he filed no adverse claim to the lode in question under Revised Statutes, § 2325, where complainant makes no claim of a prior location of the same lode and no objection to the boundaries or extent of the claim but asserts that he has acquired the claimant's title by legal proceedings. *Turner v. Sawyer*, 150 U. S. 578, 37 L. Ed. 1189.

**73. Introduction of new claim.**—*Richmond Min. Co. v. Rose*, 114 U. S. 576, 586, 29 L. Ed. 273.

**Patent obtained by third person.**—In a suit under Rev. Stat., § 2326, to determine the right of adverse claimants to certain mining locations, where the plaintiff admitted that a third person had obtained a patent for a claim which included that part of his claim wherein the discovery shaft was sunk, it was held, that the court committed no error in ruling "that the plaintiff was not entitled to recover any part of the premises." *Gwillim v. Donnellan*, 115 U. S. 45, 29 L. Ed. 348.

**74. Plaintiff filed application for a patent to a placer mine, and defendant filed the requisite claim in the register's office adversely to that of plaintiff's in due time, and afterwards instituted suit to determine the right of possession to the premises which defendant had agreed to convey at**

c. *Action by Placer Claimant.*—The owner of a placer claim can institute and maintain an adverse action against an applicant for a lode claim when such claim is within the placer locator's patent, and when the applicant enters against the will of the placer owner for the purpose of prospecting for unknown lodes or veins.<sup>75</sup>

3. *JURISDICTION.*—As to jurisdiction, see the titles *APPEAL AND ERROR*, vol. 1, pp. 693, 734, 775, 849, 925; vol. 2, p. 221; *COURTS*, vol. 4, p. 929.<sup>76</sup>

4. *COMPLAINT.*—In a proceeding under Rev. Stat., § 2326, to determine adverse claims to the possession of mineral lands, the filing of a complaint within the proper time is a commencement of the proceedings.<sup>77</sup>

5. *DEMURRER.*—The effect of the rules and customs of miners upon the validity of a location is not, it seems, properly raised by demurrer.<sup>78</sup>

6. *WAIVER OF JURY TRIAL.*—The act of congress of March 3, 1881 (21 Stat. 505, ch. 140), does not preclude a waiver of a jury in proceedings as to adverse mining claims which arise under United States Revised Statutes, § 2326.<sup>79</sup>

7. *QUESTION FOR JURY.*—The existence of a lode or vein which is a body of mineral or mineral-bearing rock, within defined boundaries in the general mass,

some future time to a third party who was in possession the defendant may according to the code of Montana and §§ 2325, and 2326 Rev. Stat., maintain his action for the purpose of determining such adverse claim to the premises in controversy. *Wolverton v. Nichols*, 119 U. S. 485, 30 L. Ed. 474.

75. *Lode within placer claim.*—*Clipper Min. Co. v. Eli Min., etc., Co.*, 194 U. S. 220, 231, 232, 48 L. Ed. 944. See, also, *Haws v. Victoria Copper Min. Co.*, 160 U. S. 303, 40 L. Ed. 436; *Erhardt v. Boaro*, 113 U. S. 527, 28 L. Ed. 1113.

76. *French or Spanish grants.*—Where the petitioner institutes suit in reference to a tract of land under a concession alleged to have been authorized by the laws of Spain and protected by the treaties ceding Louisiana to the United States under the act of May 25, 1824, "enabling the claimant to lands within the limits of the state of Missouri and territory of Arkansas to institute proceedings to try the validity of their claims," it held that the act of congress on which the suit depended contained no reservation of the lead mines but extended the jurisdiction of the court to all claims "by virtue of any French or Spanish grant concession, warrant or order of survey," legally made by the proper authorities, etc. *Delassus v. United States*, 9 Pet. 117, 9 L. Ed. 71. See the title *PUBLIC LANDS*.

77. *Commencement of proceedings.*—*Richmond Min. Co. v. Rose*, 114 U. S. 576, 583, 29 L. Ed. 273.

*Failure to allege discovery.*—In an action to recover possession of mining claims it was urged, for the first time, upon the argument at bar, that as the United States statutes, Rev. Stat., § 2320, provide that no location of mining claim shall be made until the discovery of a vein or lode within the limits of the mine located, the complaint was fatally defective in not averring such a discovery prior to the alleged location, and that there was

an entire absence of evidence to justify the trial judge in concluding as he did in his first finding that the person from whom plaintiff derived title "at and prior to the time of locating the claims, discovered and appropriated a mineral vein or lode of rock in place." The contention that the complaint did not aver discovery was held to be without merit, no demurrer having been filed, no objection to admission of evidence of discovery having been made and no error assigned in this particular. The court said the contention amounted merely to a contention that the evidence did not support the finding. *Haws v. Victoria Copper Min. Co.*, 160 U. S. 303, 314, 40 L. Ed. 436.

*Filing fees.*—In a proceeding under Rev. Stat., § 2326, to determine adverse claims to the possession of mineral lands where the defendant had demurred to the complaint, answered, and gone to trial it was too late to raise the objection that the fees for the filing of the complaint were not paid within the time required by law and that the whole proceeding was void because process had not been served within proper time. *Richmond Min. Co. v. Rose*, 114 U. S. 576, 583, 29 L. Ed. 273.

78. *Local rules and customs.*—Where it was alleged that a location was made in accordance with the rules and customs of miners in force at the time of the location and that therefore such location was recognized and protected by the general mineral laws of July 26th, 1866, 14 Rev. Stat. 251, and that of May 10th, 1872, 17 Stat. 19, and this allegation was denied by the plaintiff, it was held that as these local rules and customs differ in the several mining districts as to the extent and character of the mine, the question could not properly be determined on demurrer. *Glacier, etc., Min. Co. v. Willis*, 127 U. S. 471, 481, 32 L. Ed. 172.

79. *Waiver of jury trial.*—*Perego v. Dodge*, 163 U. S. 160, 167, 168, 41 L. Ed. 113.



is a question of fact for the jury.<sup>80</sup> In a suit in reference to a placer mine, it was objected that the plaintiffs failed to show that the possession of the parties conflicted. The defendants, however, had admitted in their answer that they had applied for a patent for exactly the same land. This was held to show a contest as to possession, the court saying: "If they did not desire to have the question of the right of possession to any part of these forty acres submitted to a jury on the ground that they did not claim it, they should have made a disclaimer."<sup>81</sup>

8. **EFFECT OF DECISION UPON LAND OFFICE.**—If, in a proceeding under § 2326, Rev. Stat., to determine adverse claims to the possession of a mine, the court decides for one party or the other, the land department is bound by the decision and if it decides that neither party has established a right to the mine or any part of it, this is equally binding as the case then stands.<sup>82</sup> The abandonment of any claim to a disputed location is not a waiver of the adverse claim, and does not restore the right of the land office to proceed, but such proceedings are stayed in the land office until the determination of the dispute by the court in which the action is brought, or the party who has presented such adverse claim shall have in some way waived his opposition to the application.<sup>83</sup>

**D. Action to Quiet Title.**—Where it does not appear that a patent has been issued to the applicant for a placer claim, but it appears that he has complied with all the proceedings essential for the issue of such a patent, he is the equitable owner of the mining ground, and the government holds the premises in trust for him to be delivered upon the payments specified. Being entitled to a patent, he has a right to ask a determination of any claim asserted against his possession which may throw doubt upon his title; that is to say, he may maintain an action to quiet title.<sup>84</sup>

**E. Actions to Recover Possession of Ores.**—Actions will, of course, lie for the unlawful conversion of ores.<sup>85</sup>

**F. Actions between Co-Owners.—Ejectment.**—In ejectment for an undivided interest in a mining claim in Nevada, where both parties derive title from the original owner, the validity and regularity of his location are not in question.<sup>86</sup>

**Accounting.**—In a suit to compel an account for the proceeds of a mining claim, a finding by the court that there was no such cotenancy between the parties in the mine in controversy as to entitle the plaintiff to an accounting is a mere legal inference, and not a sufficient finding of fact upon which to base a decree.<sup>87</sup>

**80. Existence of vein or lode.**—*Iron Silver Min. Co. v. Mike & Starr, etc.*, Min. Co., 143 U. S. 394, 404, 36 L. Ed. 201.

**81. Wolverton v. Nichols**, 119 U. S. 485, 30 L. Ed. 474.

**82. Effect upon land office.**—*Richmond Min. Co. v. Rose*, 114 U. S. 576, 585, 29 L. Ed. 273.

**83. Stay of proceedings.**—*Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, 693, 39 L. Ed. 859.

**84. Equitable owner.**—*Dahl v. Raunheim*, 132 U. S. 260, 262, 33 L. Ed. 324.

**85. Prima facie case.**—To make out a prima facie cause of action for the conversion of ore by the defendant on premises belonging to complainant, all that is necessary is to show the patent and complainant's possession under it. *Boston, etc., Min. Co. v. Montana Ore, etc., Co.*, 188 U. S. 632, 47 L. Ed. 626.

**Right of United States.**—In the *United States v. Gear*, 3 How. 120, 11 L. Ed. 523, the right of the United States to maintain an action of trespass for taking ore from their lead mines was not questioned. *Cot-*

*ton v. United States*, 11 How. 229, 232, 13 L. Ed. 675.

**Liability of trespasser.**—A locator working subterraneously into the dip of the vein belonging to another, who is in possession of his location, is a trespasser, and liable to an action for taking ore therefrom. *Mining Co. v. Tarbet*, 98 U. S. 463, 25 L. Ed. 253.

**Cost of mining ore.**—Where A. unlawfully mined and converted the ores of B's mine, and expended a considerable sum in removing the ores, and assorting it from the rock, it was held, that in an action to recover the value of the mineral, A. could not recover the cost of mining the ore. *Benson Min., etc., Co. v. Alta Min., etc., Co.*, 145 U. S. 428, 434, 36 L. Ed. 762. See the title **TROVER AND CONVERSION**.

**86. Validity of title.**—*Mining Co. v. Taylor*, 100 U. S. 37, 25 L. Ed. 541. See the title **LANDLORD AND TENANT**, vol. 7, p. 827.

**87. Finding as to cotenancy.**—*Kahn v. Smelting Co.*, 102 U. S. 641, 26 L. Ed. 266.



**Limitations.**—Where the plaintiff was a tenant in common with the defendants, their possession of the claim was his possession until he was ousted. The statute of limitations would then run against him, but not bar his recovery, unless, after such ouster, their adverse possession was maintained two years before the commencement of the suit.<sup>88</sup>

**G. Injunction and Specific Performance.**—Where a deed from one owner conveyed quarry lands to his co-owners, reserving a right in the grantor, if the grantees did not furnish marble from them, to enter and keep possession and take the marble himself, till the grantees should be ready and willing to fulfill the conditions of the contract on their part, an injunction which, after unwarrantable and illegal entry for alleged conditions broken, enjoined the grantor from hindering the grantees from retaking possession and occupying and using the premises until the further order of the court, was held too broad, and on appeal was modified so as only to enjoin against an entry for any cause theretofore existing; thus leaving the grantor to enjoy his reserved right thereafter untrammelled.<sup>89</sup> Where, in a grant of quarry land, the grantee agrees to quarry and deliver to the grantor certain sorts of marble from it, and the grantor reserves a right of re-entry in case of nonperformance, in order to supply himself, and has moreover a remedy by an ordinary suit at law on the contract, such grantor will not be entitled to a decree of specific performance.<sup>90</sup> The extraction of ore from a mine is such irremediable mischief as will be prevented by injunction in a proper case.<sup>91</sup> In a suit to recover possession of a mine which was in possession of the defendant and where the title thereto had been obtained from the government by the wrongful and unlawful conspiracy between the party who held the legal title and the defendant, it was held that the plaintiff who held the equitable title could not maintain an action in ejectment, but must obtain relief in equity by treating the defendants as trustees *ex maleficio*, and was entitled to recover from them all the material taken from the mine, and the plaintiff was also entitled to an injunction restraining the defendants from further mining upon the premises during the pendency of the suit.<sup>92</sup>

## XVII. Spanish and Mexican Mining Laws and Grants.

**A. In General.**—The ordinances made and established by the King of Spain at Madrid in 1783, prescribe the mode of acquiring titles to mines, and were in force throughout the Republic of Mexico at the date of the American conquest of California.<sup>93</sup> Mines under Mexican laws, whether situated in public or private lands, belong to the supreme government, and private persons can only acquire a title in one not previously discovered and made individual property according to law, by conforming substantially to the conditions ordained in the provisions of the 4th article of the mining ordinance.<sup>94</sup> A strict compliance with the terms and conditions of those ordinances is required by the ordinances themselves, and is shown to be necessary on general principles by all the writers

**88. Possession of the cotenant.**—Mining Co. v. Taylor, 100 U. S. 37, 25 L. Ed. 541.

**89. Quarry lands.**—Marble Co. v. Ripley, 10 Wall. 339, 19 L. Ed. 955.

**90. Quarry lands.**—Marble Co. v. Ripley, 10 Wall. 339, 19 L. Ed. 955.

**91. Extraction of ore.**—Erhardt v. Boaro, 113 U. S. 527, 537, 28 L. Ed. 1113. See the titles INJUNCTIONS, vol. 6, p. 1022; WASTE.

**Digging lead ore.**—Digging lead ore from the lead mines upon the public lands of the United States is such a waste as entitles the United States to a writ of injunction to restrain it. United States v. Gear, 3 How. 120, 11 L. Ed. 523.

**92. During pendency of suit.**—Lockhart

v. Leeds, 195 U. S. 427, 434, 438, 49 L. Ed. 263.

**93. Mining ordinances.**—United States v. Castillero, 2 Black 17, 17 L. Ed. 360.

**Royalties.**—As to royalties reserved to the crown, see ante, "Origin, History and Policy of Mining Laws," II.

**Extralateral right.**—The Spanish and Mexican Mining law confined the owner of a mine to perpendicular lines on every side. Del Monte Min., etc., Co. v. Last Chance Min., etc., Co., 171 U. S. 55, 60, 43 L. Ed. 72; Mining Co. v. Tarbet, 98 U. S. 463, 25 L. Ed. 253.

**94. Fourth article of ordinances.**—United States v. Castillero, 2 Black 17, 190, 17 L. Ed. 360.

on the subject.<sup>95</sup> Some of the provisions of those ordinances are doubtless directory, and others conditions subsequent, but some of them are clearly conditions precedent.<sup>96</sup> Mines under the Mexican law may be the subject of rightful ownership, distinct from the land as such for agricultural or other ordinary uses. Ownership of a mine, however, as secured under the mining ordinance by registry and juridical possession, does not consist alone in the right to take from the soil the minerals therein to be found, but it also embraces, if necessary to the working of the mine, a right to the exclusive possession and use of the surface of the land for an indefinite period within the boundaries of the *pertenencias* appertaining to the mining right or privilege. Such rights are by law regarded as severed from private land and also from public land when granted by the usual forms of conveyance for agricultural or other ordinary purposes.<sup>97</sup>

**B. Jurisdiction.**—It may be safely inferred from the character and history of Mexico, that its supreme government reserved to itself the power over its mines, and purposely withheld all jurisdiction of that nature from the local authorities of its distant and frontier territories.<sup>98</sup>

**95. Compliance with ordinances.**—*United States v. Castillero*, 2 Black 17, 17 L. Ed. 360.

Strict compliance with that provision is required as matter of public policy, because the mines of a country like Mexico are a great source of revenue to the government, and because it tends to prevent disputes and litigation; prevent fraud and false swearing; secure such rights of property, and promote order and a good understanding among miners holding and working contiguous *pertenencias*. 1 *Gamboa per H.*, pp. 143, 144. *United States v. Castillero*, 2 Black 17, 192, 17 L. Ed. 360.

**96. Nature of provisions.**—*United States v. Castillero*, 2 Black 17, 17 L. Ed. 360.

**97. Right of exclusive possession.**—*United States v. Castillero*, 2 Black 17, 166, 17 L. Ed. 360, citing *Camboa* by Heathfield, p. 132, § 5.

**98. Governor or alcalde.**—*United States v. Castillero*, 2 Black 17, 17 L. Ed. 360.

If a mine was on private property, the governor of California was wholly without power to make a grant of land there, for his jurisdiction under the colonization laws extends only so far as to make grants of public lands. *United States v. Castillero*, 2 Black 17, 17 L. Ed. 360.

**Representations and acts of claimant.**—Nor would it benefit the claimant, if it were now shown that it was public land because his own representations prove that he fully believed it to be private property. *United States v. Castillero*, 2 Black 17, 17 L. Ed. 360.

The court discusses numerous acts of the original claimant and of parties interested in the mine, and especially those disclosed in a correspondence between them, and holds these acts to be evidence that the claimant and his alienees knew full well the invalidity of the title which he and they were setting up. *United States v. Castillero*, 2 Black 17, 17 L. Ed. 360.

**Knowledge of the Mexican government as to invalidity of claim.**—The assurance

given by the Mexican government when the treaty of peace was under negotiation, that no title for land in California had been made of later date than May 13th, 1846; her assent to the tenth article which contained a similar declaration; and her acceptance of the subsequent explanations contained in a protocol which promised the protection of the American government only to such titles as were made before that time, prove that Mexico herself did know, and must have known, that the pretensions of the claimants under a title of later date were unfounded. *United States v. Castillero*, 2 Black 17, 17 L. Ed. 360.

**Agricultural grants.**—Granting vacant lands for agricultural purposes was by no means regarded as a matter of so much public importance as the adjudication of titles to newly-discovered mines. Grants of land made under those laws did not convey to the grantee the unsevered minerals in the soil or any interest in them. *United States v. Castillero*, 2 Black 17, 195, 17 L. Ed. 360.

**Jurisdiction of alcalde.**—An alcalde had no jurisdiction under the mining laws and could make no title to a mine. The tribunal empowered to exercise this jurisdiction was the mining deputation of the territory or the nearest one thereto. *United States v. Castillero*, 2 Black 17, 17 L. Ed. 360.

The fact that no mining deputation nor no courts of first instance were established in California, would show that a law, giving jurisdiction over mines to an alcalde, might have been a convenience to the people, but it does not show that such a law existed. *United States v. Castillero*, 2 Black 17, 17 L. Ed. 360.

If the alcalde had jurisdiction, it would be necessary for the claimant to show that such jurisdiction was exercised in accordance with the requirements of the mining ordinances. The authority of the alcalde cannot be inferred from the fact



**C. Adjudication and Registry.**—Registry is the basis of title to a mine, and no mine can be lawfully worked until it is registered; nor can any title thereto be acquired either by the discoverer or by any other person without a registry.<sup>99</sup> Registry consists of an entry in a book kept by the proper public authority.<sup>1</sup> Title to a mine is vested by the adjudication or decree of the proper tribunal in a case duly presented for decision, and by the registry of the adjudication, together with the proceedings on which it is founded.<sup>2</sup> The mere fact of discovery without such adjudication and registry, gives no title to the discoverer, though it is also true that without proof of discovery there can be no adjudication in his favor.<sup>3</sup> Those provisions which appertain to the registry of the mine and the action of the tribunal thereon, and in respect to the judicial possession of it, are conditions precedent, and a discoverer cannot support a title without showing a substantial compliance. Want of registry and omission to mark boundaries on the ground are fatal defects in a mining title.<sup>4</sup> A discoverer who neglects to have his title adjudicated and registered agreeably to the ordinance, or to have his pertenencias measured and marked, does not by such negligence forfeit his title; but simply fails to acquire any title

of its exercise or from the fact that no other tribunal was authorized to exercise such a jurisdiction. *United States v. Castillero*, 2 Black 17, 17 L. Ed. 360.

**99. Basis of title.**—*United States v. Castillero*, 2 Black 17, 17 L. Ed. 360.

**Rights to mine not registered.**—"Rights to a mine not registered can only be acquired from the sovereign power, and it is true, as contended by the United States, that the forms of such a conveyance are wholly distinct from those employed in the ordinary process of granting lands." *United States v. Castillero*, 2 Black 17, 166, 17 L. Ed. 360.

**1. Entry in book.**—*United States v. Castillero*, 2 Black 17, 17 L. Ed. 360.

**Compliance with provisions as to registry.**—"A document cannot be said to have been registered, merely because it was handed to the secretary of the alcalde, before whom it was executed, and was for a time somewhere in the courthouse, especially when it appears that it was subsequently abstracted from the depository, if such it may be called, and was not returned to it for years afterwards, and then clandestinely and under circumstances of the greatest suspicion." *United States v. Castillero*, 2 Black 17, 202, 17 L. Ed. 360.

It is a great error to suppose that a compliance with a mining ordinance is shown by proving that sheets of paper, not executed at the same time, but assumed to constitute an *espediente*, were at some time placed in the office of the alcalde and remained there for a time in one of the pigeon holes of his desk. Such a suggestion is destitute of any foundation. On the contrary, the requirement is in express terms that the statement of the discoverer, together with the time when he presented himself, "shall be noted in a book of registry, which the deputation and notary, if there be one, shall keep, and in respect to the action of the tribunal on the application, the provision is that an

exact account shall be taken" in order that it may be added to the corresponding part of the registry with the evidence of possession, which shall immediately be given. Act of possession, therefore, is to be added to the registry, together with the action of the tribunal on making the adjudication, and they are both required to be noted in a book (*Libro*) of registry. *United States v. Castillero*, 2 Black 17, 191, 17 L. Ed. 360.

**2. Title vested by adjudication and registry.**—*United States v. Castillero*, 2 Black 17, 17 L. Ed. 360.

**Statement of applicant.**—Applicant must resort to the proper tribunal and present his written statement, specifying in it his name and the names of his partners, if he has any, the place of their birth, their residence, profession and employment, and the most particular and distinguishing features of the place, hill or vein, of which he asks adjudication. *United States v. Castillero*, 2 Black 17, 190, 17 L. Ed. 360.

**Contesting right.**—Contestants appearing during the ninety days may prefer a counterclaim, and in that event it becomes the duty of the tribunal to adjudge the right to him who shall make the better proof, but no one shall have any right to be heard unless he shall appear within that time. Halleck Coll., p. 224, arts. 4 and 5. *United States v. Castillero*, 2 Black 17, 170, 17 L. Ed. 360.

**Boundaries.**—To complete the adjudication and carry it into effect, the boundaries must be fixed; else the title or claim, like other indefinite interests in lands, will be void for uncertainty; and this rule applies to mines situate on public as well as to those on private lands. *United States v. Castillero*, 2 Black 17, 17 L. Ed. 360.

**3. Mere fact of discovery.**—*United States v. Castillero*, 2 Black 17, 17 L. Ed. 360.

**4. Conditions precedent.**—*United States v. Castillero*, 2 Black 17, 17 L. Ed. 360.



which could be the subject of forfeiture.<sup>5</sup>

**D. Construction and Validity of Documents of Title.**—Conceding the power of the acting president of the republic of Mexico, to make a grant of land in California, the several documents attesting any supposed grant are to be examined with care, since it thus becomes a question of construction whether it was or was not intended to be a grant.<sup>6</sup> In the case of *United States v. Castillero*, 2 Black 17, 17 L. Ed. 360 the *espedientes* of title were held to be entitled to little or no consideration.<sup>7</sup>

**5. Failure to acquire title.**—*United States v. Castillero*, 2 Black 17, 17 L. Ed. 360.

**6. Documents of title.**—*United States v. Castillero*, 2 Black 17, 17 L. Ed. 360.

Claimant went to Mexico six months after the alleged date of his mining title. He petitioned the Junta for aid and asked a land grant. He asserted that he had discovered and denounced a mine, but produced no title papers, and falsely stated that the mine was in the Mission of Santa Clara, suppressing the fact that it was on a private rancho five leagues distant from that mission. He requested the Junta to recommend the approval of the possession of the mine which had been given him by the local authorities of California. The Junta agreed to furnish the assistance and recommended the approval or confirmation. The president approved of the agreement made by the Junta in order to commence working the mine (as one of his ministers said) or (according to another) for the exploration of the mine, but made no decree concerning the title. Held, that these proceedings were not a confirmation or approval of any title which the claimant might previously have obtained from an *alcalde* in California, and therefore, the documents produced to show that he had such a title must stand or fall by their own contents and the evidence which supports them on their original merits. *United States v. Castillero*, 2 Black 17, 17 L. Ed. 360.

A party asserting that he had discovered and denounced a valuable mine in California, presented a memorial to the Junta de Minería, asking a loan of money and materials to work it, and also requesting the Junta to recommend that the government grant him as a colonist two square leagues on his mining possession. The Junta communicated the memorial to the minister of justice, with their approval of the loan, etc.; but declined to give any opinion upon the propriety of granting the land. The minister of justice in the name of the president concurred with the Junta, and with respect to the land, ordered the proper measures to be taken by the minister of relations, "with the understanding that the government accedes to the petition." The minister of relations made out and gave to the applicant a dispatch addressed to the governor of California reciting the previous proceedings and declaring that he did so in order that the governor might put the applicant in pos-

session of the two square leagues "in conformity with the laws and decrees on the subject of colonization." The dispatch was never delivered to the governor. Held, that this was not a grant for two leagues of land nor intended to be so. *United States v. Castillero*, 2 Black 17, 17 L. Ed. 360.

**Legal effect of dispatch.**—The legal effect of the dispatch of the minister of relations was merely to authorize a regular application to the governor by petition under the laws of 1824 and 1828 to be followed by such steps as those laws require, and a grant of land if the governor should ascertain that it was proper to make one. *United States v. Castillero*, 2 Black 17, 17 L. Ed. 360.

"To say that these proceedings at the city of Mexico were in themselves an absolute grant, either legal or equitable, of the land claimed under them, is a manifest error which this court cannot be expected to sanction." *United States v. Castillero*, 2 Black 17, 17 L. Ed. 360.

The case of *United States v. Castillero*, 23 How. 464, 468, 16 L. Ed. 498, reviewed and shown to be entirely different from this in its facts, and in the legal principles applicable to it. *United States v. Castillero*, 2 Black 17, 17 L. Ed. 360.

**7. Espedientes of title—Value of documents.**—Claimant of a mining right filed with his petition an *espediente* of his title certified by an *alcalde* to be a true copy to the letter from the original in his office. It was afterwards proved that the *espediente* and the certificate were in the handwriting of a party interested, who had copied them from papers furnished by another party also interested, and that the *alcalde* had signed the certificate without seeing any original. Held, that this document is entirely unworthy of credit. *United States v. Castillero*, 2 Black 17, 17 L. Ed. 360.

Claimant produced another *espediente* certified by a Mexican *alcalde* who could not write nor read writing. This *espediente* differed in some particulars from that which the claimant filed with his petition. The *alcalde*, though a witness, was not asked to verify the document. It was in the handwriting of another witness who swore to that fact, but did not testify from what he had copied it. Held, that such a document, so proved, is entitled to very little consideration. *United States v. Castillero*, 2 Black 17, 17 L. Ed. 360.

Another *espediente* was produced at a

**E. Agricultural Grants.**—Grants made to an applicant in the department of California as a colonist conveyed no interest in the minerals.<sup>8</sup> Under the mining laws of Spain, the discovery of a mine of gold or silver did not destroy the title of the individual to the land granted.<sup>9</sup>

**F. Right of United States Board of Land Commissioners to Investigate Claim.**—A mining right or privilege under the Mexican ordinances relating to that subject, is a title to land within the meaning of the act of 1851, and therefore the board of land commissioners had jurisdiction to investigate a claim to such right.<sup>10</sup>

**MINING PARTNERSHIP.**—See the title **PARTNERSHIP**.

**MINISTER.**—See the title **AMBASSADORS AND CONSULS**, vol. 1, p. 274.

**MINISTERIAL.**—See **JUDICIAL, LEGISLATIVE AND MINISTERIAL**, vol. 7, p. 670. As to ministerial court for the District of Columbia, see the title **COURTS**, vol. 4, p. 1167.

**MINORS.**—See the title **INFANTS**, vol. 6, p. 1012.

**MINUTES OF COURT.**—See the title **RECORDS**.

**MISAPPLICATION OF FUNDS.**—See the titles **BANKS AND BANKING**, vol. 3, p. 109; **EMBEZZLEMENT**, vol. 5, p. 742.

**MISDEMEANOR.**—See the title **CRIMINAL LAW**, vol. 5, p. 58, and references given.

**MISJOINDER.**—As to misjoinder of actions, see the titles **ACTIONS**, vol. 1, p. 111; **ADMIRALTY**, vol. 1, p. 158; **DEMURRERS**, vol. 5, p. 304. As to misjoinder of parties, see the titles **ABATEMENT, REVIVAL AND SURVIVAL**, vol. 1, pp. 31, 40; **ADMIRALTY**, vol. 1, p. 160; **PARTIES**.

**MISNOMER.**—See references under the title **NAMES**.

**MISPRISION OF TREASON.**—See the title **TREASON**.

**MISREPRESENTATION.**—See the title **FRAUD AND DECEIT**, vol. 6, p. 394.

**MISSISSIPPI.**—See the title **BOUNDARIES**, vol. 3, p. 494.

**MISSISSIPPI RIVER.**—See the titles **ACCESSION, ACCRETION AND RELICTION**, vol. 1, p. 55; **NAVIGABLE WATERS**.

**MISSOURI.**—See the title **BOUNDARIES**, vol. 3, p. 494.

**MISSOURI RIVER.**—See the title **BOUNDARIES**, vol. 3, p. 497.

subsequent period which the claimant alleged to be the original from the archives, though it differed materially from the two others previously alleged to be copies. A witness testified that he found it among the records in January, 1851, but it bore no official marks, it was never seen among the archives previous to that time, the claimant's counsel had made affidavit in December, 1850, that the original expediente was in Mexico and could not be produced, nor a copy of it furnished, though it had been diligently sought for. Held, that this document was not sufficiently proved, and that the testimony of Mexican officers and assisting witnesses who swore to its execution by them at or about the time of its date did not establish it as an official paper. *United States v. Castillero*, 2 Black 17, 17 L. Ed. 360.

A fourth and still different expediente was introduced by claimant near the close of the case. It was certified (all but the act of possession) by an alcalde who admitted on his oath that the papers had been sent to him from the mine, and he

had signed the certificates without knowing what they were. The Mexican officer and his assisting witnesses were then called to prove that the act of possession in this expediente was a duplicate original. Upon these and other circumstances it was held, that this expediente could not be regarded as a genuine document, and that its production at that late stage of the case, added to its glaring inconsistency with the evidence previously given, had the effect, not only to impair all confidence in the first expediente, but to discredit all the witnesses who had sworn to the papers of which it was composed. *United States v. Castillero*, 2 Black 17, 17 L. Ed. 360.

**8. Agricultural grant.**—*United States v. Castillero*, 2 Black 17, 201, 17 L. Ed. 360.

**9. Discovery of gold or silver.**—*Fremont v. United States*, 17 How. 542, 565, 15 L. Ed. 241.

**10. Land commissioners.**—*United States v. Castillero*, 2 Black 17, 17 L. Ed. 360; Compare *Fremont v. United States*, 17 How. 542, 15 L. Ed. 241.

## MISTAKE AND ACCIDENT.

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### CROSS REFERENCES.

See the titles ACCESSION, ACCRETION AND RELICTION, vol. 1, p. 51; ACCIDENT INSURANCE, vol. 1, p. 58; ACKNOWLEDGMENTS, vol. 1, p. 90; AFFIDAVITS, vol. 1, p. 202; ALTERATION OF INSTRUMENTS, vol. 1, p. 261; AMENDMENTS, vol. 1, p. 288; ANCIENT DOCUMENTS, vol. 1, p. 313; APPEAL AND ERROR, vol. 1, p. 333; ARBITRATION AND AWARD, vol. 2, p. 486; ASSIGNMENTS, vol. 2, p. 571; ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 2, p. 610; AUCTIONS AND AUCTIONEERS, vol. 2, p. 743; BAIL AND RECOGNIZANCE, vol. 2, p. 777; BILL OF REVIEW, vol. 3, p. 244; BILLS, NOTES AND CHECKS, vol. 3, pp. 305, et seq., 350; BONDS, vol. 3, p. 394; BOUNDARIES, vol. 3, p. 461; COMPROMISE AND SETTLEMENT, vol. 3, p. 990; CONFUSION OF GOODS, vol. 3, p. 1093; COVENANTS, vol. 5, p. 5; DEATH BY WRONGFUL ACT, vol. 5, p. 200; DEEDS, vol. 5, pp. 254, et seq., 258, 263, 268, et seq.; DOCUMENTARY EVIDENCE, vol. 5, p. 431; ELECTIONS, vol. 5, p. 721; EQUITY, vol. 5, p. 803; EXCHANGE OF PROPERTY, vol. 6, p. 75; FRAUD AND DECEIT, vol. 6, p. 394; FRAUDS, STATUTE OF, vol. 6, p. 451; IDENTITY, vol. 6, p. 90; IMPROVEMENTS, vol. 6, p. 896; INDICTMENTS, INFORMATIONS, PRESENTMENTS AND COMPLAINTS, vol. 6, p. 961; INSTRUCTIONS, vol. 7, p. 26; INSURANCE, vol. 7, p. 66; INTERPRETATION AND CONSTRUCTION, vol. 7, p. 257; JUDGMENTS AND DECREES, vol. 7, p. 544; LOST INSTRUMENTS AND RECORDS, vol. 7, p. 1064; MARINE INSURANCE, ante, p. 149; MASTER AND SERVANT, ante, p. 275; MASTERS OF VESSELS, ante, p. 300; MAXIMS, ante, p. 313; MORTGAGES AND DEEDS OF TRUST; NAMES; NEW TRIALS; PAROL EVIDENCE; PATENT; PLEADING; POWERS; PRESUMPTIONS AND BURDEN OF PROOF; PUBLIC OFFICERS; QUIETING TITLE; RECEIPTS; RECORDING ACTS; REFERENCE; RE-SCISSION, CANCELLATION AND REFORMATION; SALES; SEALS AND SEALED IN-



STRUMENTS; SPECIFIC PERFORMANCE; STOCK AND STOCKHOLDERS; SUMMONS AND PROCESS; TROVER AND CONVERSION; TRUSTS AND TRUSTEES; VENDOR AND PURCHASER; VERDICT; WORKING CONTRACTS.

As affecting the validity of particular instruments, contracts and transactions, see the various titles treating thereof. As affecting criminal liability, see the title CRIMINAL LAW, vol. 5, p. 43, and the specific criminal titles. As affecting liability for torts, see the title TORTS, and the titles treating of the various torts. As excusing laches and lapse of time, see the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 900. As ground of relief from forfeiture, see the title PENALTIES AND FORFEITURES. As ground for attacking will, see the title WILLS. As to accidents generally, see the titles FELLOW SERVANTS, vol. 6, p. 245; MASTER AND SERVANT, ante, p. 275, etc. As to inevitable accident, see the titles CARRIERS, vol. 3, p. 593; COLLISION, vol. 3, p. 879; CONTRACTS, vol. 4, p. 587; MARINE INSURANCE, ante, p. 149; NEGLIGENCE. See, also, ACT OF GOD, vol. 1, p. 115. As to mistake in accord and plea thereof, see the title ACCORD AND SATISFACTION, vol. 1, p. 69. As to mistake in assessment, see the title SPECIAL ASSESSMENTS. As to mistake in date of citation, or statement of names of parties, see the title APPEAL AND ERROR, vol. 2, pp. 160, 161. As to mistake in election, see the title ELECTION OF REMEDIES, vol. 5, p. 720. Mistake in entry of order for continuance, see the title CONTINUANCES, vol. 4, p. 546. As to mistakes in government contracts, see the titles UNITED STATES; PUBLIC OFFICERS. As to mistake in notice of dishonor of note, etc., see the title BILLS, NOTES AND CHECKS, vol. 3, p. 332. As to mistake in partnership settlement, see the title PARTNERSHIP. As to mistake in payment of duties, see the titles PAYMENT; REVENUE LAWS. As to mistake in proposal for municipal contract, see the title MUNICIPAL CORPORATIONS. As to mistake as to land conveyed and vendor's remedy, see the title VENDOR AND PURCHASER. As to mistake in commission to take depositions, see the title DEPOSITIONS, vol. 5, p. 324. As to mistake in drawing of a lottery, see the title LOTTERIES, vol. 7, p. 1070. As to mistake in insurance policy or notice of premium due, see the title INSURANCE, vol. 7, p. 100, et seq.; 124. As to mistake in estimates and decisions of engineers, referees, etc., to whom questions are referred for decision, see the title WORKING CONTRACTS. As to mistake in letter of credit, see the title LETTERS OF CREDIT, vol. 7, p. 854. As to mistake in patents and entries of public lands, see the title PUBLIC LANDS. As to mistakes in proceedings of municipal corporations, see the title MUNICIPAL CORPORATIONS. As to mistakes in statutes, see the title STATUTES. As to mistake in telegram, see the title TELEGRAPHS AND TELEPHONES. As to mistake of attorney, see the title ATTORNEY AND CLIENT, vol. 2, p. 703. As to mistakes as to matters of prize, see the title PRIZE. As to mistake of bailor as to rights of third person to property, see the title BAILMENTS, vol. 2, p. 790. As to assumption of mortgage by mistake by vendee, see the title VENDOR AND PURCHASER. As to correction of mistakes in judgments and decrees, see the titles FOREIGN JUDGMENTS, RECORDS AND JUDICIAL PROCEEDINGS, vol. 6, p. 335; JUDGMENTS AND DECREES, vol. 7, p. 544; MANDATE AND PROCEEDINGS THEREON, ante, p. 97. As to effect of mistake on discharge of insolvent debtor, see the titles BANKRUPTCY, vol. 2, p. 848; INSOLVENCY, vol. 7, p. 1. As to mistake as ground for relief against forfeiture of lease, see the title LANDLORD AND TENANT, vol. 7, p. 827. As to mistake or accident as excusing usury, see the title USURY. As to mistake as to title under which adverse possession is held, see the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 941. As to estoppel by mistake, see the title ESTOPPEL, vol. 5, p. 953. As to impeaching a settled account for mistake, see the title ACCOUNTS AND ACCOUNTING, vol. 1, p. 72. As to interest on money received and paid by mistake, see the title INTEREST, vol. 7, p. 217. As to omission of direct descendant from will by accident or mistake, see the title WILLS.

As to accidental omission from mortgage and mistake generally, see the title MORTGAGES AND DEEDS OF TRUST. As to accidental destruction of or injury to railroad rolling stock, see the title RAILROADS. As to payment of assessment on national bank as mistake, see the title BANKS AND BANKING, vol. 3, p. 133. As to recovery of money paid by mistake, see the title PAYMENT. See, also, the title POSTAL LAWS. As to forms of and time for relief against mistake, see the titles INJUNCTIONS, vol. 6, p. 1022; LACHES, vol. 7, p. 790; LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 900; RESCISSION, CANCELLATION AND REFORMATION; SPECIFIC PERFORMANCE. As to relief against mistake in boundaries, see the title BOUNDARIES, vol. 3, p. 498. As to validity of bond accidentally signed by attorney in fact with the wrong baptismal name of obligor, see the title BONDS, vol. 3, p. 394. As to validity of municipal bonds upon which by mistake the seal has been omitted, see the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES. As to warranty against mistake as to conditions surrounding work, see the title WORKING CONTRACTS. As to power of court to reinstate a cause dismissed by mistake, see the title DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 5, pp. 366, 388.

### I. Definitions and General Principles.

**Mistake Defined.**—Where the action of the parties would not have been what it was, but for ignorance of particular facts or of the law, it constitutes a case of mistake.<sup>1</sup>

**Mistake and Fraud Compared.**—Mistake and fraud run very closely together, and mistake may amount to fraud in law.<sup>2</sup>

**Accident.**—"Accident" has been construed to mean "fortuitous event or irresistible force."<sup>3</sup> And an accident or casualty, according to common under-

1. **Mistake defined.**—Curtner *v.* United States, 149 U. S. 662, 673, 37 L. Ed. 890.

2. **Mistake and fraud.**—Where a false assertion was made in a court of justice, by which the defendant profited, to the loss of the plaintiff, whose suit was thereby defeated, the fact that it was made by mistake would not excuse or make it the less a fraud in law. Philadelphia, etc., R. Co. *v.* Howard, 13 How. 307, 337, 14 L. Ed. 157. See the title FRAUD AND DECEIT, vol. 6, p. 399.

In equitable remedies given for fraud, accident or mistake, it is the facts as found that give the right to relief, and it is often difficult to say, upon admitted facts, whether the error which is complained of was occasioned by intentional fraud or by mere inadvertence or mistake. Indeed, upon the very same state of facts, an intelligent man, acting deliberately, might well be regarded as guilty of fraud, and an ignorant and inexperienced person might be entitled to a more charitable view. Yet the injury to the complainant would be the same in either case. A defendant in a suit, therefore, has no reason to complain of the language of the court below in attributing the appellant's misconduct to mistake and inadvertence, rather than to intentional fraud. Wasatch Min. Co. *v.* Crescent Min. Co., 148 U. S. 293, 298, 37 L. Ed. 454.

**Mistake may be so gross** as necessarily to imply bad faith. Kihlberg *v.* United States, 97 U. S. 398, 24 L. Ed. 1106. See the title FRAUD AND DECEIT, vol. 6, p. 399, et seq.

**Advantage taken of clerical error as fraud.**—If a party contracting with government agents knew that a clerical error had been committed, of which the agents of the government were ignorant, and deliberately intended to take advantage of the error to obtain the execution of a contract for the payment of so grossly unconscionable a price, or if the facts were such that he must be held to have known that their action, if understandingly taken, would be in palpable dereliction of their duty to their principal, and, notwithstanding, sought to profit by it, the character of the fraud, so far as the claimant is concerned, is not changed by the fact that such action was the result of the negligence or mistake of the government's agents, untainted by moral turpitude on their part. Hume *v.* United States, 132 U. S. 406, 414, 33 L. Ed. 393.

3. **Accident.**—The term "accident" in Louisiana Code providing for abatement of the rent in case the tenant suffers damage to crop by accident, was construed to mean "fortuitous event" or irresistible force. Viterbo *v.* Friedlander, 120 U. S. 707, 30 L. Ed. 776.

"The Louisiana Code, following the French law and the Code Napoleon, recognizes two kinds or degrees of what, under various but equivalent names, has been called *vis major*, *cas fortuit*, irresistible force, inevitable accident, or unforeseen event; the one, ordinary, which might have been foreseen by any man of common prudence as not unlikely to happen at some time; the other, extraordinary,



standing, proceeds from an unknown cause or is an unusual effect of a known cause.<sup>4</sup>

## II. As Affecting Validity of Instruments and Transactions.

**Effect of Mistake.**—It is a principle sanctioned as well by law as by the immutable principles of justice, that where an individual acts in ignorance of his rights, he shall not be prejudiced by such acts. And this rule applies at least with as much force to the acts of corporate bodies, as to those of individuals.<sup>5</sup>

**Effect of Technical Mistake of Attorney.**—Equity will not destroy a right of action on account of a mere technical mistake of counsel.<sup>6</sup>

**Mistake of Law.**—And that a misrepresentation or misunderstanding of the law will not vitiate a contract, where there is no misunderstanding of the facts, is well settled.<sup>7</sup> And an agreement is not avoidable because its legal effect is different from that which was intended by the parties to the agreement.<sup>8</sup>

**Payment under Mistake and Recovery Back.**—See the title PAYMENT. See, also, the titles ASSUMPSIT, vol. 2, p. 645, et seq.; POSTAL LAWS.<sup>9</sup>

## III. As Grounds of Equity Jurisdiction.

**A. In General.**—A court of equity has a general authority to relieve in cases of accident or mistake.<sup>10</sup> Especially where the mistake was caused chiefly by

which could not have been foreseen, or expected to occur at any time." *Viterbo v. Friedlander*, 120 U. S. 707, 728, 30 L. Ed. 776.

4. *Chicago, etc., R. Co. v. Pullman Southern Car Co.*, 139 U. S. 79, 86, 35 L. Ed. 97.

5. **Effect of mistake.**—*New Orleans v. United States*, 10 Pet. 662, 735, 9 L. Ed. 573.

"Where there is a misunderstanding as to the terms of a contract, neither party is liable in law or equity." *National Bank v. Hall*, 101 U. S. 43, 49, 25 L. Ed. 822. See the title CONTRACTS, vol. 4, p. 552.

As to effect of mistake in description of property sold, see the title VENDOR AND PURCHASER.

6. **Technical mistake of counsel.**—*Ward v. Sherman*, 192 U. S. 168, 48 L. Ed. 391.

So held where action was not brought in proper form, but the intention of plaintiff was manifest. *Ward v. Sherman*, 192 U. S. 168, 48 L. Ed. 391. See, generally, the title ATTORNEY AND CLIENT, vol. 2, p. 703.

7. **Reliance on misrepresentation of law.**—*Upton v. Tribilcock*, 91 U. S. 45, 50, 23 L. Ed. 203. See the title FRAUD AND DECEIT, vol. 6, p. 406.

8. **Legal effect different from expectation.**—*Laver v. Dennett*, 109 U. S. 90, 27 L. Ed. 867. See, also, post, "Mistake of Law," III, C.

9. **Responsibility of agent for money paid him by mistake after payment over to principal.**—*Elliott v. Swartwout*, 10 Pet. 137, 155, 9 L. Ed. 373. See the title PRINCIPAL AND AGENT.

10. **Mistake and accident as grounds of equity jurisdiction.**—*Kann v. King*, 204 U. S. 43, 57, 51 L. Ed. 360; *Graves v. Boston Marine Ins. Co.*, 2 Cranch 419, 2 L. Ed. 324; *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589; *Vau Ness v. Washington*, 4 Pet. 232, 7 L. Ed. 842; *Allen v. Hammond*,

11 Pet. 63, 9 L. Ed. 633; *Rhode Island v. Massachusetts*, 15 Pet. 233, 10 L. Ed. 721; *Bradford v. Union Bank*, 13 How. 57, 14 L. Ed. 49; *Meador v. Norton*, 11 Wall. 442, 458, 20 L. Ed. 184; *Insurance Co. v. Wilkinson*, 13 Wall. 222, 20 L. Ed. 617; *Hearne v. Marine Ins. Co.*, 20 Wall. 488, 22 L. Ed. 395; *Equitable Ins. Co. v. Hearne*, 20 Wall. 494, 22 L. Ed. 398; *Moore v. Robbins*, 96 U. S. 530, 535, 24 L. Ed. 848; *Ivinson v. Hutton*, 98 U. S. 79, 82, 25 L. Ed. 66; *Snell v. Insurance Co.*, 98 U. S. 85, 88, 25 L. Ed. 52; *Walden v. Skinner*, 101 U. S. 577, 585, 25 L. Ed. 963; *Marquez v. Frisbie*, 101 U. S. 473, 476, 25 L. Ed. 800; *Metcalf v. Williams*, 104 U. S. 93, 95, 26 L. Ed. 665; *Smelting Co. v. Kemp*, 104 U. S. 636, 645, 26 L. Ed. 875; *Harvey v. United States*, 105 U. S. 671, 26 L. Ed. 1206; *Elliott v. Sackett*, 108 U. S. 132, 27 L. Ed. 678; *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 300, 31 L. Ed. 747; *Williams v. United States*, 138 U. S. 514, 517, 34 L. Ed. 1026; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 435, 35 L. Ed. 1062; *Schroeder v. Young*, 161 U. S. 334, 345, 40 L. Ed. 721. See, also, *Cross v. United States*, 14 Wall. 479, 20 L. Ed. 721; *United States v. Stone*, 2 Wall. 525, 17 L. Ed. 765; *Brown v. Buena Vista County*, 95 U. S. 157, 159, 24 L. Ed. 422.

"There has always existed in the courts of equity the power in certain classes of cases to inquire into and correct mistakes, injustice, and wrong in both judicial and executive action, however solemn the form which the result of that action may assume, when it invades private rights." *Johnson v. Towsley*, 13 Wall. 72, 84, 20 L. Ed. 485.

"When a party has been deprived of his right by fraud, accident, or mistake, and has no remedy at law, a court of equity will grant relief." *Metcalf v. Williams*, 104 U. S. 93, 95, 26 L. Ed. 665.

**Mistake in deed.**—The aid of a court of



the party claiming thereunder.<sup>11</sup> But not for mere recovery of damages, for which the remedy at law is adequate.<sup>12</sup> And such relief can only be afforded in courts of equity as distinguished from law.<sup>13</sup>

equity may be required to supply what was omitted from a deed by mistake, and so make it conform to the intentions of the parties. *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 449, 35 L. Ed. 1062.

And a clause inserted in a deed by mistake of the scrivener and against the intention of the parties, is unenforceable against the grantee, where no principle of estoppel intervenes. *Drury v. Hayden*, 111 U. S. 223, 28 L. Ed. 408.

**Mistake of agent.**—"Relief, when deeds or other instruments are executed by mistake or inadvertence of agents, as well as upon false suggestions, is a common head of equity jurisprudence." *Germania Iron Co. v. United States*, 165 U. S. 379, 383, 41 L. Ed. 754; *Hughes v. United States*, 4 Wall. 232, 236, 18 L. Ed. 303.

**Ordinary head of equity jurisdiction.**—Relief upon the ground of mistake is an ordinary head of equity jurisdiction. The parties will be placed as they would have stood if the mistake had not occurred. *Moffett, etc., Co. v. Rochester*, 178 U. S. 373, 44 L. Ed. 1108; *Hearne v. Marine Ins. Co.*, 20 Wall. 488, 490, 22 L. Ed. 395; *Hughes v. United States*, 4 Wall. 232, 236, 18 L. Ed. 303. See the title RESCIS-SION, CANCELLATION AND REF-ORMATION.

In *Simpson v. Vaughan* (2 Atk. 33), Lord Hardwicke said that a mistake was "a head of equity on which the court always relieves." *Snell v. Insurance Co.*, 98 U. S. 85, 89, 25 L. Ed. 52.

In *Gillespie v. Moon* (2 Johns. (N. Y.) Ch. 585), Chancellor Kent examined the question both upon principle and authority, and said: "I have looked into most, if not all, of the cases in this branch of equity jurisdiction, and it appears to me established, and on great and essential grounds of justice, that relief can be had against any deed or contract in writing founded in mistake." *Snell v. Insurance Co.*, 98 U. S. 85, 89, 25 L. Ed. 52.

**A clerical error in a bid or proposal for a contract** for work to be done, is such a mistake as will be relieved against in equity, where there is no question of the fact of the error or of the good faith of complainant. *Moffett, etc., Co. v. Rochester*, 178 U. S. 373, 386, 44 L. Ed. 1108. See, also, the title WORKING CONTRACTS.

**Mistake in execution of instrument in conformity with intention.**—It is a principle of equity, that when an instrument is drawn and executed, which professes, or is intended, to carry into execution an agreement, whether in writing or by parol, previously entered into; but which, by mistake of the draftsman, either in fact or in law, does not fulfill, or which violates, the manifest intention of the par-

ties to the agreement; equity will correct the mistake, so as to produce a conformity of the instrument to the agreement. *Hunt v. Rousmaniere*, 1 Pet. 1, 7 L. Ed. 27; *Ivinson v. Hutton*, 98 U. S. 79, 83, 25 L. Ed. 66; *Elliott v. Sackett*, 108 U. S. 132, 27 L. Ed. 678, where a covenant assuming a mortgage was inserted in a deed contrary to the agreement therefor. *Snell v. Insurance Co.*, 98 U. S. 85, 25 L. Ed. 52.

Proof of mistake may be admitted in equity to show that the terms of the instrument employed in the preparation of the same were varied or made different by addition or subtraction from what they were intended and believed to be when the same was executed. *Walden v. Skinner*, 101 U. S. 577, 585, 25 L. Ed. 963.

And where, through mistake or accident, an instrument has been incorrectly framed, equity will afford relief. *Ivinson v. Hutton*, 98 U. S. 79, 82, 25 L. Ed. 66.

**11. Mistake due to party claiming advantage thereof.**—In the case of a contract from which, by mistake, material stipulations have been omitted, whereby the true intent and meaning of the parties are not fully or accurately expressed, and where, in the attempt to reduce the contract to writing, there has been a mutual mistake, caused chiefly by that party who now seeks to avail himself of it, that a court of equity can afford relief in such a case is well settled by the authorities. *Snell v. Insurance Co.*, 98 U. S. 85, 88, 25 L. Ed. 52.

It is one of the most familiar duties of a court of chancery to relieve against mistake; especially where it has been produced by the misrepresentations of the adverse party. *Rhode Island v. Massachusetts*, 15 Pet. 233, 10 L. Ed. 721.

**12. Not when damages merely are sought.**—In cases of mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages, when the like amount can be recovered at law in an action sounding in tort or for money had and received. *Buzard v. Houston*, 119 U. S. 347, 352, 30 L. Ed. 451; *Parkersburg v. Brown*, 106 U. S. 487, 500, 27 L. Ed. 238; *Ambler v. Choteau*, 107 U. S. 586, 27 L. Ed. 322; *Litchfield v. Ballou*, 114 U. S. 190, 29 L. Ed. 132. See, also, the title EQUITY, vol. 5, p. 815.

"Courts of equity grant relief in cases of fraud and mistake, which cannot be obtained in courts of law." *Hunt v. Rousmanier*, 8 Wheat. 174, 211, 5 L. Ed. 589.

**13. Equity jurisdiction exclusive.**—*Ivinson v. Hutton*, 98 U. S. 79, 82, 25 L. Ed. 66; *Hearne v. Marine Ins. Co.*, 20 Wall. 488, 490, 22 L. Ed. 395.

**To Divest a Title Acquired by Mistake.**—Inadvertence and mistake are grounds for judicial interference to divest a title acquired thereby.<sup>14</sup>

**Mistake in Supposing the Existence of a Subject Matter for the Contract.**—Where parties make an agreement for the rendition of and payment for services in the prosecution of a claim, which, unknown to either, has been already allowed, so as not to be in dispute, there is such a mutual mistake as will be ground of relief in equity from such contract. There is mutual mistake, hardship and injustice, and total want of consideration.<sup>15</sup>

**Accident as Giving Right to Annulment of Lease or Abatement of Rent.**—See note.<sup>16</sup>

**Amount of Evidence Necessary.**—See post, "Burden of Proof and Sufficiency of Evidence," III, G, 1.

**B. Mistake of Fact.**—Courts of equity afford relief in case of mistake of facts.<sup>17</sup>

14. **To divest a title.**—"It cannot be doubted that inadvertence and mistake are, equally with fraud and wrong, grounds for judicial interference to divest a title acquired thereby. That is equally true, in transactions between individuals, and in those between the government and its patentee. If, through inadvertence and mistake, a wrong description is placed in a deed by an individual, and property not intended to be conveyed is conveyed, can there be any doubt of the jurisdiction of a court of equity to interfere and restore to the party the title which he never intended to convey? So of any other inadvertence and mistake, vital in its nature, by which a title is conveyed when it ought not to have been conveyed. The facts and proceedings attending this transfer of title are fully disclosed in the bill. They point to fraud and wrong, and equally to inadvertence and mistake; and if the latter be shown, the bill is sustainable, although the former charge against the defendant may not have been fully established." *Williams v. United States*, 138 U. S. 514, 517, 34 L. Ed. 1026. See, also, *Germania Iron Co. v. United States*, 165 U. S. 379, 384, 41 L. Ed. 754; *Duluth, etc., R. Co. v. Roy*, 173 U. S. 587, 590, 43 L. Ed. 820.

**Patent procured by mistake.**—And that power plainly extends to cases where one man has procured the patent which belonged to another at the time the patent was issued. *Meador v. Norton*, 11 Wall. 442, 458, 20 L. Ed. 184. See, also, the title **PATENTS**.

15. **Mistake as to existence of a subject matter.**—*Allen v. Hammond*, 11 Pet. 63, 9 L. Ed. 633. See, also, *Jacksonville, etc., Nav. Co. v. Hooper*, 160 U. S. 514, 527, 40 L. Ed. 515.

Thus, if a life estate in land were to be sold, when the estate has terminated by the death of the life tenant, the purchaser would be relieved in equity. *Allen v. Hammond*, 11 Pet. 63, 71, 9 L. Ed. 633.

And so if a horse be sold, which is dead, though believed to be living by both parties, the purchaser cannot be compelled to pay the consideration. These

are cases in which the parties enter into the contract, under a material mistake as to the subject matter of it. In the first case, the vendor intended to sell, and the vendee to purchase, a subsisting title, but which in fact, did not exist; and in the second, a horse was believed to be living, but which was in fact dead. If, in either of these cases, the payment of the purchase money should be required, it would be a payment without the shadow of consideration. *Allen v. Hammond*, 11 Pet. 63, 71, 9 L. Ed. 633.

"In 1 Fonbl. Eq. 114, it is laid down, that where there is an error in the thing for which an individual bargains, by the general rules of contracting, the contract is null, as in such case the parties are supposed not to give their assent." *Allen v. Hammond*, 11 Pet. 63, 71, 9 L. Ed. 633.

The law on this subject is clearly stated in the case of *Hitchcock v. Giddings*, Daniel's Exch. 1, where it is said, that a vendor is bound to know he actually has that which he professes to sell; and even though the subject of the contract be known to both parties to be liable to a contingency, which may destroy it immediately; yet if the contingency has already happened, it will be void. *Allen v. Hammond*, 11 Pet. 63, 9 L. Ed. 633.

16. **Accident as giving right to annulment of lease or abatement of rent.**—*Viterbo v. Friedlander*, 120 U. S. 707, 733, 30 L. Ed. 776. See the title **LANDLORD AND TENANT**, vol. 7, pp. 840, 841.

17. **Mistake of fact.**—*Walden v. Skinner*, 101 U. S. 577, 583, 25 L. Ed. 963; *Ivinson v. Hutton*, 98 U. S. 79, 82, 25 L. Ed. 66.

"In general, the mistakes against which a court of equity relieves, are mistakes in fact." *Hunt v. Rousmanier*, 8 Wheat. 174, 211, 5 L. Ed. 589.

**Mistake in agreement.**—If the mistake exist, not in the instrument which is intended to give effect to the agreement, but in the agreement itself, and is clearly proved to have been the result of ignorance of some material fact; a court of equity will, in general, grant relief, according to the nature of the particular case in



**C. Mistake of Law**—1. **RULE STATED AND ILLUSTRATED.**—It has been held from the earliest days, in both the federal and state courts, that a mistake of law, pure and simple, without the addition of any circumstances of fraud or misrepresentation, constitutes no basis for relief at law or in equity, and forms no excuse in favor of the party asserting that he made such mistake,<sup>18</sup> except in some few cases, and those of peculiar character.<sup>19</sup>

**Illustrations.**—See note.<sup>20</sup>

which it is sought. *Hunt v. Rousmaniere*, 1 Pet. 1, 7 L. Ed. 27; *Ivinson v. Hutton*, 98 U. S. 79, 82, 25 L. Ed. 66. See ante, "In General," III, A.

**18. Simple mistake of law not relieved against.**—*Utermehle v. Norment*, 197 U. S. 40, 56, 49 L. Ed. 655; *Hunt v. Rousmaniere*, 1 Pet. 1, 15, 7 L. Ed. 27; *United States Bank v. Daniel*, 12 Pet. 32, 55, 9 L. Ed. 989; *United States v. Hodson*, 10 Wall. 395, 409, 19 L. Ed. 937; *Lamborn v. County Commissioners*, 97 U. S. 181, 185, 24 L. Ed. 926; *Snell v. Insurance Co.*, 98 U. S. 85, 90, 92, 25 L. Ed. 52; *United States v. Ames*, 99 U. S. 35, 46, 25 L. Ed. 295. See, also, *Pittsburgh, etc., Iron Co. v. Cleveland Iron Min. Co.*, 178 U. S. 270, 277, 44 L. Ed. 1065, reaffirmed in *Wright Seminary v. Tacoma*, 187 U. S. 639, 47 L. Ed. 345; *South Ottawa v. Perkins*, 94 U. S. 260, 269, 24 L. Ed. 154; *Barlow v. United States*, 7 Pet. 404, 411, 8 L. Ed. 728; *United States v. Edmondston*, 181 U. S. 500, 509, 45 L. Ed. 971; *Homestead Co. v. Valley Railroad*, 17 Wall. 152, 166, 21 L. Ed. 622.

A mistake or ignorance of the law forms no ground for relief in equity from contracts fairly entered into, with a full knowledge of the facts; and under circumstances repelling all presumptions of fraud, imposition or undue advantage having been taken of the party. *United States Bank v. Daniel*, 12 Pet. 32, 56, 9 L. Ed. 989.

Mere ignorance of the law, standing alone, constitutes no excuse or defense against its enforcement. It would be impossible to administer the law if ignorance of its provisions were a defense thereto. *Utermehle v. Norment*, 197 U. S. 40, 55, 49 L. Ed. 655.

**Both in equity and at law.**—"The rule that a mistake of law does not avail, prevails in equity as well as at common law. *United States Bank v. Daniel*, 12 Pet. 32, 9 L. Ed. 989; *Hunt v. Rousmaniere*, 1 Pet. 1, 7 L. Ed. 27; *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589; *Mellech v. Robertson*, 25 Vt. 603; *Leant v. Palmer*, 3 Comst. 19." *Upton v. Tribilcock*, 91 U. S. 45, 50, 23 L. Ed. 203. See, also, ante, "As Affecting Validity of Instruments and Transactions," II.

**As excuse for crime.**—See the title **CRIMINAL LAW**, vol. 5, p. 67.

**Presumptions.**—See the title **PRESUMPTIONS AND BURDEN OF PROOF**.

**19. Exceptions.**—*Hunt v. Rousmaniere*, 1 Pet. 1, 7 L. Ed. 27. See post, "Exceptions to Rule," III, C, 2.

**20. Illustrations.**—A mistake as to the effect of legal transactions is not a mistake of fact but a mistake of law and money paid under such mistake of law is not recoverable. *Railroad Co. v. Soutter*, 13 Wall. 517, 524, 20 L. Ed. 543. See the title **PAYMENT**.

**Different security given from one intended—No relief.**—If an agreement was not founded on a mistake of any material fact, or if it is in strict conformity with itself, it would be unprecedented for a court of equity to decree another security to be given, different from that which has been agreed upon; or to treat the case as if such other security had, in fact, been agreed upon and executed. *Hunt v. Rousmaniere*, 1 Pet. 1, 7 L. Ed. 27.

It seems that there may be cases in which a court of equity will relieve against mistake, arising from ignorance of law; but where parties, under deliberation and advice, reject one species of security, and agree to select another, under a misapprehension of the law as to the nature of the security thus selected, a court of equity will not, on the ground of misapprehension, and the insufficiency of the security, in consequence of a subsequent event not foreseen, direct a security of a different character to be given, or decree that to be done, which the parties supposed would have been effected by the instrument, which was finally agreed upon. The court would be much less disposed to interfere, in such a case, in favor of a particular creditor, against the general creditors of an insolvent estate. *Hunt v. Rousmaniere*, 1 Pet. 1, 7 L. Ed. 27.

**Ignorance of effect of releasing one joint obligor.**—If the obligee of a joint bond, by two or more, agree with one obligor to release him, and do so, and all the obligors are thereby discharged at law, equity will not afford relief against the legal consequences; although the release was given under a manifest misapprehension of the legal effect of it, in relation to the other obligors. *Hunt v. Rousmaniere*, 1 Pet. 1, 7 L. Ed. 27.

**Ignorance of rights different from ignorance of evidence thereof.**—"The ignorance of evidence to substantiate what he knew were his rights is a very different thing from ignorance of the rights themselves." *Utermehle v. Norment*, 197 U. S. 40, 56, 49 L. Ed. 655.



2. EXCEPTIONS TO RULE—*a. General Statement.*—But relief is granted in cases of mistake of law in exceptional cases.<sup>21</sup> But there must be some element, other than a mere mistake of law, which will afford an excuse.<sup>22</sup>

**21. Relief granted in exceptional cases.**  
—*Marquez v. Frisbie*, 101 U. S. 473, 476, 25 L. Ed. 800; *Utermehle v. Norment*, 197 U. S. 40, 57, 49 L. Ed. 655; *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589.

**22. Utermehle v. Norment**, 197 U. S. 40, 55, 49 L. Ed. 655; *United States Bank v. Daniel*, 12 Pet. 32, 9 L. Ed. 989, where it is said that courts of chancery will not relieve for mere mistakes of law; this rule is well established, and the court will only repeat what was said in the case of *Hunt v. Rousmaniere*, 1 Pet. 1, 15, 7 L. Ed. 27, "that whatever exceptions there may be to the rule, they will be found few in number, and to have something peculiar in their character, and to involve other elements of decision."

It was held in *Snell v. Insurance Co.*, 98 U. S. 85, 90, 25 L. Ed. 52, that the mistake, in that case, the execution of an insurance policy which did not cover the interests intended to be covered by both parties, was one to be relieved against, whether it was of law or fact. The court said: "It was stated in *Hunt v. Rousmaniere*, 1 Pet. 1, 7 L. Ed. 27, as a general rule, that mistake of law is not a ground for reforming a deed, and that the exceptions to the rule were not only few in number, but had something peculiar in their character. The court, however, was careful to say that it was not its intention 'to lay it down, that there may not be cases in which a court of equity will relieve against a plain mistake, arising from ignorance of law.' In the same case, *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589, Mr. Chief Justice Marshall said that he had found no case in the books in which it has been decided that a plain and acknowledged mistake of law was beyond the reach of equity. In 1 Story, Eq. Jur., § 138e and f (Redf. Ed.), the author, after stating certain qualifications to be observed in granting relief upon the ground of mistake of law, says that 'the rule that an admitted or clearly established misapprehension of the law does create a basis for the interference of courts of equity, resting on discretion, and to be exercised only in the most unquestionable and flagrant cases, is certainly more in consonance with the best considered and best reasoned cases upon the point, both English and American.' The same author says: 'We trust the principle that cases may and do occur where courts of equity feel compelled to grant relief, upon the mere ground of the misapprehension of a clear rule of law, which has so long maintained its standing among the fundamental rules of equity jurisprudence, is yet destined to afford the basis of many wise and just decrees, without infringing the general rule that mis-

take of law is presumptively no sufficient ground of equitable interference.'" See, also, to same effect, *Griswold v. Hazard*, 141 U. S. 260, 284, 35 L. Ed. 678.

After an examination of the cases, applicable to the general question, it was stated by the chief justice, who delivered the opinion of the court in *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589, that, although none of them asserted the naked principle, that relief could be granted, on the ground of ignorance of law, yet none decided that a plain and acknowledged mistake in law was beyond the reach of a court of equity. The conclusion, to which he came, is expressed in the following terms: "We find no case which we think precisely in point; and are unwilling, where the effect of the instrument is acknowledged to have been entirely misunderstood by both parties, to say that a court of equity is incapable of affording relief." The decree was, accordingly, reversed; but the case being one in which creditors were concerned, the court, instead of giving a final decree on the demurrer, in favor of the plaintiff, directed the cause to be remanded, that the circuit court might permit the defendants to withdraw their demurrer, and to answer the bill. *Hunt v. Rousmaniere*, 1 Pet. 1, 9, 7 L. Ed. 27.

See the case of *Lansdowne v. Lansdowne*, reported in *Moseley*. "Admitting, for the present, the authority of this case, it is most apparent, from the face of it, that the decision of the court might well be supported, upon a principle not involved in the question we are examining. The subject which the court had to decide arose out of a dispute between an heir at law, and a younger member of the family, who was entitled to an estate descended and this question the parties agreed to submit to arbitration. The award being against the heir at law, he executed a deed in compliance with it, but was relieved against it, on the principle that he was ignorant of his title. If the decision of the court proceeded upon the ground that the plaintiff was ignorant of the fact that he was the eldest son, it was clearly a case proper for relief, upon a principle which has already been considered. If the mistake was of his legal rights, as heir at law, it is not going too far to presume that the opinion of the court may have been founded upon the belief that the heir at law was imposed upon by some unfair representations of his better-informed opponent; or that his ignorance of a legal principle, so universally understood by all, where the right of primogeniture forms a part of the law of descents, demonstrated a degree of mental imbecility which might well en-

b. *Mistake Induced by Other Party without Fraud.*—Where the mistake is induced by the representations or conduct of the other party, without fraud, and the reliance thereon of the party seeking relief is justifiable, equity will relieve therefrom in proper cases.<sup>23</sup> As where the parties did not stand upon equal terms.<sup>24</sup>

title him to relief. He acted, besides, under the pressure of an award, which was manifestly repugnant to law, and for aught that is stated in this case, this may have appeared upon the face of it. But if this case must be considered as an exception from the general rule which has been mentioned, the circumstances attending it do not entitle it, were it otherwise objectionable, to be respected as an authority, but in cases which it closely resembles." *Hunt v. Rousmaniere*, 1 Pet. 1, 15, 7 L. Ed. 27.

In *Snell v. Insurance Co.*, 98 U. S. 85, 92, 25 L. Ed. 52, the court said: In granting relief here, "it is not perceived that we enlarge or depart, in any just sense, from the general and salutary rule, that a mere mistake of law, stripped of all other circumstances, constitutes no ground for the reformation of written contracts." See the title *INSURANCE*, vol. 7, p. 203.

In *absence of laches.*—"There being no laches on the part of the party, either in discovering and alleging the mistake, or in demanding relief therefrom, equity will lay hold of any additional circumstances, fully established, which will justify its interposition to prevent marked injustice being done." *Snell v. Insurance Co.*, 98 U. S. 85, 91, 25 L. Ed. 52; *Wheeler v. Smith*, 9 How. 55, 13 L. Ed. 44.

**Bond not embodying intention of parties.**—It was held in *Griswold v. Hazard*, 141 U. S. 260, 283, 35 L. Ed. 678, that, although the condition of the new exact bond in question was that D. should "abide and perform the orders and decrees" of the court in the suit in which it was given, all the parties, according to the decided preponderance of evidence, intended it, at the time, as an instrument binding the sureties for the appearance of the principal so as to be amenable to the process and decrees of the court, upon default in which, and not before, were they to be liable to pay the penalty. If the bond means, in law, more than that—and counsel in this court agree that it does—the case is one of a mutual mistake, clearly established, as to the legal effect of the instrument.

Although there was no mistake as to the mere words of the bond; for it was drawn by one of obligee's attorneys, and was read by obligor before signing it, but according to the great weight of the evidence, there was a mistake, on both sides, as to the legal import of the terms employed to give effect to the mutual agreement. In short, the instrument does not express the thought and intention which the parties had at the time of its execu-

tion. And this mistake was attended by circumstances that render it inequitable for the obligees in the bond to take advantage of it. *Griswold v. Hazard*, 141 U. S. 260, 283, 35 L. Ed. 678.

"A court of equity ought not to allow that mistake, satisfactorily established and thus caused, to stand uncorrected, and thereby subject a surety to liability he did not intend to assume, and which, according to the decided preponderance of the evidence, there was at the time no purpose to impose upon him." *Griswold v. Hazard*, 141 U. S. 260, 284, 35 L. Ed. 678.

**23. Mistake induced by other party.**—*Wheeler v. Smith*, 9 How. 55, 83, 13 L. Ed. 44; *Snell v. Insurance Co.*, 98 U. S. 85, 88, 25 L. Ed. 52.

In most of the cases where relief has been given, the party seeking relief was led into error by the action of the other party to the transaction, as in contracts and releases. *Utermehle v. Norment*, 197 U. S. 40, 57, 49 L. Ed. 655.

**Example.**—Where the heir at law was induced to enter into a compromise by which he, in consideration of a certain sum, released any right to attack an adverse will giving testator's property to a charitable use, and did so under a mistake of law as to his rights, induced by the representations of the executors and his reliance thereon, it was held a proper case for relief in equity, contrary to the general rule that a mistake of law will not be relieved against. *Wheeler v. Smith*, 9 How. 55, 83, 13 L. Ed. 44.

This compromise is to be judged by what is stated in the bill, the facts being admitted by the demurrer. And it appears that the agreement, under the circumstances, is void. It cannot be sustained on principles which lie at the foundation of a valid contract. The influences operating upon the mind of the complainant induced him to sacrifice his interests. He did not act freely, and with a proper understanding of his rights. *Wheeler v. Smith*, 9 How. 55, 83, 13 L. Ed. 44.

**24. Parties not on equal terms.**—*Wheeler v. Smith*, 9 How. 55, 82, 13 L. Ed. 44, where it is said: "In making the compromise, the parties did not stand on equal ground. The necessities and character of the complainant were well known to the executors."

**Mistakes of officers of the land department.**—"In the case of *Johnson v. Townslev*, 13 Wall. 72, 20 L. Ed. 485, the court, considering the force and effect to be given to the actions of the officers of the land department of the government, announces the doctrine that their decision,



c. *Fraud and Imposition*.—Relief has been granted against mistake of law where there has been fraud and imposition on the part of the other party.<sup>25</sup>

d. *Mistake of Law and Fact Mixed*.—Where ignorance of law is united with mistakes of fact relating thereto, relief has been afforded in equity.<sup>26</sup>

D. **Materiality**.—In order to justify relief in equity, the mistake must be as to a material fact.<sup>27</sup>

E. **Mutuality**.—Mutual mistake, or mistake on one side and fraud or inequitable conduct on the other, is a well-settled ground of equitable jurisdiction.<sup>28</sup>

F. **Care and Diligence Necessary, and Effect of Delay**—1. **CARE IN AVOIDING MISTAKE**.—Mistake or accident, to be available in equity, must not have arisen from negligence where the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence "which may be fairly expected from a reasonable person."<sup>29</sup> Especially

made within the scope of their authority on questions of this kind, is in general conclusive everywhere, except when reconsidered by way of appeal within that department; and that as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in courts of justice, when the title afterwards comes in question. But that in this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and, in cases where it is clear that those officers have by a mistake of the law given to one man the land which on the undisputed facts belongs to another, to give proper relief. These propositions have been repeatedly reaffirmed in this court." *Maxwell Land-Grant Case*, 121 U. S. 325, 380, 30 L. Ed. 949; *Moore v. Robbins*, 96 U. S. 530, 24 L. Ed. 848; *Marquez v. Frisbie*, 101 U. S. 473, 25 L. Ed. 800; *United States v. Atherton*, 102 U. S. 372, 26 L. Ed. 213; *Shepley v. Cowan*, 91 U. S. 330, 23 L. Ed. 424. See the title PUBLIC LANDS.

25. **Fraud and imposition**.—*Utermehle v. Norment*, 197 U. S. 40, 55, 57, 27 L. Ed. 655.

"Exceptional cases where relief has been given have been, as stated, where there was fraud or imposition upon the individual by the person seeking to avail himself of the contract of the other party. In this case there was, as we have said, neither fraud nor imposition, nor misrepresentation; plaintiff in error was not advised that, although he took under the will, he could attack it. It is a simple, bald case of an alleged mistake or misapprehension, on the part of plaintiff, of what the law was under certain circumstances, with no representation or persuasion on the part of others to cause him to act upon such mistaken assumption." *Utermehle v. Norment*, 197 U. S. 40, 55, 57, 49 L. Ed. 655. See post, "Mutuality," III, D. See, also, the title FRAUD AND DECEIT, vol. 6, p. 394.

26. **Mistake of law and fact mixed**.—*Utermehle v. Norment*, 197 U. S. 40, 55, 49 L. Ed. 655.

27. **Materiality**.—*McFerran v. Taylor*, 3 Cranch 270, 2 L. Ed. 436; *Ivinson v. Hutton*, 98 U. S. 79, 82, 25 L. Ed. 66.

A mistake as to matter of fact, to warrant relief in equity, must be material; and the fact must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view, and not be merely incidental. The court must be satisfied that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved. *Grymes v. Sanders*, 93 U. S. 55, 23 L. Ed. 798.

"Ignorance of a fact extrinsic and not essential to a contract, but which, if known, might have influenced the action of a party to the contract, is not such a mistake as will authorize equitable relief." *Cleveland v. Richardson*, 132 U. S. 318, 329, 33 L. Ed. 384.

"As to such facts, the party must rely upon his own vigilance, and, if not imposed upon or defrauded, will be held to his contract." *Cleveland v. Richardson*, 132 U. S. 318, 329, 33 L. Ed. 384.

28. **Mutuality**.—*Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 435, 35 L. Ed. 1062; *Allen v. Hammond*, 11 Pet. 63, 9 L. Ed. 633.

"The mistake must be mutual, and common to both parties to the instrument. It must appear that both have done what neither intended." *Moffett, etc., Co. v. Rochester*, 178 U. S. 373, 385, 44 L. Ed. 1108.

29. **Care in avoiding mistake**.—*Grymes v. Sanders*, 93 U. S. 55, 23 L. Ed. 798; *United States v. Ames*, 99 U. S. 35, 47, 25 L. Ed. 295; *Utermehle v. Norment*, 197 U. S. 40, 55, 49 L. Ed. 655. See, also, *Marine Ins. Co. v. Hodgson*, 7 Cranch 332, 3 L. Ed. 362; *Elliot v. Sackett*, 108 U. S. 132, 142, 27 L. Ed. 678.

In *Moffett, etc., Co. v. Rochester*, 178 U. S. 373, 44 L. Ed. 1108, it was held that the negligence of the party was insufficient to preclude a claim for relief if the mistakes justified it, as they did.

It was held in *Kann v. King*, 204 U. S. 43, 51, 51 L. Ed. 360, that the evidence established the absence of accident or mis-



where the position of other parties has materially changed.<sup>30</sup>

**Accident Avoidable by Care.**—Courts of equity will not grant relief merely upon the ground of accident, where the accident has arisen without fault of the other party, if it appears that it might have been avoided by inquiry or due diligence.<sup>31</sup>

2. **DILIGENCE IN SEEKING RELIEF.**—There must be diligence in discovering the mistake and asserting right to relief.<sup>32</sup>

**G. Evidence.**—See, generally, the titles **BEST AND SECONDARY EVIDENCE**, vol. 3, p. 214; **EVIDENCE**, vol. 5, p. 1004.

1. **BURDEN OF PROOF AND SUFFICIENCY OF EVIDENCE.**—When, in a court of equity, it is proposed to set aside, to annul, or to correct a written instrument for mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt.<sup>33</sup>

**Admission or Proof.**—But whether the mistake is admitted or clearly proved, the effect is the same.<sup>34</sup>

take and demonstrated the presence of gross negligence.

**Failure to read contract.**—"It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission." *Upton v. Tribilcock*, 91 U. S. 45, 50, 23 L. Ed. 203.

**Mere ignorance of ascertainable fact.**—"Where there is neither accident nor mistake, misrepresentation nor fraud, there is no jurisdiction in equity to afford relief to a party who has lost his remedy at law through mere ignorance of a fact, the knowledge of which might have been obtained by due diligence and inquiry, or by a bill of discovery." *United States v. Ames*, 99 U. S. 35, 47, 25 L. Ed. 295. See, also, the title **NEGLIGENCE**.

30. **Material change of situation.**—Equity will not grant relief where the position of other parties to the litigation has most materially changed, and the plaintiff has been also guilty of extreme negligence even in attempting to discover what he alleges are facts. *Utermehle v. Norment*, 197 U. S. 40, 60, 49 L. Ed. 655. See the title **WILLS**.

31. **Accident avoidable by care.**—*United States v. Ames*, 99 U. S. 35, 47, 25 L. Ed. 295.

32. **Diligence in seeking relief.**—*Bronson v. Schulten*, 104 U. S. 410, 417, 26 L. Ed. 797; *Stearns v. Page*, 7 How. 819, 829, 12 L. Ed. 928.

"Nor should relief be granted where the party seeking it has unreasonably delayed application for redress, or where the circumstances raise the presumption that he acquiesced in the written agreement after becoming aware of the mistake." *Snell v. Insurance Co.*, 98 U. S. 85, 90, 25 L. Ed. 52. See *Graves v. Boston Marine Ins. Co.*,

2 Cranch 419, 2 L. Ed. 324. See the titles **LACHES**, vol. 7, p. 790; **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, p. 900.

33. **Burden of proof and sufficiency.**—*Maxwell Land-Grant Case*, 121 U. S. 325, 30 L. Ed. 949; *Rhode Island v. Massachusetts*, 15 Pet. 233, 271, 10 L. Ed. 721; *Grymes v. Sanders*, 93 U. S. 55, 23 L. Ed. 798; *Howland v. Blake*, 97 U. S. 624, 24 L. Ed. 1027; *Ivinson v. Hutton*, 98 U. S. 79, 82, 25 L. Ed. 66; *Snell v. Insurance Co.*, 98 U. S. 85, 89, 25 L. Ed. 52; *Baltzer v. Raleigh, etc., R. Co.*, 115 U. S. 634, 645, 29 L. Ed. 505; *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 300, 31 L. Ed. 747; *United States v. Budd*, 144 U. S. 154, 161, 36 L. Ed. 384.

In *Story's Equity Jurisprudence*, § 157, it is said that relief will be granted in cases of written instruments only where there is a plain mistake, clearly made out by satisfactory proofs. Chancellor Kent, in the case of *Lyman v. United Ins. Co.*, 2 Johns. Ch. 632, which had reference to reforming a policy of insurance, says: "The cases which treat of this head of equity jurisdiction require the mistake to be made out in the most clear and decided manner, and to the entire satisfaction of the court." See, also, *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290. *Maxwell Land-Grant Case*, 121 U. S. 325, 381, 30 L. Ed. 949.

34. **Admission or proof of mistake.**—"Where the mistake is admitted by the other party, relief, as all agree, will be granted, and if it be fully proved by other evidence, Judge Story says, the reasons for granting relief seem to be equally satisfactory. 1 *Story, Eq. Jur.*, § 156." *Walden v. Skinner*, 101 U. S. 577, 583, 25 L. Ed. 963.

**Examples.**—In *Moffett, etc., Co. v. Rochester*, 178 U. S. 373, 44 L. Ed. 1108, the proof of a mistake was held to be clear and explicit, saying: "The party alleging the mistake must show exactly in what it consists and the correction that should be made. The evidence must be such as to

**Question of Fact.**—The question of mistake is one of fact.<sup>35</sup>

2. **PAROL EVIDENCE.—Admission to Establish Mistake.**—Contrary to the general rule as to such evidence to vary a written instrument, a party may be admitted to show, by parol evidence, a mistake in the execution of a deed or other writing.<sup>36</sup> But of course parol proof in all such cases is to be received with great caution, and, where the mistake is denied, should never be made the foundation of a decree, variant from the written contract, except it be of the clearest and most satisfactory character.<sup>37</sup>

**In Rebuttal.**—And parol evidence is also admissible to rebut a claim of mistake.<sup>38</sup>

**H. Pleading**—1. **AS AFFIRMATIVE GROUND OF RELIEF OR AS DEFENSE.**—Relief can be had against any deed or contract in writing founded on mistake, and the relief granted to the injured party, whether he sets up the mistake affirmatively by bill or as a defense.<sup>39</sup>

leave no reasonable doubt upon the mind of the court as to either of these points." *Moffett, etc., Co. v. Rochester*, 178 U. S. 373, 385, 44 L. Ed. 1108.

In *Snell v. Insurance Co.*, 98 U. S. 85, 91, 25 L. Ed. 52, it was that the alleged mistake was "proven to the entire satisfaction of the court." See, also, *Ivinson v. Hutton*, 98 U. S. 79, 83, 25 L. Ed. 66; *Elliott v. Sackett*, 108 U. S. 132, 142, 27 L. Ed. 678, where it is said that every case must depend largely on its own special circumstances.

In the following cases the evidence was held not to show mutual mistake or accident. *United States v. Milliken, etc., Co.*, 202 U. S. 168, 50 L. Ed. 980; *Kann v. King*, 204 U. S. 43, 51, 51 L. Ed. 360; *Baltzer v. Raleigh, etc., R. Co.*, 115 U. S. 634, 29 L. Ed. 505; *Wheeler v. New Brunswick, etc., R. Co.*, 115 U. S. 29, 34, 29 L. Ed. 341.

It was held in *Shipman v. District of Columbia*, 119 U. S. 148, 30 L. Ed. 337, adopting the opinion of the court of claims found in appx., p. 704, that the practical construction given to the contract in question, in which a mistake was alleged, by both parties, showed that there was no mistake.

35. **Question of fact.**—*Oil Co. v. Van Etten*, 107 U. S. 325, 27 L. Ed. 319.

It was held in *Clark v. United States*, 131 U. S., appx. lxxxv, 18 L. Ed. 915, that the question of mistake was one of fact, and was negated by the finding of the court below, which was conclusive on the supreme court.

Where there was a discrepancy between the counts of matched headings supplied under contract before shipment and upon delivery to vendee, the question whether it was due to mistake in the first counting or loss in transportation was one for the jury. *Oil Co. v. Van Etten*, 107 U. S. 325, 333, 27 L. Ed. 319.

36. **Parol evidence.**—*Snell v. Insurance Co.*, 98 U. S. 85, 89, 25 L. Ed. 52; *Walden v. Skinner*, 101 U. S. 577, 585, 25 L. Ed. 963; *Ivinson v. Hutton*, 98 U. S. 79, 82, 25 L. Ed. 66.

And such is the settled law of the federal supreme court. *Snell v. Insurance*

*Co.*, 98 U. S. 85, 89, 25 L. Ed. 52, citing *Graves v. Boston Marine Ins. Co.*, 2 Cranch 419, 2 L. Ed. 324; *Bradford v. Union Bank*, 13 How. 57, 14 L. Ed. 49; *Insurance Co. v. Wilkinson*, 13 Wall. 222, 20 L. Ed. 617; *Hearne v. Marine Ins. Co.*, 20 Wall. 488, 22 L. Ed. 395; *Equitable Ins. Co. v. Hearne*, 20 Wall. 494, 22 L. Ed. 398.

The general rule, both at law, and in equity, is that parol testimony is not admissible to vary a written instrument; but in cases of mistake, courts of equity will relieve. *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589.

Evidence of mistake is seldom found in the instrument itself, from which it follows that unless parol evidence may be admitted for that purpose, the aggrieved party would have as little hope of redress in a court of equity as in a court of law. *Walden v. Skinner*, 101 U. S. 577, 585, 25 L. Ed. 963.

Courts of equity will admit parol evidence to contradict or vary a writing where, by some mistake in fact, it speaks a different language from what the parties intended, and where, consequently, it would be unconscionable or unjust to enforce it against either party, according to its terms. 2 Taylor, Evid. (6th Ed.) 1041. *Ivinson v. Hutton*, 98 U. S. 79, 83, 25 L. Ed. 66.

Quære, how far parol proof may be introduced to show verbal agreements of the parties at the time when deeds were executed, and so to prove mistake or fraud in not executing what it was understood should be executed. *Bloomer v. Millinger*, 1 Wall. 340, 17 L. Ed. 581.

37. **Caution necessary and clear proof essential.**—*Snell v. Insurance Co.*, 98 U. S. 85, 89, 25 L. Ed. 52. See ante, "Burden of Proof and Sufficiency of Evidence," III. G. 1. See, generally, the title **PAROL EVIDENCE**.

38. **In rebuttal.**—*Case Mfg. Co. v. Soxman*, 138 U. S. 431, 436, 437, 34 L. Ed. 1019.

39. **As affirmative ground of relief or as defense.**—*Walden v. Skinner*, 101 U. S. 577, 585, 25 L. Ed. 963; *Snell v. Insurance Co.*, 98 U. S. 85, 89, 25 L. Ed. 52.

2. **NECESSARY ALLEGATIONS.**—When a bill seeks relief on the ground of mistake, it must set out the manner in which the mistake occurred, and when it was discovered.<sup>40</sup>

**MISTRIAL.**—See the title **NEW TRIAL**.

**MITIGATION OF DAMAGES.**—See the title **DAMAGES**, vol. 5, p. 191.

**MITTIMUS.**—See the title **COMMITMENT AND PRELIMINARY EXAMINATION OF ACCUSED**, vol. 3, p. 951. As to clerks' fees, see the title **CLERKS OF COURT**, vol. 3, p. 860.

**MIXED JURY.**—See the titles **CIVIL RIGHTS**, vol. 3, p. 831; **JURY**, vol. 7, p. 752.

**MIXED MATERIAL.**—See note 1.

**MOBS.**—See the titles **RIOT**; **UNLAWFUL ASSEMBLY**. As to liability of city for damages done by mob, see the title **MUNICIPAL CORPORATIONS**. As to acts of mob as contempt, see the title **CONTEMPT**, vol. 4, p. 534.

**MODE.**—"Mode usually means the manner in which a thing is done."<sup>2</sup>

**MODERATE SPEED.**—See the title **COLLISION**, vol. 3, pp. 918, 923.

**MONEY.**—As medium of payment, see the title **PAYMENT**. As to payment of money into court, see the title **PAYMENT INTO COURT**. As to tender of money, see the title **TENDER**. As to power of congress to coin money and prescribe a legal tender, see the title **CONSTITUTIONAL LAW**, vol. 4, p. 305. As to confederate money as medium of payment, see the title **PAYMENT**. "Money is a universal medium or common standard, by a comparison with which the value of all merchandise may be ascertained, or it is a sign which represents the respective values of all commodities."<sup>3</sup>

40. **Necessary allegations.**—United States v. Atherton, 102 U. S. 372, 374, 26 L. Ed. 213.

If a mistake is alleged, it must be stated with precision, and made apparent, so that the court may rectify it with a feeling of certainty that they are not committing another, and perhaps greater, mistake. And especially must there be distinct averments as to the time when the mistake was discovered, and what the discovery is, so that the court may clearly see whether, by the exercise of ordinary diligence, the discovery might not have been before made. *Stearns v. Page*, 7 How. 819, 829, 12 L. Ed. 928. See, also, the title **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, p. 900.

"Averments in a bill of complaint that the parties to a judicial proceeding understood that the legal effect would be different from what it really is, amounts merely to an averment of a mistake of law against which there can be no relief in a court of equity." *United States v. Ames*, 99 U. S. 35, 46, 25 L. Ed. 295; *Hunt v. Rousmaniere*, 1 Pet. 1, 7 L. Ed. 27.

1. **Mixed material.**—See *Solomon v. Arthur*, 102 U. S. 208, 211, 26 L. Ed. 147. And see the title **REVENUE LAWS**.

2. **Mode.**—*Hanks Dental Ass'n v. International Tooth Crown Co.*, 194 U. S. 303, 308, 48 L. Ed. 989.

**Form and mode of proceeding.**—As to "forms and mode of proceeding" as used in the practice conformity act, see the title **COURTS**, vol. 4, p. 1122.

As to what is embraced by the term

"forms and modes of proceeding in suits," see the title **COURTS**, vol. 4, p. 1137.

**Modes of process.**—As to meaning of "modes of process" as used in the practice conformity act, see the title **COURTS**, vol. 4, p. 1137.

**Mode of taking depositions.**—As to mode of taking depositions, prescribed by the act of March 9, 1892, see the title **DEPOSITIONS**, vol. 5, p. 326.

3. **Money.**—*Legal Tender Cases*, 12 Wall. 457, 650, 20 L. Ed. 287, Judge Field in a dissenting opinion quoting from 1 *Blackstone's Commentaries*, 276; 1 *Story on the Constitution*, § 1118.

**Money as legal tender.**—"Money being such standard, its coins or pieces are necessarily a legal tender to the amount of their respective values for all contracts or judgments payable in money, without any legislative enactment to make them so. The provisions in the different coinage acts that the coins to be struck shall be such legal tender, are merely declaratory of their effect when offered in payment, and are not essential to give them that character." *Legal Tender Cases*, 12 Wall. 457, 650, 20 L. Ed. 287, dissenting opinion of Judge Field. See the title **PAYMENT**.

**Bank notes.**—"The word money is often used as applicable to other media of exchange than coin. Bank notes lawfully issued and actually current at par in lieu of coin are treated as money, because flowing as such through the channels of trade and commerce without question." *Woodruff v. Mississippi*, 162 U. S. 291, 300, 40 L. Ed. 973. *United States Bank v. Bank*, 10 Wheat. 333, 346, 6 L. Ed. 334. See the



**MONEY COUNTS.**—See the title ASSUMPSIT, vol. 2, p. 636.

**MONEYED CAPITAL.**—See the title TAXATION.

**MONEYED CORPORATION.**—The term "moneyed corporation," as used in a New York statute limiting time of action against directors or stockholders of moneyed corporations, to recover penalties or forfeitures imposed, was therein defined to mean every corporation having banking powers, or having the power to make loans upon pledges or deposits, or authorized by law to make insurances.<sup>1</sup>

**MONEY HAD AND RECEIVED.**—See the title ASSUMPSIT, vol. 2, p. 641.

**MONEY IN COURT.**—See the title PAYMENT INTO COURT, and references given.

**MONEY LENT AND ADVANCED.**—See the title ASSUMPSIT, vol. 2, p. 649.

**MONEY ORDERS.**—See the title POSTAL LAWS. As to embezzlement of money belonging to postal money-order office, see the title EMBEZZLEMENT, vol. 5, p. 744.

**MONEY PAID.**—See the title ASSUMPSIT, vol. 2, p. 649.

**MONEY PAID INTO COURT.**—See the title PAYMENT INTO COURT.

**MONITION.**—See the title ADMIRALTY, vol. 1, p. 162.

titles BANKS AND BANKING, vol. 3, p. 70; PAYMENT.

**Certificate of deposit—Check.**—Where certain persons gave a joint and several note for the purpose of raising money, and their agent received a certificate of deposit, which certificate was afterwards duly paid upon presentation, the signers of the note cannot escape from their responsibility upon the plea that a certificate of deposit was not money. The court said: "To maintain, as we are asked in effect to do, that a check on a bank, payable at sight, to order, and endorsed in blank, and which an agent, to raise money on negotiable paper, took as money, and which check was presently paid to a bona fide holder by the cashier of the bank, was not money; that the note or bill purchased was not sold for money; that no title passed to the purchaser; and that the principal was not bound by the contract of the agent, would be a startling doctrine in the marts of commerce of this country, where money is usually transferred by bank checks, and may be fairly presumed to change hands on the check being given." *Poorman v. Woodward*, 21 How. 266, 275, 16 L. Ed. 152. See, generally, the title PAYMENT.

**Full value in sterling money.**—The 4th article of the treaty of peace between the United States and Great Britain provided as follows: "It is agreed, that creditors, on either side, shall meet with no lawful impediment to the recovery of the full

value, in sterling money, of all bona fide debts, heretofore contracted." In *Ware v. Hylton*, 3 Dall. 199, 242, 1 L. Ed. 568, in construing the words "in the full value in sterling money" in the treaty, the court said: "'In the full value in sterling money,' that is, British creditors shall not be obliged to receive paper money, or property at a valuation, or anything else but the full value of their debts, according to the exchange with Great Britain. This provision is clearly restricted to British debts, contracted before the treaty, and cannot relate to debts contracted afterwards, which would be dischargeable according to contract, and the laws of the state where entered into. This provision has also a future aspect in this particular, namely, that no lawful impediment, no law of any of the states made after the treaty, shall oblige British creditors to receive their debts, contracted before the treaty, in paper money, or property at appraisement, or in anything but the value in sterling money. The obvious intent of these words was, to prevent the operation of past and future tender laws; or past and future laws, authorizing the discharge of executions for such debts by property at a valuation."

**Lawful money.**—See LAWFUL, vol. 7, p. 847.

**1. Moneyed corporation.**—*Platt v. Wilmot*, 193 U. S. 602, 611, 48 L. Ed. 809. And in that case a trust company was held to be a "moneyed corporation."

# MONOPOLIES AND CORPORATE TRUSTS.

BY GORDON NELSON.

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## CROSS REFERENCES.

As to contracts in restraint of trade, see the titles **ILLEGAL CONTRACTS**, vol. 6, p. 737; **INNTERSTATE AND FOREIGN COMMERCE**, vol. 7, p. 332; **RESTRAINT OF TRADE**. As to what constitutes interstate and foreign commerce, see the title **INTERSTATE AND FOREIGN COMMERCE**, vol. 7, p. 269. As to construction of anti-trust act in connection with the interstate commerce act prohibiting "pooling," see the title **INTERSTATE AND FOREIGN COMMERCE**, vol. 7, p. 494. As to all matters pertaining to grants of exclusive privileges and franchises in the nature of monopolies, see the titles **CONSTITUTIONAL LAW**, vol. 4, pp. 409, 410, 424; **CORPORATIONS**, vol. 4, p. 681, and references there given; **DUE PROCESS OF LAW**, vol. 5, p. 553; **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, pp. 697, et seq. and 817, et seq.; **POLICE POWERS**. As to jurisdiction of courts in suits to enjoin, see the title **COURTS**, vol. 4, p. 915. As to proper and necessary parties to injunction suit, see the title **COURTS**, vol. 4, p. 1052. As to rules of construction in federal courts, see the title **COURTS**, vol. 4, p. 1103. As to self-in-

crimination of witnesses in suits against corporations for violating anti-trust acts, see the titles CONSTITUTIONAL LAW, vol. 4, p. 504; WITNESSES.

### I. Definition and General Nature.

A monopoly, as understood in law, is an exclusive right, granted to a few, of something which was before of common right.<sup>1</sup>

**Present Meaning.**—The term as it is used to-day includes any contract or combination which really tends to create a monopoly and to deprive the public of the advantages which flow from free competition.<sup>2</sup>

### II. At Common Law.

All grants of monopolies are void at common law, because they destroy the

**1. Definition.**—Lord Coke's words are that: "A monopoly is an institution, or allowance by the king by his grant, commission, or otherwise, to any person or persons, bodies politique, or corporate, of or for the sole buying, selling, making, working, or using of anything whereby any person or persons, bodies politique, or corporate, are sought to be restrained of any freedom or liberty that they had before or hindered in their lawful trade." *United States v. Knight Co.*, 156 U. S. 1, 9, 39 L. Ed. 325; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 607, 9 L. Ed. 773; *Butchers' Union Slaughter-House, etc., Co. v. Crescent City, etc., Slaughter-House Co.*, 111 U. S. 746, 755, 28 L. Ed. 585.

Thus, a privilege granted by the king for the sole buying, selling, making, working or using a thing, whereby the subject, in general, is restrained from that liberty of manufacturing or trading, which before he had, is a monopoly, but it is not the case of a monopoly, if the subjects had not the common right or liberty before to do the act, or possess or enjoy the privilege or franchise granted, as a common right. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 607, 9 L. Ed. 773.

**Exclusive franchise.**—The grant of a right to erect a bridge over a navigable stream is not a grant of a common right. "Before such grant, had all the citizens of the state a right to erect bridges over navigable streams? Certainly, they had not; and therefore, the grant was no restriction of any common right. It was neither a monopoly; nor, in a legal sense, had it any tendency to a monopoly. It took from no citizen what he possessed before, and had no tendency to take it from him. It took, indeed, from the legislature the power of granting the same identical privilege or franchise to any other persons. But this made it no more a monopoly, than the grant of the public stock or funds of a state for a valuable consideration. Even in cases of monopolies, strictly so called, if the nature of the grant be such that it is for the public good, as in cases of patents for inventions, the rule has always been to give them a favorable construction, in support of the patent." *Charles River*

*Bridge v. Warren Bridge*, 11 Pet. 420, 607, 9 L. Ed. 773.

**Letters patent are not grants of monopolies.**—Letters patent are not to be regarded as monopolies, created by the executive authority at the expense and to the prejudice of all the community except the persons therein named as patentees, but as public franchises granted to the inventors of new and useful improvements for the purpose of securing to them, as such inventors, for the limited term therein mentioned, the exclusive right and liberty to make and use and vend to others to be used their own inventions. *Seymour v. Osborne*, 11 Wall. 516, 533, 20 L. Ed. 33. See the title PATENTS.

**2. Addyston Pipe and Steel Co. v. United States**, 175 U. S. 211, 237, 44 L. Ed. 136; *United States v. Knight Co.*, 156 U. S. 1, 39 L. Ed. 325.

**Present meaning.**—It is certainly the conception of a large body of public opinion that the control of prices through combinations tends to restraint of trade and to monopoly, and is evil. The idea of monopoly is not now confined to a grant of privileges. It is understood to include a "condition produced by the acts of mere individuals." Its dominant thought now is, to quote another, "the notion of exclusiveness or unity;" in other words, the suppression of competition by the unification of interest or management, or it may be through agreement and concert of action. And the purpose is so definitely the control of prices that monopoly has been defined to be "unified tactics with regard to prices." *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 129, 49 L. Ed. 689.

As to a majority of those living along its line, each railroad is a monopoly. *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 335, 41 L. Ed. 1007.

The results of trusts, or combinations of that nature, may be different in different kinds of corporations, and yet they all have an essential similarity, and have been induced by motives of individual or corporate aggrandizement as against the public interest. *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 322, 41 L. Ed. 1007.



freedom of trade, discourage labor and industry, restrain persons from getting an honest livelihood, and put it in the power of the grantees to enhance the price of commodities. They are void because they interfere with the liberty of the individual to pursue a lawful trade or employment.<sup>3</sup>

**Contracts Illegal.**—At common law contracts in unreasonable restraint of trade were illegal and void,<sup>4</sup> but contracts collateral to the illegal agreement are not thereby rendered illegal.<sup>5</sup>

### III. Constitutional and Statutory Provisions.

**A. Old English Statutes.**—"The act of 21 James I was passed abolishing all monopolies, with the exception of 'letters patent and grants of privileges,

3. Butchers' Union Slaughter-House, etc., *Co. v. Crescent City, etc., Slaughter-House Co.*, 111 U. S. 746, 755, 28 L. Ed. 585.

**Monopolies void at common law.**—Monopolies were void at common law. *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 220, 46 L. Ed. 1132.

Lord Coke said that all grants of monopolies are against the ancient and fundamental laws of the kingdom. *United States v. Knight Co.*, 156 U. S. 1, 9, 39 L. Ed. 325.

The great Case of Monopolies, reported by Coke, and so fully stated in the brief, was undoubtedly a contest of the commons against the monarch. The decision is based upon the ground that it was against common law, and the argument was aimed at the unlawful assumption of power by the crown. *Slaughter-House Cases*, 16 Wall. 36, 65, 21 L. Ed. 394.

**Monopolies odious and against common right.**—Justice Bradley said: "I hold it to be an incontrovertible proposition of both English and American public law, that all mere monopolies are odious and against common right. The practice of granting them in the time of Elizabeth came near creating a revolution. But parliament, then the vindicator of the public liberties, intervened and passed the act against monopolies. 21 Jac. I, c. 3. The courts had previously, in the last year of Elizabeth, in the great Case of Monopolies, 11 Rep. 84 b, decided against the legality of royal grants of this kind. That was only the case of the sole privilege of making cards within the realm; but it was decided on the general principle that all monopoly patents were void both at common law and by statute, unless granted to the introducer of a new trade or engine, and then for a reasonable time only; that all trades, as well mechanical as others, which prevent idleness, and enable men to maintain themselves and their families, are profitable to the commonwealth, and therefore the grant of the sole exercise thereof is against not only the common law, but the benefit and liberty of the subject." *Butchers' Union Slaughter-House, etc., Co. v. Crescent City, etc., Slaughter-House Co.*, 111 U. S. 746, 761, 28 L. Ed. 585.

4. **Contracts in restraint of trade unreasonable and void.**—Considering the long term of the indenture, the perishable nature of the property transferred, the large sums to be paid quarterly by the defendant by way of compensation, its assumption of the plaintiff's debts, and the frank avowal, in the indenture itself, of the intention of the two corporations to prevent competition and to create a monopoly, there can be no doubt that the chief consideration for the sums to be paid by the defendant was the plaintiff's covenant not to engage in the business of manufacturing, using or hiring sleeping cars. This case strikingly illustrates several of the obvious considerations for holding contracts in restraint of trade to be unreasonable and void: "They tend to deprive the public of the services of men in the employment and capacities in which they may be most useful to the community as well as themselves." "They prevent competition and enhance prices." "They expose the public to all the evils of monopoly. And this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business and engross the market." *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 52, 35 L. Ed. 55. See the title RE-  
STRAINT OF TRADE.

In the case of a combination of two coal companies, in order to give one of them a monopoly of coal in a particular region, the court of appeals of New York held that "a combination to effect such a purpose is inimical to the interests of the public, and that all contracts designed to effect such an end are contrary to public policy, and therefore illegal." *Northern Securities Co. v. United States*, 193 U. S. 197, 340, 48 L. Ed. 679.

5. Although the plaintiff is an illegal combination in restraint of trade, the defendant could not, at common law, refuse, on the ground of such illegality, to pay for goods purchased from the plaintiff, under special contracts. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 545, 46 L. Ed. 679.

As to contracts restricting distribution of stock quotations, see post, "Protects

for the term of fourteen years or under, of the sole working or vending of any manner of new manufactures to the true and first inventor and inventors of such manufactures, which others, at the time of making such letters patent and grants, shall not use."'<sup>6</sup>

**B. State Constitutions and Statutes**—1. **CONSTITUTIONAL PROHIBITIONS**.—Monopolies were void at common law and need no special prohibitions in the organic law of a free republic.<sup>7</sup> But the constitutions of some of the states contain clauses prohibiting and abolishing them.<sup>8</sup>

**Abolition of Exclusive Privileges**.—As to effect of constitutional provisions abolishing exclusive privileges in the nature of monopolies as impairing the obligation of contract, see the titles **CONSTITUTIONAL LAW**, vol. 4, p. 424; **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 817.

2. **UNDER THE ACTS OF STATES**—a. *In General*.—There is and has been, for the past three hundred years, both in England and in this country, a popular prejudice against monopolies in general, which has found expression in the innumerable acts of legislation;<sup>9</sup> and several of the states, when dealing with combinations that are in restraint of their domestic commerce, have long applied the rule that contracts, combinations, and conspiracies in restraint of trade or commerce are illegal.<sup>10</sup>

Only Interstate and International Trade or Commerce," III, C, 3, c.

6. In commenting upon the statute, 21 Jac. 1, c. 3, at the commencement of ch. 85 of the third institute, entitled "Against Monopolists, Propounders, and Projectors," Lord Coke, in language often quoted, said: "It appeareth by the preamble of this act (as a judgment in parliament) that all grants of monopolies are against the ancient and fundamental laws of this kingdom." *United States v. Knight Co.*, 156 U. S. 1, 9, 39 L. Ed. 325.

The old colonial act of 1641, against monopolies, is merely in affirmance of the principles of the English statute against monopolies, of 21 James I, c. 3. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 606, 9 L. Ed. 773.

7. *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 220, 46 L. Ed. 1132.

8. **Constitutional prohibitions—Alabama**.—Where the constitution of Alabama prohibited the legislature from "making any irrevocable grants of special privileges or immunities," the court said: "It seems plain from the very terms used that the evil intended to be especially prevented was the granting of exclusive privileges in the nature of a monopoly by the legislative creation of corporate franchises." *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 220, 46 L. Ed. 1132.

**Kentucky**.—Bill of rights of Kentucky declares that "all freemen, when they form a social compact, are equal, and that no man or set of men are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services." *Const. Kentucky*, 1799, Art. 10, § 1. *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 691, 29 L. Ed. 510.

It is true, as was observed in *Pearsall v. Great Northern R. Co.*, 161 U. S. 646,

40 L. Ed. 838, that the stockholders of the L. & N. Co. may individually become the purchasers of the Chesapeake Co. at a judicial sale, and may organize a new corporation, but it would still be a corporation separate and distinct from that of the L. & N. Co. The inhibition of the constitution is not against the sale to individuals, though they may chance to be stockholders in a competing line, but against the acquisition by a railway, in any form, of a parallel or competing line. *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 693, 40 L. Ed. 849.

9. *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 676, 40 L. Ed. 838.

10. *Northern Securities Co. v. United States*, 193 U. S. 197, 339, 48 L. Ed. 679. See, generally, the title **RESTRAINT OF TRADE**.

The restriction upon the unlimited power of railroads to consolidate is not, as the plaintiff in error suggests, called for by any new view of commercial policy, but in virtue of a settled policy which has obtained in Kentucky since 1858, in Minnesota since 1874, in Ohio since 1851, in New Hampshire since 1867, and by more recent enactments in some dozen other states—a policy which has not only found a place in the statute law of such states as apprehended evil effects from such consolidations, but has been declared by the courts to be necessary to protect the public from the establishment of monopolies. Indeed, the unanimity with which the states have legislated against the consolidation of competing lines shows that it is not the result of a local prejudice, but of a general sentiment that such monopolies are reprehensible. *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 693, 40 L. Ed. 849. See the title **CORPORATIONS**, vol. 4, p. 771.

**Illinois**.—See *Dickerman v. Northern*



b. *Constitutionality of State Statutes*.—Although these statutes have been attacked as unconstitutional for depriving those persons to whom they apply of their property without due process of law, or for denying them the equal protection of the laws, or because they unduly infringe the freedom of contract, it has been held that they are constitutional as a valid exercise of the police power of the states.<sup>11</sup>

Trust Co., 176 U. S. 181, 195, 44 L. Ed. 423.

**Iowa**.—A general statute of Iowa prohibits all contracts or combinations to fix the price of any article of merchandise or commodity, or to limit the quantity of the same produced or sold in the state. Code of 1897, § 5060. And that this section covers fire insurance, see *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 410, 50 L. Ed. 246.

**Minnesota**.—Where the Great Northern Railway Company makes an agreement with the bondholders of the Northern Pacific Railway Company that in return for one-half the capital stock of the Northern Pacific Railway Company, it will guarantee the payment of principal and interest of such bonds, it was held that the arrangement was in violation of the acts of Minnesota passed in 1874 and 1881, prohibiting railroad corporations from consolidating with, leasing or purchasing or in any other way becoming the owner of, or controlling any other railroad corporation, or the stock, franchises or rights of property thereof, having a parallel or competing line. *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 40 L. Ed. 838; *Northern Securities Co. v. United States*, 193 U. S. 197, 330, 48 L. Ed. 679.

As to provisions of act of Minnesota prohibiting combinations in restraint of trade, see *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 48 L. Ed. 870.

**Missouri**.—The Missouri statute providing for the consolidation of railroad companies prohibits consolidation in whole or in part, when, by so doing, it will deprive the public of the benefits of competition between said roads. *Leavenworth County Comm'rs v. Chicago, etc., R. Co.*, 134 U. S. 688, 697, 33 L. Ed. 1064.

As to consolidation of railroads, see post, "Constitutionality," III, B, 2, b.

**Regulating rates and conduct of railroads**.—From the very nature of the case, therefore, railroads are monopolies, and the evils that usually accompany monopolies soon began to show themselves, and were the cause of loud complaints. The companies owning the railroads were charged, and sometimes truthfully, with making unjust discriminations between shippers and localities, with making secret agreements with some to the detriment of other patrons, and with making pools or combinations with each other, leading to oppression of entire communities. Some of these mischiefs were partially remedied by special provisions inserted in the charters of the companies, and by general enactments by the several

states, such as clauses restricting the rates of toll, and forbidding railroad companies from becoming concerned in the sale or production of articles carried, and from making unjust preferences. *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 210, 40 L. Ed. 940.

**Tendency of law**.—"The law does not visit with its reprobation a fair competition in trade; its tendency is rather to discourage monopolies, except where protected by statute, and to build up new enterprises from which the public is likely to derive a benefit." *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 544, 35 L. Ed. 247.

**11. State statutes held to be constitutional**.—Whatever may be thought of the policy of such attempts, it cannot be denied in the federal supreme court, unless some of its decisions are to be overruled, that statutes prohibiting combinations between possible rivals in trade may be constitutional. The decisions concern not only statutes of the United States, *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. Ed. 679; *Swift & Co. v. United States*, 196 U. S. 375, 49 L. Ed. 518, but also state laws of similar import. *Smiley v. Kansas*, 196 U. S. 447, 49 L. Ed. 546; *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 49 L. Ed. 689; *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 409, 50 L. Ed. 246.

Competition, not combination, should be the law of trade. If there is evil in this it is accepted as less than that which may result from the unification of interest, and the power such unification gives. And that legislatures may so ordain this court has decided. *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 129, 49 L. Ed. 689; *United States v. Knight Co.*, 156 U. S. 1, 39 L. Ed. 325; *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 41 L. Ed. 1007; *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 43 L. Ed. 259; *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. Ed. 679; *Swift & Co. v. United States*, 196 U. S. 375, 49 L. Ed. 518.

In *Spring Valley Waterworks v. Schotter*, 110 U. S. 347, 354, 28 L. Ed. 173, the court said: "That it is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale, we do not doubt. That question is settled by what was decided on full consideration in *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77. As was said in that case, such regulations do not deprive a person of his property without due proc-



**Statutes Must Be Uniform.**—Laws against combinations in trade must be uniform in their application as applied to all persons within the same general class.<sup>12</sup>

ess of law." *Budd v. New York*, 143 U. S. 517, 537, 36 L. Ed. 247. See the title *CONSTITUTIONAL LAW*, vol. 4, p. 578.

Where competitive grain dealers combining to pool and fix the price of grain and prevent competition and to divide the net earnings were convicted under the Kansas anti-trust law, the court held that the statute was not in conflict with the fourteenth amendment to the federal constitution, in that it unduly infringes the freedom of contract. *Smiley v. Kansas*, 196 U. S. 447, 49 L. Ed. 546.

As to whether these statutes interfere with the right to pursue lawful trade, calling, business or profession, see the titles *CONSTITUTIONAL LAW*, vol. 4, pp. 372, 373; *DUE PROCESS OF LAW*, vol. 5, pp. 553, 554.

As to whether these statutes impair the obligation of contracts, see the titles *CONSTITUTIONAL LAW*, vol. 4, p. 421; *IMPAIRMENT OF OBLIGATION OF CONTRACTS*, vol. 6, p. 759.

**Regulation under police power.**—"Undoubtedly there is a certain freedom of contract which cannot be destroyed by legislative enactment. In pursuance of that freedom parties may seek to further their business interests, and it may not be always easy to draw the line between those contracts which are beyond the reach of the police power and those which are subject to prohibition or restraint. But a secret arrangement, by which, under penalties, an apparently existing competition among all the dealers in a community in one of the necessities of life is substantially destroyed, without any merging of interests through partnership or incorporation, is one to which the police power extends." *Smiley v. Kansas*, 196 U. S. 447, 456, 49 L. Ed. 546.

"The relief of the citizens of each state from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the states to deal with, and this court has recognized their possession of that power even to the extent of holding that an employment or business carried on by private individuals, when it becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort and by means of which a tribute can be exacted from the community, it is subject to regulation by state legislative power." *United States v. Knight Co.*, 156 U. S. 1, 11, 39 L. Ed. 325. See the title *CONSTITUTIONAL LAW*, vol. 4, p. 411.

Business of certain kinds holds such a

peculiar relation to the public interest that there is superinduced upon it the right of public regulation; and the court rested the power of the legislature to control and regulate elevator charges upon the nature and extent of the business, the existence of a virtual monopoly. *Budd v. New York*, 143 U. S. 517, 533, 36 L. Ed. 247. See the title *CONSTITUTIONAL LAW*, vol. 4, p. 378.

As to right under police power to regulate, see the titles *CONSTITUTIONAL LAW*, vol. 4, pp. 375, 379, 420; *CORPORATIONS*, vol. 4, p. 693; *DUE PROCESS OF LAW*, vol. 5, pp. 556, 560. And see, generally, the title *POLICE POWERS*.

**Railroad consolidation.**—As to power of legislation to forbid consolidation of competing railroads, see the titles *CONSTITUTIONAL LAW*, vol. 4, p. 423; *CORPORATIONS*, vol. 4, p. 771; *RAILROADS*.

12. *Cook v. Marshall County*, 196 U. S. 261, 273, 49 L. Ed. 471.

**Statutes must be uniform.**—The leading case upon this point is *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679, where a law of Illinois against combinations to regulate prices and productions, and create restrictions, was held to be invalid by reason of the exemption of agricultural productions or live stock while in the hands of the producer or raiser. A similar case is that of *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 46 L. Ed. 92, wherein a statute of Kansas regulating the prices to be paid for the use of public cattle stock yards was held invalid by reason of the fact that it was intended to apply only to the stock yards of Kansas City, and not to other companies or corporations engaged in like business in other portions of the state. *Cook v. Marshall County*, 196 U. S. 261, 273, 49 L. Ed. 471.

**Statutes discriminating in favor of producers.**—"A state may regulate or suppress combinations to restrict the sale of products. The power cannot be exerted to forbid combinations among those who buy products and permit combinations among those who raise or grow products. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679." *Billings v. Illinois*, 188 U. S. 97, 102, 47 L. Ed. 400.

Where the Illinois statute against trusts and combinations was declared unconstitutional because it provided that the act should not apply to agricultural products or live stock while in the hands of the producer or raiser, the court observed "that if combinations of capital, skill or acts, in respect of the sale or purchase of goods, merchandise or commodities, whereby such combinations may, for their

**Statutes Constitutional in part.**—Where a statute contains unconstitutional provisions, the whole act is not thereby rendered unconstitutional if the obnoxious section can be disregarded and eliminated without affecting the rest of the statute.<sup>13</sup>

c. *Remedies under the Statutes*—(1) *Criminal Prosecution*.—By the anti-trust laws of some of the states, persons who are parties to a combination and conspiracy in restraint of trade may be punished criminally.<sup>14</sup>

(2) *Remedies against Corporations*.—While the remedy against domestic corporations, for violating the anti-trust act, is by proceedings to forfeit their charters,<sup>15</sup> the remedy in case of foreign corporations is the forfeiture of their

own benefit exclusively, control or establish prices, are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect to agricultural products and live stock are not also hurtful." *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 564, 46 L. Ed. 679.

As to constitutionality of statutes discriminating in favor of producers, see the title CONSTITUTIONAL LAW, vol. 4, p. 374.

13. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 564, 46 L. Ed. 679, cited with approval in *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 132, 49 L. Ed. 689. See the title STATUTES.

If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 564, 46 L. Ed. 679.

14. **Iowa.**—By § 1754, of the Iowa Code of 1897, "it shall be unlawful for two or more fire insurance companies doing business in this state, or for the officers, agents or employees of such companies, to make or enter into any combination or agreement relating to the rates to be charged for insurance, the amount of commissions to be allowed agents for procuring the same, or the manner of transacting the fire insurance business within this state; and any such company, officer, agent or employee violating this provision shall be guilty of a misdemeanor," and a fine is imposed for each offense. *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 407, 50 L. Ed. 246.

**Minnesota.**—The Minnesota laws make criminal a combination and conspiracy in restraint of trade. *Nelson v. United States*, 201 U. S. 92, 116, 50 L. Ed. 673.

"That for the purpose of carrying out the provisions of this act any citizen of this state may, and it is hereby declared to be the duty of the attorney general, to institute, in the name of the state, proceedings in any court of competent jurisdiction against any person, partnership, association or corporation who may be guilty of violating any of the provisions of section one of this act, for the purpose of imposing the penalties imposed by this act, or securing the enforcement of section three hereof." *Minnesota v. North-*

*ern Securities Co.*, 194 U. S. 48, 59, 48 L. Ed. 870.

**Texas.**—"Under the laws of Texas, therefore, combinations of the kind described in the various anti-trust laws, whether by agriculturalists or organized laborers or others, are forbidden and penalized. *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 133, 49 L. Ed. 689.

As to confiscation as a penalty for past offenses, see the titles DUE PROCESS OF LAW, vol. 5, p. 595; GAS, vol. 6, p. 548.

15. **Domestic corporations.**—The laws of Minnesota subject to forfeiture the charters of corporations who become parties to a combination and conspiracy in restraint of trade. *Nelson v. United States*, 201 U. S. 92, 116, 50 L. Ed. 673.

As to forfeiture of charters, see the title CORPORATIONS, vol. 4, p. 792.

"Any corporation heretofore or hereafter created, organized or existing under the laws of this state, which shall hereafter either directly or indirectly make any contract, agreement or arrangement, or enter into any combination, conspiracy or trust, as defined in section one of this act, shall, in addition to the penalty prescribed in section two of this act, forfeit its charter, rights and franchises, and it shall thereafter be unlawful for such corporation to engage in business, either as a corporation or as a part of any combination, trust or monopoly, except as to the final disposition of its property under the laws of this state." *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 59, 48 L. Ed. 870.

The anti-trust acts of Texas of 1880, 1895, and 1899, are all directed to the prohibition of combinations to restrict trade, or in any way limit competition in the production or sale of articles, or to increase or reduce their price in order to preclude a free and unrestricted competition in them. The various ways in which these purposes can be accomplished are enumerated and forbidden. Penalties are affixed to the violation of the acts, offending domestic corporations forfeit their charters, and offending foreign corporations forfeit their privileges to do business in the state. *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 127, 49 L. Ed. 689. See the title CORPORATIONS, vol. 4, p. 621.



permit to do business in the state.<sup>16</sup>

d. *Effect on Contracts*.—Although, under the statutes declaring illegal and void an agreement or combination in restraint of trade, there can be no recovery on the illegal contract,<sup>17</sup> the illegality of the trust agreement is no defense to an action on independent and collateral contracts.<sup>18</sup>

**C. Under the Act of Congress**—1. **THE ACT STATED**.—The act declares that every contract, combination, in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations is illegal, and every person making such contract is deemed guilty of a misdemeanor punishable by fine or by imprisonment or both, and every person monopolizing or attempting to monopolize or combining or conspiring with any other person or persons to monopolize any part of such trade or commerce is liable to like penalties. The statute provides the method of procedure, to restrain violations of the act and to seize property forfeited under it and it gives to any person injured in his business or property by reason of anything forbidden or declared to be unlawful, in the act, the right to sue for threefold damages.<sup>19</sup>

2. **CONSTITUTIONALITY OF ACT**.—Congress has, under the authority conferred on it by the constitution to regulate commerce among the states, and with foreign nations, the power to prohibit and make illegal any contract or combination which shall restrain trade and commerce by shutting out the operation of the general law of competition.<sup>20</sup>

**16. Foreign corporation**.—A foreign corporation is subject to the laws of any state permitting it to engage in business and a violation by it of the anti-trust laws of the state may subject its permit to do business in the state to forfeiture. *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 44 L. Ed. 657; *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 127, 49 L. Ed. 689. See the title **FOREIGN CORPORATIONS**, vol. 6, p. 321.

**17. No recovery on illegal contract**.—Where gas companies contracted not to sell below a certain price, it was held that the contract was void because contrary to public policy and because it was prohibited by statute and therefore no recovery could be had, by a party to such contract, for services rendered in carrying out the illegal agreement. *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 32 L. Ed. 979. See the title **DUE PROCESS OF LAW**, vol. 5, p. 595.

As to contracts in violation of positive law, see the title **ILLEGAL CONTRACTS**, vol. 6, p. 747.

**18. Illegality of corporation, no defense to suit on mortgage**.—After the answer of the defendant company and the original answer of the appellants—who had been admitted as defendants by leave of court—were filed, and all the proofs had been taken, appellants filed an amendment to their answer, setting up that the bonds and mortgages were parts of a combination or trust in restraint of trade, and in direct violation of the act of the general assembly of Illinois "to provide for the punishment of persons, partnerships or corporations forming trusts, pools and combines, and mode of procedure and rules of evidence in such cases," approved June 11, 1891. If this were a proceeding

in quo warranto to attack the organization of the corporation, or an indictment under the statute of Illinois, or an action against a member of the combination to enforce any of the provisions of the original contract, the validity of such contract would become an important question. But in a suit to foreclose a mortgage upon the property of a corporation, the purpose for which the corporation was originally organized cannot become a material inquiry. *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 195, 44 L. Ed. 423.

**19. Anti-Trust Act of July 2, 1890, 26 Stat. 209**; *Northern Securities Co. v. United States*, 193 U. S. 197, 318, 48 L. Ed. 679; *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 41 L. Ed. 1007.

**20. Power to regulate based on power to control interstate and international commerce**.—Congress has the power to establish rules by which interstate and international commerce shall be governed, and, by the anti-trust act, has prescribed the rule of free competition among those engaged in such commerce. *Northern Securities Co. v. United States*, 193 U. S. 197, 331, 48 L. Ed. 679.

"The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed or whenever the transaction is itself a monopoly of commerce." *United States v. Knight Co.*, 156 U. S. 1, 12, 39 L. Ed. 325.

Congress has with regard to interstate commerce and in the course of regulating



3. **GENERAL CONSTRUCTION OF ACT**—a. *In General*.—"The act of congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it."<sup>21</sup>

b. *Applies to Existing Combinations*.—Although the act has no retroactive effect, the continuation of an agreement which was legal when entered into, after it has been declared to be illegal, becomes a violation of the act.<sup>22</sup>

c. *Protects Only Interstate and International Trade or Commerce*.—The act has reference only to that trade or commerce which exists, or may exist, among the several states or with foreign nations and has no application whatever to any other trade or commerce.<sup>23</sup> "It was never intended that the power

it, in the case of railroad corporations, the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition. *Northern Securities Co. v. United States*, 193 U. S. 197, 338, 48 L. Ed. 679; *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 43 L. Ed. 259.

"The act of July 2, 1890, known as the Sherman anti-trust act, and which is based upon the power of congress to regulate commerce among the states, is an illustration of the proposition that regulation may take the form of prohibition. The object of that act was to protect trade and commerce against unlawful restraints and monopolies. To accomplish that object congress declared certain contracts to be illegal. That act, in effect, prohibited the doing of certain things, and its prohibitory clauses have been sustained in several cases as valid under the power of congress to regulate interstate commerce. *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 41 L. Ed. 1007; *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 43 L. Ed. 259; *Addyston Pipe and Steel Co. v. United States*, 175 U. S. 211, 44 L. Ed. 136." *Lottery Case*, 188 U. S. 321, 359, 47 L. Ed. 492.

As to effect of constitutional guarantee of liberty of contract on power of congress to pass anti-trust act, see the title **DUE PROCESS OF LAW**, vol. 5, p. 559.

21. *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 568, 43 L. Ed. 259.

**Criminal provisions**.—As this statute contains criminal provisions, cases must not be brought within its provision that are not clearly embraced by it and cases must not be excluded from it, by narrow, technical or forced construction of words, that are obviously within its provisions. *Northern Securities Co. v. United States*, 193 U. S. 197, 358, 48 L. Ed. 679. See the title **STATUTES**.

22. *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 342, 41 L. Ed. 1007.

**Prohibits continuation of agreement**.—The statute prohibits the continuing or entering into such an agreement for the future, and if the agreement be continued, it then becomes a violation of the act.

*United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 342, 41 L. Ed. 1007.

23. *Hopkins v. United States*, 171 U. S. 578, 43 L. Ed. 290.

**Applies to interstate and international trade**.—The act of congress approved July 2, 1890, c. 647, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly spoken of as the anti-trust act. 26 Stat. 209. The act has reference only to that trade or commerce which exists, or may exist, among the several states or with foreign nations, and has no application whatever to any other trade or commerce. *Hopkins v. United States*, 171 U. S. 578, 586, 43 L. Ed. 290.

Congress has, so far as its jurisdiction extends, prohibited all contracts or combinations in the form of trusts entered into for the purpose of restraining trade and commerce. Transporting commodities is commerce, and if from one state to or through another it is interstate commerce. To be reached by the federal statute it must be commerce among the several states or with foreign nations. *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 324, 41 L. Ed. 1007.

**No attempt by act to regulate domestic trade**.—Congress did not attempt by the act of July 2, 1890, to assert the power to deal with monopoly directly as such; or to limit and restrict the rights of corporations created by the states or the citizens of the states in the acquisition, control, or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the states of their residence or creation sanctioned or permitted. Aside from the provisions applicable where congress might exercise municipal power, what the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several states or with the foreign nations. *United States v. Knight Co.*, 156 U. S. 1, 16, 39 L. Ed. 325.

**Regulating rates**.—In *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 41 L. Ed. 1007, it was held that an agreement between certain railroad com-

to regulate commerce among the several states should be exercised so as to interfere with private contracts not designed at the time they were made to create impediments to such intercourse."<sup>24</sup>

d. *Restraint Must Be Direct.*—The contract or combination condemned by

panies providing for establishing and maintaining, for their mutual protection, reasonable rates, rules and regulations in respect of freight traffic, through and local, and by which free competition among those companies was restricted, was, by reason of such restriction, illegal under the anti-trust act. *Northern Securities Co. v. United States*, 193 U. S. 197, 329, 48 L. Ed. 679.

In *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 43 L. Ed. 259, it was held that an arrangement between certain railroad companies in reference to railroad traffic among the states, by which the railroads involved were not subject to competition among themselves, was also forbidden by the act. *Northern Securities Co. v. United States*, 193 U. S. 197, 330, 48 L. Ed. 679.

**Formation of holding company.**—A combination of the shareholders of two competing and substantially parallel interstate railroads to form a corporation which should hold the shares of the stock of the constituent companies, such shareholders in lieu of their shares in those companies to receive, upon an agreed basis of value, shares in the holding corporation, is within the meaning of the act of July 2, 1890, a "trust" but if not, it is a combination in restraint of interstate and international commerce and is therefore illegal. *Northern Securities Co. v. United States*, 193 U. S. 197, 326, 48 L. Ed. 679.

24. *Railroad Co. v. Richmond*, 19 Wall. 584, 589, 22 L. Ed. 173, cited in *Addyston Pipe and Steel Co. v. United States*, 175 U. S. 211, 44 L. Ed. 136.

As to regulation of private contracts, see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 332.

**Commerce within state not affected.**—“Although the jurisdiction of congress over commerce among the states is full and complete, it is not questioned that it has none over that which is wholly within a state, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce. It does not acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a state, by reason of the fact that the combination also covers and regulates commerce which is interstate. The latter it can regulate, while the former is subject alone to the jurisdiction of the state.” *Addyston Pipe and Steel Co. v. United States*, 175 U. S. 211, 247, 44 L. Ed. 136.

**Act has no reference to combinations within state.**—“The fact that the proposal called for the delivery of pipe in the same state where some of the defendants resided and carried on their business would

be sufficient, so far as the act of congress is concerned, to permit those defendants to combine as they might choose, in regard to the proposed contract for the delivery of the pipe, and that right would not be affected by the fact that the contract might be subsequently awarded to some one outside the state as the lowest bidder. In brief, their right to combine in regard to a proposal for pipe deliverable in their own state could not be reached by the federal power derived from the commerce clause in the constitution.” *Addyston Pipe and Steel Co. v. United States*, 175 U. S. 211, 247, 44 L. Ed. 136.

The act of congress known as the anti-trust act has no reference to the mere manufacture or production of articles or commodities within the limits of the several states. *Northern Securities Co. v. United States*, 193 U. S. 197, 331, 48 L. Ed. 679.

It would be an extravagant consequence to draw from *Hanley v. Kansas City Southern R. Co.*, 187 U. S. 617, 47 L. Ed. 333, a case of a state attempting to fix rates over a railroad route passing outside its limits, that the contract was within the Sherman act because the boats referred to might sail over soil belonging to Kentucky in passing between two Ohio points. It may be noticed further that Ohio equally has jurisdiction on the river. *Cincinnati, etc., Packet Co. v. Bay*, 200 U. S. 179, 183, 50 L. Ed. 428.

**Business not interstate commerce.**—Where the commission merchants of Kansas City doing business at its stock yard formed an association, prescribing certain rules and regulations for the conduct of their business, providing among other things, that no member should buy from a commission merchant who was not a member of the exchange it was held that the agreement was not illegal within the meaning of the act of July 2, 1890, since their business was not interstate commerce. *Hopkins v. United States*, 171 U. S. 578, 43 L. Ed. 290. See the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 292.

An agreement between the members of the Kansas City Live Stock Exchange not to recognize any yard trader unless he is a member of the exchange, does not create a combination in restraint of trade within the meaning of the act of July 2, 1890, where the association itself does no business and any yard trader can become a member upon complying with its conditions of membership. *Anderson v. United States*, 171 U. S. 604, 43 L. Ed. 300.

**Necessary of life.**—“In the *Knight Company Case*, it was said that this statute applied to monopolies in restraint of inter-



the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate.<sup>25</sup>

state or international trade or commerce, and not to monopolies in the manufacture even of a necessary of life." *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 326, 41 L. Ed. 1007.

**Contracts restricting distribution of stock quotations.**—Where the Board of Trade furnishes telegraph companies with its quotations under a contract that they will not communicate such information to bucket-shops but will only deliver it, to persons approved by the board, it was held that there was no monopoly or attempt at monopoly, and no contract in restraint of trade, either under the act of July 2, 1890, or at common law. *Board of Trade v. Christie Grain, etc., Co.*, 198 U. S. 236, 252, 49 L. Ed. 1031. See ante, "At Common Law," II.

**25. Hopkins v. United States**, 171 U. S. 578, 592, 43 L. Ed. 290.

**Restraint must be direct.**—The Sherman act is not intended to affect contracts which have a remote and indirect bearing upon commerce between the states. *Hopkins v. United States*, 171 U. S. 578, 43 L. Ed. 290; *Addyston Pipe and Steel Co. v. United States*, 175 U. S. 211, 44 L. Ed. 136; *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618, 623, 48 L. Ed. 1142.

**Combinations among commission merchants.**—In *Hopkins v. United States*, 171 U. S. 578, 43 L. Ed. 290, it was decided that the local business of commission merchants was not commerce among the states, even if what the brokers were employed to sell was an object of such commerce. "The brokers were not like the defendants before us, themselves the buyers and sellers. They only furnished certain facilities for the sales. Therefore, there again the effects of the combination of brokers upon the commerce was only indirect and not within the act. Whether the case could have been different if the combination had resulted in exorbitant charges, was left open." *Swift & Co. v. United States*, 196 U. S. 375, 397, 49 L. Ed. 518.

**Holding company to control railroads.**—The actual nature of the transaction was only to organize the Northern Securities Company as a holding company, in whose hands, not as a real purchaser or absolute owner, but simply as custodian were to be placed the stocks of the constituent companies—such custodian to represent the combination formed between the shareholders of the constituent companies, the direct and necessary effect of such combination being to restrain and monopolize interstate commerce by suppressing or (to use the words of this court in *United States v. Joint Traffic Association*) "smothering" competition between the lines of two railway carriers, and is illegal within the meaning of the act of July 2,

1890. *Northern Securities Co. v. United States*, 193 U. S. 197, 354, 48 L. Ed. 679.

Although the act of congress known as the anti-trust act has no reference to the mere manufacture or production of articles or commodities within the limits of the several states, it does embrace and declare to be illegal every contract, combination or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates in restraint of trade or commerce among the several states or with foreign nations. *Northern Securities Co. v. United States*, 193 U. S. 197, 331, 48 L. Ed. 679.

**Agreement restraining manufacture and sale of commodities.**—If an agreement or combination directly restrains not alone the manufacture, but the purchase, sale or exchange of the manufactured commodity among the several states, it is brought within the provisions of the statute. *Addyston Pipe and Steel Co. v. United States*, 175 U. S. 211, 241, 44 L. Ed. 136.

**Agreement regulating rates.**—An agreement entered into between competing railroad companies "for the purpose of mutual protection by establishing and maintaining reasonable rates, rules and regulations on all freight traffic, both through and local" by its direct, immediate and necessary effect puts a restraint upon trade and commerce within the meaning of the anti-trust act no matter what the intent was on the part of those who signed it. *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 341, 41 L. Ed. 1007.

Where thirty-one competing railroads enter into an association known as the joint traffic association, agreeing among other things "to establish and maintain reasonable and just rates, fares, rules and regulations on state and interstate traffic," it was held that the natural effect of such agreement was to prevent and stifle competition and therefore the contract was void for violating the federal anti-trust act, even though it might be possible that unrestrained competition would bring about the same result by destroying the weaker roads and thereby giving the more powerful survivors the power to raise rates. *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 43 L. Ed. 259.

**Combination of dealers in different states.**—A combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the live stock markets of the different states, to bid up prices for a few days in order to induce the cattle men to send their stock to the stock yards, to fix prices at which they will sell, and to that end to restrict shipments of meat when necessary, to estab-



**Promoting Legitimate Business.**—An attempt to monopolize or the actual monopoly of the production and manufacture of a commodity by enlarging and extending a business is not necessarily an attempt, whether executory or consummated, to monopolize trade and commerce, within the meaning of the act, even though, in order to dispose of the product, the instrumentality of commerce is necessarily invoked.<sup>26</sup>

lish a uniform rule of credit to dealers and to keep a black list, to make uniform and improper charges for cartage, and finally, to get less than lawful rates from the railroads to the exclusion of competitors with intent to monopolize the commerce and to prevent competition, is an illegal combination within the meaning of the so called anti-trust act of July 2, 1890. *Swift & Co. v. United States*, 196 U. S. 375, 394, 49 L. Ed. 518.

"Although the combination alleged embraces restraint and monopoly of trade within a single state, its effect upon commerce among the states is not accidental, secondary, remote or merely probable. On the allegations of the bill the latter commerce no less, perhaps even more, than commerce within a single state, is an object of attack. See *Leloup v. Mobile*, 127 U. S. 640, 647, 32 L. Ed. 311; *Crutcher v. Kentucky*, 141 U. S. 47, 59, 35 L. Ed. 649; *Allen v. Pullman's Palace Car Co.*, 191 U. S. 171, 179, 180, 48 L. Ed. 134." *Swift & Co. v. United States*, 196 U. S. 375, 397, 49 L. Ed. 518.

In *Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. Ed. 608, all the members of the court concurring, decided that a combination created by an agreement between certain private manufacturers and dealers in tiles, grates and mantels, in different states, whereby they controlled or sought to control the price of such articles in those states, was condemned by the act of congress. *Northern Securities Co. v. United States*, 193 U. S. 197, 330, 48 L. Ed. 679.

**Combinations to control domestic enterprises.**—"Contracts, combinations, or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination, or conspiracy." *United States v. Knight Co.*, 156 U. S. 1, 16, 39 L. Ed. 325.

**Specification requiring particular material.**—Where a municipality specifies through its board of aldermen that Trinidad Lake asphalt shall be used in street improvement, it was held that, although this asphalt is a foreign product, and the specification of it excludes from competition the domestic asphalt, this was not such a direct restraint upon interstate commerce as to violate the Sherman act

of July 2, 1890. *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618, 622, 48 L. Ed. 1142.

**26.** *United States v. Knight Co.*, 156 U. S. 1, 17, 39 L. Ed. 325.

**Promoting legitimate business.**—In *Hopkins v. United States*, 171 U. S. 578, 43 L. Ed. 290, the court said that the statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce, and that to treat the act as condemning all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not covered by the act, although the agreement may indirectly and remotely affect that commerce. *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 568, 43 L. Ed. 259.

**Agreement regulating conduct of business.**—"In *Anderson v. United States*, 171 U. S. 604, 43 L. Ed. 300, the defendants were buyers and sellers at the stock yards, but their agreement was merely not to employ brokers, or to recognize yard traders, who were not members of their association. Any yard trader could become a member of the association on complying with the conditions, and there was said to be no feature of monopoly in the case. It was held that the combination did not directly regulate commerce between the states, and, being formed with a different intent, was not within the act." *Swift & Co. v. United States*, 196 U. S. 375, 397, 49 L. Ed. 518.

**Agreement regulating business may restrain commerce indirectly.**—It has already been stated in *Hopkins v. United States*, 171 U. S. 578, 43 L. Ed. 290, that in order to come within the provisions of the statute the direct effect of an agreement or combination must be in restraint of that trade or commerce which is among the several states, or with foreign nations. Where the subject matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct or restrain that com-

e. *Embraces All Restraints.*—"The act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but

merce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object. *Anderson v. United States*, 171 U. S. 604, 615, 43 L. Ed. 300.

**Contract as part of sale of business.**—

A contract, made as part of the sale of a business and not as a device to control commerce, will not fall within the act of July 2, 1890. On the contrary, it has been suggested repeatedly that such a contract is not within the letter or spirit of the statute, *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 329, 41 L. Ed. 1007; *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 568, 43 L. Ed. 259, and it was so decided in the case of a patent. *Bement v. National Harrow Co.*, 186 U. S. 70, 92, 46 L. Ed. 1058; *Cincinnati, etc., Packet Co. v. Bay*, 200 U. S. 179, 185, 50 L. Ed. 428. See the title RESTRAINT OF TRADE.

**Interference too insignificant and incidental.**—An agreement between the vendors and purchasers of an Ohio River steamboat which stipulates that the vendors withdraw from competition for five years is not illegal as a combination to gain a monopoly within the meaning of the anti-trust act; and even though the contract does not leave commerce among the states untouched, the inference is too insignificant and incidental and is not the dominant purpose of the contract. *Cincinnati, etc., Packet Co. v. Bay*, 200 U. S. 179, 184, 50 L. Ed. 428.

**Agreements in regard to patents.**—The agreement of the defendant not to manufacture or sell any other float spring tooth harrow, etc., than those which it had made under its patents before assigning them to the plaintiff, or which it was licensed to manufacture and make, under the terms of the license, except such other style and construction as it may be licensed to manufacture and sell by the plaintiff, is not void under the act of congress. The plain purpose of the provision was to prevent the defendant from infringing upon the rights of others under other patents, and it had no purpose to stifle competition in the harrow business more than the patent provided for, nor was its purpose to prevent the licensee from attempting to make any improvement in harrows. *Bement v. National*

*Harrow Co.*, 186 U. S. 70, 93, 46 L. Ed. 1058.

The owner of letters patent has a monopoly recognized by the constitution and by the statutes of congress and if he sells or assigns it, reasonable and legal conditions restricting the terms upon which the article may be used, the price to be demanded therefor and by whom sales may be made, will be upheld by the courts. Although such agreement keeps up the monopoly, it is not illegal as being a contract in restraint of trade and commerce among the states and with foreign nations. *Bement v. National Harrow Co.*, 186 U. S. 70, 46 L. Ed. 1058.

**Monopoly of manufacture of commodity.**—Where, by the purchase of the stock of four Philadelphia refineries, with shares of its own stock, the American Sugar Refining Company acquired nearly complete control of the manufacture of refined sugar within the United States, it was held that, although there was created an actual monopoly in the manufacture of refined sugar, such stock purchases could not be restrained under the act of congress prohibiting combinations, contracts and conspiracies to monopolize trade and commerce among the several states or with foreign nations. *United States v. Knight Co.*, 156 U. S. 1, 39 L. Ed. 325, cited with approval in *Bement v. National Harrow Co.*, 186 U. S. 70, 92, 46 L. Ed. 1058; *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 313, 41 L. Ed. 1007; *Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. Ed. 608; *Northern Securities Co. v. United States*, 193 U. S. 197, 323, 48 L. Ed. 679; *Hopkins v. United States*, 171 U. S. 578, 43 L. Ed. 290.

**Distinction between manufacture and commerce.**—It was there held that although the American Sugar Refining Company, by means of the combination referred to, had obtained a practical monopoly of the business of manufacturing sugar, yet the act of congress did not touch the case, because the combination only related to manufacture and not to commerce among the states or with foreign nations. The plain distinction between manufacture and commerce was pointed out, and it was observed that a contract or combination which directly related to manufacture only was not brought within the purview of the act, although as an indirect and incidental result of such combination commerce among the states might be thereafter somewhat affected. *Addyston Pipe and Steel Co. v. United States*, 175 U. S. 211, 238, 44 L. Ed. 136; *United States v. Knight Co.*, 156 U. S. 1, 39 L. Ed. 325. See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 289.



embraces all direct restraints imposed by any combination, conspiracy or monopoly upon such trade or commerce."<sup>27</sup>

**Extent of Monopoly.**—"All the authorities agree that in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition."<sup>28</sup>

**Form of Combination Immaterial.**—"All combinations which are in re-

27. *Northern Securities Co. v. United States*, 193 U. S. 197, 331, 48 L. Ed. 679.

**Includes all restraints.**—When the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by congress. By the simple use of the term "contract in restraint of trade" all contracts of that nature whether valid or otherwise, would be included and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 41 L. Ed. 1007.

**Restraints made unlawful in act.**—When the language of the title of the act of July 2, 1890, is "to protect trade and commerce against unlawful restraints and monopolies," it does not mean only those restraints and monopolies which the common law regarded as unlawful, and which were to be prohibited by the federal statute. But the court said: "We are of opinion that the language used in the title refers to and includes and was intended to include those restraints and monopolies which are made unlawful in the body of the statute." *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 327, 41 L. Ed. 1007.

**Agreement to maintain reasonable rates.**—Although railroads have a right to charge reasonable rates, it does not follow that a contract among themselves to keep up their charges to that extent is valid. And where an agreement was entered into between competing railroad companies for the purpose of maintaining reasonable rates to be received by each company executing the agreement, it was held that this amounted to an illegal combination within the meaning of act of July 2, 1890. *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 41 L. Ed. 1007.

A combination of competing railroads for the purpose of regulating traffic rates is illegal within the meaning of the act of July 2, 1890, when such agreement directly effects and restrains interstate trade and commerce even though the rates fixed upon are admitted to be reasonable.

*United States v. Joint Traffic Ass'n*, 171 U. S. 505, 43 L. Ed. 259, affirming *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 41 L. Ed. 1007.

**Patents.**—"It is true that it has been held by this court that the act included any restraint of commerce, whether reasonable or unreasonable. *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 41 L. Ed. 1007; *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 43 L. Ed. 259; *Addyston Pipe and Steel Co. v. United States*, 175 U. S. 211, 44 L. Ed. 136. But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor." *Bement v. National Harrow Co.*, 186 U. S. 70, 92, 46 L. Ed. 1058.

28. *United States v. Knight Co.*, 156 U. S. 1, 16, 39 L. Ed. 325; *Northern Securities Co. v. United States*, 193 U. S. 197, 332, 48 L. Ed. 679; *Addyston Pipe and Steel Co. v. United States*, 175 U. S. 211, 237, 44 L. Ed. 136.

**Extent of monopoly.**—"Where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are continually being made." And it is not material that the combination did not prevent the letting of any particular contract. *Addyston Pipe and Steel Co. v. United States*, 175 U. S. 211, 244, 44 L. Ed. 136.

Where the defendants being manufacturers and vendors of cast iron pipe entered into a combination to raise the price for pipe for all states west and south of New York, Pennsylvania and Virginia, such combination is contrary to the federal statute prohibiting combination in restraint of trade or commerce among the several states or with foreign nations. *Addyston Pipe and Steel Co. v. United States*, 175 U. S. 211, 44 L. Ed. 136.

**Injurious tendency sufficient.**—To vitiate a combination, such as the act of congress condemns, it need not be shown that the combination, in fact, results or



straint of trade or commerce are prohibited, whether in the form of trusts or in any other form whatever."<sup>29</sup> Congress aimed to destroy the power to place any direct restraint on interstate trade or commerce, when by any combination or conspiracy, formed by either natural or artificial persons, such power had been acquired.<sup>30</sup>

4. PLEADING AND PRACTICE—*a. Criminal Prosecution.*—Every person making a contract or engaging in a conspiracy declared illegal by the statute, is deemed guilty of a misdemeanor, and on conviction may be punished by fine or by imprisonment or both.<sup>31</sup>

will result in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition. *Northern Securities Co. v. United States*, 193 U. S. 197, 332, 48 L. Ed. 679.

It is no answer to say that competition in trade was not in fact destroyed, or that the price of a commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public. *Northern Securities Co. v. United States*, 193 U. S. 197, 340, 48 L. Ed. 679.

29. *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 326, 41 L. Ed. 1007.

The language of the act of July 2, 1890, includes every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations. *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 312, 41 L. Ed. 1007.

30. *Northern Securities Co. v. United States*, 193 U. S. 197, 357, 48 L. Ed. 679.

**Railroad combinations.**—Railroad carriers engaged in interstate or international trade or commerce are embraced by the act. *Northern Securities Co. v. United States*, 193 U. S. 197, 331, 48 L. Ed. 679.

"In speaking of the situation as between the government and the defendants, the securities company is sometimes referred to as the custodian of the shares and sometimes as the absolute owner, but in the sense that in either view the combination was illegal. For the purposes of that suit it was enough that in any capacity the securities company had the power to vote the railway shares and to receive the dividends thereon. The objection was that the exercise of its powers, whether those of owner or of trustee, would tend to prevent competition, and thus to restrain commerce." *Harriman v. Northern Securities Co.*, 197 U. S. 244, 291, 49 L. Ed. 739.

**Combination of private companies.**—Combinations, even among private manufacturers or dealers, whereby interstate or

international commerce is restrained, are equally embraced by the act. *Northern Securities Co. v. United States*, 193 U. S. 197, 331, 48 L. Ed. 679.

In *Addyston Pipe and Steel Co. v. United States*, 175 U. S. 211, 44 L. Ed. 136, all the members of the court concurring held that the act of congress made illegal an agreement between certain private companies or corporations engaged in different states in the manufacture, sale and transportation of iron pipe, whereby competition among them was avoided, was covered by the anti-trust act. *Northern Securities Co. v. United States*, 193 U. S. 197, 330, 48 L. Ed. 679.

In an association composed of manufacturers and dealers in titles, mantles and grates, the dealers agree not to purchase from manufacturers not members of the association, and not to sell unset titles to any one not a member of the association for less than list prices, which are more than fifty per cent higher than the prices would be to those who were members, while the manufacturers who became members agreed not to sell to any one not a member, and in case of a violation of the agreement they were subject to forfeiting their membership. Such agreement is unlawful within the meaning of the Sherman act of July 2, 1890. *Montague & Co. v. Lowry*, 193 U. S. 38, 45, 48 L. Ed. 608.

**Combination to obtain unlawful railroad rates.**—A combination of dealers in fresh meat, to secure less than lawful rates from railroads to the exclusion of competitors with intent to monopolize the commerce and prevent competition, is prohibited by the anti-trust act of July 2, 1890. *Swift & Co. v. United States*, 196 U. S. 375, 49 L. Ed. 518.

**Right of withdrawal immaterial.**—The joint traffic association was held to be an illegal combination within the meaning of the Sherman act notwithstanding the fact that any company upon giving proper notice, etc., could withdraw or deviate from the rate prescribed, for the abstract right of a single company to deviate from the rates becomes immaterial and its exercise, to say the least, inexpedient, in the face of the power of the managers to enlist the whole association in a war upon it. *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 43 L. Ed. 259.

31. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 550, 46 L. Ed. 679; *Bement*

b. *Civil Remedies*—(1) *Penal Action for Forfeiture*.—The sixth section of the act provides that any property owned under any contract or combination, declared illegal by the act, and being in the course of transportation from one state to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture of property imported into the United States contrary to law.<sup>32</sup>

(2) *Injunctions*.—The act provides for the prevention of violations thereof, and makes it the duty of the several district attorneys, under the direction of the attorney general, to institute proceedings in equity to prevent and restrain such violations.<sup>33</sup> And the government may intervene and demand relief as well

*v. National Harrow Co.*, 186 U. S. 70, 88, 46 L. Ed. 1058. See the titles CONSPIRACY, vol. 3, p. 1102; CRIMINAL LAW, vol. 5, p. 43.

**Criminal prosecution.**—A violation of the provision of the act is made a misdemeanor, punishable by a fine not exceeding five thousand dollars or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. Of course, a criminal prosecution under the act must be in the name of the United States and in a court of the United States, the district attorney who conducts the prosecution being subject to the direction of the attorney general as to the manner in which his duties shall be discharged. *Rev. Stat. 362. Minnesota v. Northern Securities Co.*, 194 U. S. 48, 67, 48 L. Ed. 870.

**Indictment and punishment.**—Where a trust or combination is illegal within the anti-trust act, its members may be subject to indictment and punishment. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 547, 46 L. Ed. 679.

**Attempting to monopolize.**—And every person monopolizing or attempting to monopolize, or combining or conspiring with any other person or persons to monopolize any part of the trade or commerce among the several states or with foreign nations, is liable by the act to like penalties. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 550, 46 L. Ed. 679.

**Conspiracy gist of offense.**—Such a combination is more than a contract; it is an offense. In all such combinations where the purpose is injurious or unlawful, the gist of the offense is the conspiracy. Men can often do by the combination of many what severally no one could accomplish, and even what when done by one would be innocent. *Northern Securities Co. v. United States*, 193 U. S. 197, 340, 48 L. Ed. 679.

**Statute is not retroactive.**—There is nothing of an *ex post-facto* character about the act. The civil remedy by injunction and the liability to punishment under the criminal provision of the act are entirely distinct, and there can be no question of an act being regarded as a violation of the statute which occurred before it was passed. After its passage, if the law be violated, the parties violating it may ren-

der themselves liable to be punished criminally, but not otherwise. *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 343, 41 L. Ed. 1007.

**32. Minnesota v. Northern Securities Co.**, 194 U. S. 48; 68, 48 L. Ed. 870.

**Forfeiture of property.**—"Section 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in § 1 of this act, and being in the course of transportation from one state to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law." *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 293, 41 L. Ed. 1007.

"The sixth section does not forfeit the property of a railroad company when merely engaged in the transportation of property owned under and which was the subject of a contract or combination mentioned in the first section." *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 313, 41 L. Ed. 1007. See the titles PENALTIES AND FORFEITURES; REVENUE LAWS.

**33. Bement v. National Harrow Co.**, 186 U. S. 70, 88, 46 L. Ed. 1058.

**Injunction—Who may bring suit.**—It was not intended that the enforcement of the act should depend in any decree upon original suits in equity instituted by the states or by individuals to prevent violations of its provisions. On the contrary, taking all the section of that act together, we think that its intention was to limit direct proceedings in equity to prevent and restrain such violations of the anti-trust act as cause injury to the general public, or to all alike, merely from the suppression of competition in trade and commerce among the several states and with foreign nations, to those instituted in the name of the United States, under the fourth section of the act, by district attorneys of the United States, acting under the direction of the attorney general. *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 70, 48 L. Ed. 870.

Where the trust or combination is illegal, its members may be restrained from



after the combination is fully organized as while it is in the course of formation.<sup>34</sup>

**Effect of Voluntary Dissolution on Jurisdiction of Court.**—After a bill in equity has been filed to dissolve and restrain an illegal combination, it cannot by voluntarily dissolving deprive the court of jurisdiction.<sup>35</sup>

**Multifariousness of Bill.**—Where a bill to enjoin a violation of the act simply alleges the successive elements of a single connected scheme, it is not multifarious and a demurrer on that ground will not be sustained.<sup>35a</sup>

(3) *Actions for Damages*—(a) *In General.*—Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.<sup>36</sup>

carrying out the purposes for which it was created by a court of equity in a suit on behalf of the public. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 547, 46 L. Ed. 679.

**State cannot sue to enjoin.**—A state cannot bring suit in equity to enjoin the formation of a combination prohibited by the anti-trust act on the ground that its creation will tend to diminish the value of public property owned by the state. *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 48 L. Ed. 870.

**34.** *Northern Securities Co. v. United States*, 193 U. S. 197, 357, 48 L. Ed. 679.

**Authority of United States to enjoin.**—Although the United States have no pecuniary interest in the result of the litigation, the fourth section of the act invests the government with full power and authority to bring a suit to set aside an agreement between competing interstate railroads to regulate rates, and to dissolve the association and enjoin the members from doing anything in furtherance of such agreement. *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 342, 41 L. Ed. 1007.

Congress having the control of interstate commerce, has also the duty of protecting it, and it is entirely competent for that body to give the remedy by injunction as more efficient than any other civil remedy. *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 343, 41 L. Ed. 1007.

**Injunction against orders restraining competition.**—Where a combination is formed of independent dealers to restrict the competition of their agents when purchasing stock for them in the stock yards, intending to monopolize commerce among the states, an injunction against taking part in such combination, by directing the agents to refrain from bidding against one another, is justified. *Swift & Co. v. United States*, 196 U. S. 375, 399, 49 L. Ed. 518.

The defendants cannot be ordered to complete, but they properly can be forbidden to give direction or to make agree-

ments not to compete. *Addyston Pipe and Steel Co. v. United States*, 175 U. S. 211, 44 L. Ed. 136; *Swift & Co. v. United States*, 196 U. S. 375, 400, 49 L. Ed. 518.

**Extent of injunction.**—Where an agreement is decided to be illegal, the relief would be totally inadequate to the necessities of the occasion if the judgment were to be limited to the dissolution of the association but the injunction should go further, and enjoin the defendants from entering into or acting under any similar agreement in future. *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 308, 41 L. Ed. 1007.

"If there was a combination or conspiracy in violation of the act of congress, between the stockholders of the Great Northern and the Northern Pacific Railway companies, whereby the Northern Securities Company was formed as a holding corporation, and whereby interstate commerce over the lines of the constituent companies was restrained, it must follow that the court, in execution of that act, and to defeat the efforts to evade it, could prohibit the parties to the combination from doing the specific things which being done would affect the result denounced by the act." *Northern Securities Co. v. United States*, 193 U. S. 197, 356, 48 L. Ed. 679. See the title *INJUNCTIONS*, vol. 6, p. 1022.

As to allegations in complaint necessary to confer jurisdiction, see the title *COURTS*, vol. 4, p. 915.

**35. Voluntary dissolution.**—The fact of the dissolution of the Trans-Missouri Freight Association does not prevent the federal supreme court from taking cognizance of the appeal and deciding the case upon its merits. *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 307, 41 L. Ed. 1007.

**35a. Bill must not be multifarious.**—*Swift & Co. v. United States*, 196 U. S. 375, 395, 49 L. Ed. 518. See ante, "Restraint Must Be Direct," III. C. 3. d. And see the title *MULTIFARIOUSNESS*.

**36.** *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 550, 46 L. Ed. 679; *Bement*



(b) *Limitation of Action.*—The limitation of the right of action for three-fold damages is left to the local law of the states and is not governed by the federal statute providing a five-years limitation to any suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States.<sup>37</sup>

5. *EFFECT ON CONTRACTS.*—As the statute makes the contract itself illegal, no recovery can be had upon it when the defense of illegality is shown to the court.<sup>38</sup>

*v. National Harrow Co.*, 186 U. S. 70, 88, 46 L. Ed. 1058; *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 68, 48 L. Ed. 870.

**Damages recovered by direct action.**—The seventh section of the Sherman act gives the right to any person "injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful" by the act, to sue and recover treble the damages sustained by him. But the action which it authorizes must be a direct one, and the damages claimed cannot be set off in these actions based upon special contracts for the sale of articles that have no direct connection with the alleged arrangement or combination between the plaintiff and other corporations, firms or companies. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 551, 46 L. Ed. 679.

**City, a person, within meaning of act.**—A city is a person within the meaning of § 7 of the anti-trust act of July 2, 1890, and can recover three-fold damages from a party to an unlawful combination who, by reason of the monopoly acquired by such combination, sells to the city at a price much above what is reasonable. *Chattanooga Foundry, etc., Works v. Atlanta*, 203 U. S. 390, 396, 51 L. Ed. 241.

**Reasonable attorney's fee.**—Where in the trial court three-fold damages had been recovered and the amount of attorney's fees were allowed under § 7 of the act as costs, the court held that the amount of attorney's fees was with the discretion of the trial court, reasonably exercised. *Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. Ed. 608. See the title COSTS, vol. 5, p. 819.

**Damage to property within state.**—There can be no doubt that congress had power to give an action for damages to an individual who suffers by breach of the law. *Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. Ed. 608. The damage complained of must almost or quite always be damage in property, that is, in the money of the plaintiff, which is owned within some particular state. In other words, if congress had power to make the acts which led to the damage illegal, it could authorize a recovery for the damage, although the latter was suffered wholly within the boundaries of one state. *Chattanooga Foundry, etc., Works v. Atlanta*, 203 U. S. 390, 397, 51 L. Ed. 241.

**Measure of damages.**—In an action for damages under the act, the verdict was for the difference between the price paid

and the market or fair price that the plaintiff would have had to pay under natural conditions had the combination been out of the way, together with an attorney's fee. The judgment trebled the damages. *Chattanooga Foundry, etc., Works v. Atlanta*, 203 U. S. 390, 396, 51 L. Ed. 241. See the title ACTIONS, vol. 1, p. 96.

37. *Chattanooga Foundry, etc., Works v. Atlanta*, 203 U. S. 390, 397, 51 L. Ed. 241. See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 900.

38. *Bement v. National Harrow Co.*, 186 U. S. 70, 88, 46 L. Ed. 1058.

**Contracts illegal and void.**—Where thirty-one competing railroads enter into an association known as the Joint Traffic Association, agreeing among other things "to establish and maintain reasonable and just rates, fares, rules and regulations on state and interstate traffic," it was held that the natural effect of such agreement was to prevent competition, and therefore the contract was void as being a restraint upon trade and commerce among the states and with foreign nations. *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 43 L. Ed. 259, citing with approval and affirming *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 41 L. Ed. 1007.

Every contract which would extinguish competition between otherwise competing railroads engaged in interstate trade or commerce, and which would in that way restrain such trade or commerce, is made illegal by the act. *Northern Securities Co. v. United States*, 193 U. S. 197, 331, 48 L. Ed. 679.

**Doctrine of in pari delicto applied.**—In a suit by one of the stockholders of the Northern Securities Company to recover the stock of the Northern Pacific that he had transferred to it, it was held that the purchase by the securities company was on its own account and not in trust, and could not be disturbed because of illegal purpose at the clamor of parties in pari delicto. *Harriman v. Northern Securities Co.*, 197 U. S. 244, 49 L. Ed. 739.

The Northern Pacific system, taken in connection with the Burlington system, is competitive with the Union Pacific system, and the court held, that the decree sought by the complainants, namely the recovery of the stock of the Northern Pacific, claimed by them and a ratable distribution of the remaining assets of the Northern Securities Company, would

**Collateral Contracts Not Affectel by Illegality.**—The mere fact that one of the contracting parties, may constitute an unjust monopoly, and that its general business is illegal, cannot serve, ipso facto, to create default or liability on its contracts generally; nor can such fact be invoked collaterally to affect in any manner its independent contract obligations.<sup>39</sup>

6. EVIDENCE.—If there was a violation of the anti-trust act, that is, combinations in restraint of trade, it would be probably evidenced by formal agree-

not only be inequitable but that it would tend to smother competition and thus directly contravene the object of the Sherman anti-trust law. *Harriman v. Northern Securities Co.*, 197 U. S. 244, 49 L. Ed. 739.

**No relief in equity from executed contract.**—Where one of the parties organizing the Northern Securities Company transfers his railroad stock to it in exchange for its own stock, and after a suit has been brought against the securities company to declare it illegal, for violating the act of July 2, 1890, he continues to be a director and to acquiesce in transactions which affirm the absolute ownership by the company of such stock, he cannot, after being guilty of such laches, rescind the contract and by a suit in equity recover back the stock originally owned by him. *Harriman v. Northern Securities Co.*, 197 U. S. 244, 245, 49 L. Ed. 739.

**Illegality of contract as defense to suit.**—"Any one sued upon a contract may set up as a defense that it is a violation of the act of congress, and if found to be so, that fact will constitute a good defense to the action." *Bement v. National Harrow Co.*, 186 U. S. 70, 88, 46 L. Ed. 1058. See, generally, the titles CONTRACTS, vol. 4, p. 553; ILLEGAL CONTRACTS, vol. 6, p. 737.

39. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 547, 46 L. Ed. 679.

**Illegality of combination is no defense to action for goods sold and delivered.**—Where, in an action to recover the price of goods sold and delivered, one of the defenses was that the plaintiff was a member of an illegal trust or combination to interfere with the freedom of trade and commerce, it was said that the plaintiff's cause of action is in no legal sense dependent upon, or affected by the alleged illegality of the trust or combination, because the illegality, if any, is entirely collateral to the transaction in question, and the court is not called upon in this action to enforce any contract tainted with illegality, or contrary to public policy. The mere fact that the plaintiff is a member of a trust or combination, created with the intent and purposes set forth in the answer, will not disable or prevent it in law from selling goods within or affected by the provisions of such trust or combination, and recovering their price or value. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 546, 46 L. Ed. 679.

The act of July 2, 1890, does not declare illegal or void any sale made by such combination, or by its agents, of property it acquired or which come into its possession for the purpose of being sold, such property not being at the time in course of transportation from one state to another or to a foreign country. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 550, 46 L. Ed. 679.

The purchaser of an Ohio River steamboat cannot avoid payment of the purchase price on the ground that his covenant to maintain traffic rates makes the contract illegal under the Sherman act, when the covenant in question is not declared to enter into the consideration of sale and the rates referred to must be assumed to be rates relating to domestic trade and affecting interstate commerce only indirectly if at all. *Cincinnati, etc., Packet Co. v. Bay*, 200 U. S. 179, 185, 50 L. Ed. 428.

**Illegality of trust agreement is no defense to suit to foreclose mortgage.**—In a suit to foreclose a mortgage upon the property of a corporation, the purpose for which the corporation was originally organized cannot become a material inquiry, and the fact that the corporation giving the mortgage is a member of a trust or combination in violation of the anti-trust act, is no defense. *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 196, 44 L. Ed. 423. See the title CORPORATIONS, vol. 4, p. 621.

**Suits of illegal trusts cannot be enjoined on that account.**—"In substance, the complaint shows that the defendant has entered into a combination with various other manufacturers of spring-tooth harrows for the purpose of acquiring a monopoly in this country in the manufacture and sale of the same, and, as an incident thereto, has acquired all the rights of the other manufacturers for the exclusive sale and manufacture of such harrows under patents, or interests in patents, owned by them respectively. Such a combination may be an odious and a wicked one, but the proposition that the plaintiffs, while infringing the rights vested in the defendant under letters patent of the United States, is entitled to stop the defendant from bringing or prosecuting any suit therefor because the defendant is an obnoxious corporation, and is seeking to perpetuate the monopoly which is conferred upon it by its title to the letters patent, is a novel one, and entirely un-



ments, but it might also be evidenced or its transactions alluded to in telegrams and letters sent during the time the combination operated. And in a prosecution under the act the court may order such books and papers put in evidence.<sup>40</sup>

7. **PROOF OF UNLAWFUL INTENT.**—Although, where the necessary effect of the agreement is to restrain trade or commerce, proof of an unlawful intent is unnecessary,<sup>41</sup> an illegal purpose may be essential to prove an attempt to monopolize trade.<sup>42</sup>

**MONTANA.**—See the title **EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL**, vol. 6, p. 8.

**MONTH.**—The term “month,” when used in contracts, must be construed, where the parties have not themselves given to it a definition, and there is no legislative provision on the subject, to mean calendar, and not lunar months; and so in statutes the term means a calendar month.<sup>1</sup>

warranted.” *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 546, 46 L. Ed. 679.

40. *Hale v. Henkel*, 201 U. S. 43, 79, 50 L. Ed. 652; *McAlister v. Henkel*, 201 U. S. 90, 50 L. Ed. 671; *Nelson v. United States*, 201 U. S. 92, 50 L. Ed. 673. See the title **EVIDENCE**, vol. 5, p. 1004.

As to compulsory production of books and papers to be used in evidence, see the title **CONSTITUTIONAL LAW**, vol. 4, p. 505.

41. **Proof of unlawful intent unnecessary.**—Where the necessary effect of the agreement is to restrain trade or commerce, no matter what the intent was on the part of those who signed it, the suit of the government can be maintained without proof of the allegation that the agreement was entered into for the purpose of restraining trade or commerce or for maintaining rates above what was reasonable. *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 342, 41 L. Ed. 1007.

“An unlawful intent in entering into the agreement was held immaterial, but only for the reason that the agreement did in fact and by its terms restrain trade.” *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 561, 43 L. Ed. 259.

42. **Intent essential to attempt.**—The statute gives this proceeding against combinations in restraint of commerce among the states and against attempts to monopolize the same. Intent is almost essential to such a combination and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Swift & Co. v. United States*, 196 U. S. 375, 396, 49 L. Ed. 518.

1. **Month.**—*Sheets v. Selden*, 2 Wall. 177, 17 L. Ed. 822; *Guaranty Trust, etc., Co. v. Green Cove Springs, etc., R. Co.*, 139 U. S. 137, 35 L. Ed. 116. See, generally, the titles **LANDLORD AND TENANT**, vol. 7, p. 833; **STATUTES; TIME**.

“The regularity of the proceedings then resolves itself into the question whether the provision that publication shall be made once a week for four months is satisfied by a publication for sixteen weeks or four lunar months. We think it is not. It is the settled law both of this court, and of the supreme court of Florida, that the word **month**, when used in contracts or statutes, must be construed, where the parties have not themselves given to it a definition, and there is no legislative provision on the subject, to mean calendar and not lunar months. In *Sheets v. Selden*, 2 Wall. 177, 17 L. Ed. 822, it was applied to proceedings for the forfeiture of a lease. It was contended in that case that in the absence of any legislative provision on the subject, the term must be construed to mean lunar and not calendar months, in accordance with the English rule, but it was held that the term was not technical, that it must be construed in its ordinary and general sense, and that in this sense calendar months are always understood.” *Guaranty Trust, etc., Co. v. Green Cove Springs, etc., R. Co.*, 139 U. S. 137, 145, 35 L. Ed. 116.

“Indeed, that rule (the English rule) which was apparently general, except as applied to bills of exchange and other commercial contracts, never seems to have obtained any substantial foothold in this country, though followed reluctantly in some of the older decisions, and has been practically abolished in all the states, either by express statute or by judicial interpretation.” *Guaranty Trust, etc., Co. v. Green Cove Springs, etc., R. Co.*, 139 U. S. 137, 145, 35 L. Ed. 116.

**Recording of mortgage.**—Where an act of assembly required a mortgage to be recorded within six months, the court held that by the word months, calendar months were intended. *Brudenell v. Vaux*, 2 Dall. 302, 1 L. Ed. 390. See, generally, the title **RECORDING ACTS**.

**Order of publication.**—The law of Kentucky authorizes the courts of chancery of that state to make decrees against absent defendants, on the publication of an order for two months successively, in some



**MONUMENTS.**—See the title **BOUNDARIES**, vol. 3, p. 464.

**MOOT CASE.**—As ground for dismissal, reversal or affirmance of appeal, see the title **APPEAL AND ERROR**, vol. 2, pp. 289, 378, 394.

**MORAL CERTAINTY.**—See the title **EVIDENCE**, vol. 5, p. 1034.

**MORE OR LESS.**—See **ABOUT**, vol. 1, p. 49. And see the titles **DEEDS**, vol. 5, p. 269; **SALES**; **VENDOR AND PURCHASER**.

**MOREOVER.**—See note 1.

**MORMONS.**—See the title **BIGAMY AND POLYGAMY**, vol. 3, p. 225. As to power of congress to wind up Mormon Church and repeal charter, see the titles **CORPORATIONS**, vol. 4, pp. 799, 800; **RELIGIOUS SOCIETIES**.

**MORTALITY TABLES.**—See the titles **DAMAGES**, vol. 5, pp. 175, 187; **INSURANCE**, vol. 7, pp. 131, 148; **JUDICIAL NOTICE**, vol. 7, p. 681.

**MORTGAGEE IN GOOD FAITH.**—See the titles **CHattel MORTGAGES**, vol. 3, p. 717; **RECORDING ACTS**.

paper authorized to make the publication; the supreme court of Kentucky has decided, that the publication must be continued for two calendar **months**. *Hunt v. Wickliffe*, 2 Pet. 201, 7 L. Ed. 397. To the same effect, see *Guaranty Trust, etc., Co. v. Green Cove Springs, etc., R. Co.*, 139 U. S. 137, 35 L. Ed. 116. See, generally, the title **SUMMONS AND PROCESS**.

**Act freeing slaves.**—An act declared all unregistered negroes and mulattoes to be free, "except (inter alie) the domestic slaves attending upon persons passing through or sojourning in this state, and not becoming resident therein; provided such domestic slaves be not aliened or sold to any inhabitant, nor retained in this state longer than six **months**." The court was unanimously of opinion, that the legislature intended calendar **months**; that the same expression, in other acts of the general assembly, had uniformly received

the same construction. *Commonwealth v. Chambre*, 4 Dall. 143, 1 L. Ed. 776.

1. **Moreover.**—A lease at \$3,000 a year, payable in monthly installments, stipulates that if the tenant underlets or attempts to remove any of the goods on the premises without the landlord's consent, then, at the sole option and election of the landlord, the term shall cease, and **moreover**, in either of said cases, "one whole year's rent, to wit, the rent of \$3,000 over and above all such rents" as have already accrued, shall be and is hereby reserved and shall immediately accrue and become due and owing. The word **moreover**, in the connection found does not necessarily mean the rent in advance, in addition to the previous remedies mentioned, but rather is an alternative remedy. *Dermott v. Wallach*, 1 Wall. 61, 65, 17 L. Ed. 600.

# MORTGAGES AND DEEDS OF TRUST.

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#### **CROSS REFERENCES.**

As to question of appeal and error, see the title *APPEAL AND ERROR*, vol. 1, p. 333. As to the right of the garnishee to retain property under his control by virtue of a deed of trust, for the purpose of reimbursing himself for advances made, see the title *ATTACHMENT AND GARNISHMENT*, vol. 2, p. 699. As to the power of the courts in regard to mortgages where the mortgaged property is involved in bankruptcy proceedings, see the title *BANKRUPTCY*, vol. 2, p. 792. As to the validity of mortgages made by an insolvent in contemplation of insolvency under the national bankruptcy act or state insolvency laws, see the titles *BANKRUPTCY*, vol. 2, p. 929; *INSOLVENCY*, vol. 7, p. 1. As to mortgages to building and loan associations, see the title *BUILDING AND LOAN ASSOCIATIONS*, vol. 3, p. 542. As to mortgages of chattels, see the title *CHATTEL MORTGAGES*,

vol. 3, p. 699. As to mortgages of corporate property, see the titles *BANKS AND BANKING*, vol. 3, p. 1; *CORPORATIONS*, vol. 4, p. 621; *OFFICERS AND AGENTS OF PRIVATE CORPORATIONS*; *RAILROADS*. As to the relinquishment of dower by mortgages, see the title *DOWER*, vol. 5, p. 490. As to mortgages by executors and administrators, see the title *EXECUTORS AND ADMINISTRATORS*, vol. 4, p. 141. As to the validity of a transaction whereby the mortgagee takes the security as satisfaction of his debt and has the same conveyed to the debtor's children as against other creditors, see the title *FRAUDULENT AND VOLUNTARY CONVEYANCES*, vol. 6, p. 472. As to mortgages of ward's property by guardian, see the title *GUARDIAN AND WARD*, vol. 6, p. 599. As to improvements placed upon the mortgaged premises, see the title *IMPROVEMENTS*, vol. 6, p. 896. As to disaffirmance mortgages made by infants, see the title *INFANTS*, vol. 6, p. 1016. As to where land incumbered by a mortgage given by the testator is specifically devised, see the title *MARSHALING ASSETS AND SECURITIES*. As to a treatment of the question as to the rights of the parties where a mistake enters into the transaction or the expression thereof, see the title *MISTAKE AND ACCIDENT*, ante, p. 417. As to mortgages given to secure bonds given by a municipality to aid in the construction of a railroad, see the title *MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES*. As to mortgages given by a corporation to its directors, see the title *OFFICERS AND AGENTS OF PRIVATE CORPORATIONS*. As to mortgages of patents, see the title *PATENTS*. As to mortgages given by a postmaster to secure the postoffice department, see the title *POSTAL LAWS*. As to mortgages on ships, see the title *SHIPS AND SHIPPING*. As to mortgages on property, the title to which has passed to the United States government, see the title *UNITED STATES*. As to all questions concerning usury as connected with mortgages, see the title *USURY*. As to the effect of confiscation acts upon rights and liabilities arising under mortgages, see the title *WAR*. As to mortgages by water companies, see the title *WATER COMPANIES AND WATERWORKS*.

### I. Definition and Nature.

A brief definition of a mortgage under modern law is not easy to make. At common law a mortgage was a conditional conveyance to secure the payment of money or the performance of some act, to be void upon such payment or performance,<sup>1</sup> carrying the rights and incidents of ownership;<sup>2</sup> although at an early

1. *United States v. Hooe*, 3 Cranch 73, 2 L. Ed. 370; *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 441, 7 L. Ed. 189; *Gilman v. Illinois, etc.*, Tel. Co., 91 U. S. 603, 615, 23 L. Ed. 405; *Bell Silver, etc., Min. Co. v. First Nat. Bank*, 156 U. S. 470, 475, 39 L. Ed. 497; *United States v. Commonwealth, etc., Trust Co.*, 193 U. S. 651, 655, 48 L. Ed. 830; *Maybury v. Brien*, 15 Pet. 21, 38, 10 L. Ed. 646.

In *Scott v. Neely*, 140 U. S. 106, 112, 35 L. Ed. 358, citing *Hutchins v. King*, 1 Wall. 53, 17 L. Ed. 544, the court said: "A mortgage is in form a conveyance vesting in the mortgagee a conditional estate which becomes absolute on the non-performance of the condition." See, also, *Terrell v. Allison*, 21 Wall. 289, 292, 22 L. Ed. 634.

*Willamette Mfg. Co. v. Bank*, 119 U. S. 191, 198, 30 L. Ed. 384, contains the following: "A mortgage is in effect a sale with a power of defeasance, which may ultimately end in an absolute transfer of the title."

And in *Flagg v. Walker*, 113 U. S. 659, 677, 28 L. Ed. 1072, citing *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 7 L. Ed. 189, "a

mortgage is a deed whereby one grants to another lands, upon condition that if the mortgagor shall pay a certain sum of money, or do some other act therein specified, at a day certain, the grant shall be void."

By the law of Louisiana a mortgage is defined to be "a contract, by which a person affects the whole of his property, or only some part of it, in favor of another, for security of an engagement; but without divesting himself of the possession thereof." *Livingston v. Story*, 11 Pet. 351, 388, 9 L. Ed. 746.

As to what is an hypothecary action under the Louisiana practice, see *HYPOTHECARY ACTION*, vol. 6, p. 735.

A *sale vente a remere* is defined to be "an agreement or paction, by which the vendor reserves to himself the power of taking back the thing sold, by returning the price paid for it." *Livingston v. Story*, 11 Pet. 351, 387, 9 L. Ed. 746.

An *antichresis* is, when the security given consists in immovables. *Livingston v. Story*, 11 Pet. 351, 388, 9 L. Ed. 746.

2. See post, "Character of Title Passing," V. A, 1.

day equity gave to the mortgagor, even after breach of condition, a right to recover the property from forfeiture, upon payment of the debt or obligation secured, within a prescribed period.<sup>3</sup> By more modern law and under the statutes of many states a mortgage is a mere lien<sup>4</sup> upon land and its dominant attribute is security, being merely an incident or accessory,<sup>5</sup> but nevertheless it must be regarded as both a lien in equity and a conveyance at law.<sup>6</sup> It is true that a mortgage is in substance but a security for a debt, or an obligation, to which it is collateral. As between the mortgagor and all others than the mortgagee, it is a lien, a security, and not an estate. But as between the parties to the instrument, or their privies, it is a grant which operates to transmit the legal title to the mortgagee, and leaves the mortgagor only a right to redeem.<sup>7</sup> A deed of trust in the nature of a mortgage is a conveyance in trust for the purpose of securing a debt, subject to a condition of defeasance.<sup>8</sup> As to a treatment of what are termed judicial mortgages under the Louisiana practice, see the title JUDGMENTS AND DECREES, vol. 7, p. 544. As to the provision under the Louisiana practice that a father's guardianship of his minor children imports a mortgage on his property, see the title GUARDIAN AND WARD, vol. 6, p. 599. As to comparison between a judgment lien and a mortgage, see the title JUDGMENTS AND DECREES, vol. 7, p. 544. It is an established rule of equity that the maxim "once a mortgage always a mortgage" will be strictly enforced.<sup>9</sup>

## II. Transactions Either Mortgages or Sales.<sup>10</sup>

**A. General Statement.**—A court of equity looks to the substantial object of the conveyance, and will consider an absolute deed as a mortgage, wherever it is shown to have been intended merely as a security for the payment of a debt,<sup>11</sup>

3. See post, "Redemption," XIII.

4. *Gibson v. Stevens*, 8 How. 384, 400, 12 L. Ed. 1123; *Hutchins v. King*, 1 Wall. 53, 58, 17 L. Ed. 544; *The Siren*, 7 Wall. 152, 158, 19 L. Ed. 129; *Terrell v. Allison*, 21 Wall. 289, 293, 22 L. Ed. 634; *Wall v. Bissell*, 125 U. S. 382, 387, 31 L. Ed. 772; *Waterman v. MacKenzie*, 138 U. S. 252, 258, 34 L. Ed. 923; *United States v. Commonwealth, etc.*, *Trust Co.*, 193 U. S. 651, 655, 48 L. Ed. 830. And see post, "Character of Title Passing," V, A, 1.

In *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 7 L. Ed. 189, it is said that: In discussions in courts of equity, a mortgage is sometimes called a lien for a debt; and so it certainly is, and something more; it is a transfer of the property itself, as security for the debt. It is, therefore, only in a loose and general sense, that it is sometimes called a lien; and then only by way of contrast, to an estate absolute and indefeasible. *Massingill v. Downs*, 7 How. 760, 767, 12 L. Ed. 903.

5. *Sheldon v. Sill*, 8 How. 441, 450, 12 L. Ed. 1147; *Hutchins v. King*, 1 Wall. 53, 58, 17 L. Ed. 544; *The Siren*, 7 Wall. 152, 158, 19 L. Ed. 129; *Clark v. Reyburn*, 8 Wall. 318, 322, 19 L. Ed. 354; *Carpenter v. Longan*, 16 Wall. 271, 275, 21 L. Ed. 313; *Terrell v. Allison*, 21 Wall. 289, 293, 22 L. Ed. 634; *Gilman v. Illinois, etc.*, *Tel. Co.*, 91 U. S. 603, 615, 23 L. Ed. 405; *New Orleans Canal, etc., Co. v. Montgomery*, 95 U. S. 16, 18, 24 L. Ed. 346; *National Bank v. Whitney*, 103 U. S. 99, 101, 26 L. Ed. 443; *Railway Co. v. Sprague*, 103 U. S. 756, 761, 26 L. Ed. 554; *Tredway v. Sanger*, 107 U. S. 323, 324, 27 L. Ed. 582; *Ewell v.*

*Daggs*, 108 U. S. 143, 27 L. Ed. 682; *Teal v. Walker*, 111 U. S. 242, 251, 28 L. Ed. 415; *Waterman v. MacKenzie*, 138 U. S. 252, 258, 34 L. Ed. 923; *Scott v. Neely*, 140 U. S. 106, 112, 35 L. Ed. 358; *Woodward v. Jewell*, 140 U. S. 247, 250, 35 L. Ed. 478; *Cross v. Allen*, 141 U. S. 528, 537, 35 L. Ed. 843; *Bell Silver, etc., Min. Co. v. First Nat. Bank*, 156 U. S. 470, 475, 39 L. Ed. 497; *United States v. Commonwealth, etc.*, *Trust Co.*, 193 U. S. 651, 655, 48 L. Ed. 830.

"Every mortgagee is necessarily a creditor. A mortgage is in general but an incident to the debt it secures, and the mortgagee is nothing more than a creditor secured by mortgage." *Myer v. Car Co.*, 102 U. S. 1, 10, 26 L. Ed. 59.

6. *United States v. Commonwealth, etc.*, *Trust Co.*, 193 U. S. 651, 655, 48 L. Ed. 830.

7. *Brobst v. Brock*, 10 Wall. 519, 529, 19 L. Ed. 1002.

8. *Union Bank v. Kansas City Bank*, 136 U. S. 223, 232, 34 L. Ed. 341.

9. **Once a mortgage always a mortgage.**—*Clark v. Reyburn*, 8 Wall. 318, 322, 19 L. Ed. 354; *Dean v. Nelson*, 10 Wall. 158, 171, 19 L. Ed. 926.

10. **Absolute deeds construed as mortgages.**—Generally, as to the rules of construction in regard to mortgages, see post, "Interpretation and Construction," VI.

11. **Absolute deeds as mortgages.**—*Hughes v. Edwards*, 9 Wheat. 489, 6 L. Ed. 142; *Sprigg v. Bank*, 14 Pet. 201, 10 L. Ed. 419; *Morris v. Nixon*, 1 How. 118, 11 L. Ed. 69; *Russell v. Southard*, 12 How. 139, 148, 13 L. Ed. 927; *Southard v. Rus-*



regardless of any statements or stipulations to the contrary.<sup>12</sup> But as a conditional sale, if really intended, is valid, the inquiry in every case must be, whether the contract in the specific case is a security for the repayment of money, or an actual sale.<sup>13</sup> Courts of equity will permit independent agree-

sell, 16 How. 546, 567, 14 L. Ed. 1052; *Villa v. Rodriguez*, 12 Wall. 323, 20 L. Ed. 406; *Peugh v. Davis*, 96 U. S. 332, 336, 24 L. Ed. 775; *Brick v. Brick*, 98 U. S. 514, 516, 25 L. Ed. 256; *Teal v. Walker*, 111 U. S. 242, 28 L. Ed. 415; *Jackson v. Lawrence*, 117 U. S. 679, 681, 29 L. Ed. 1024; *Balloch v. Hooper*, 146 U. S. 363, 367, 36 L. Ed. 1008.

A mortgagee who represents to the mortgagor, before as well as after the conveyance is made, that if he can sell the mortgaged property for enough to reimburse him for his outlays and interest he will return the surplus money, if any, also if he can sell a portion of the property, or enough to reimburse himself for his advances, he will do so and return the unsold portion of the property, cannot repudiate the assurances upon which his grantor was drawn in to convey. *Villa v. Rodriguez*, 12 Wall. 323, 341, 20 L. Ed. 406.

The grantee in an absolute deed, which is intended by the parties to operate as a security for a debt, may treat it as a mortgage, and acknowledging it to be such, may apply to a court of equity to foreclose the equity of redemption, which will be decreed, in like manner, as if an unexceptionable defeasance were attached to the deed. *Hughes v. Edwards*, 9 Wheat. 489, 495, 6 L. Ed. 142.

12. "To insist on what was really a mortgage, as a sale, is in equity a fraud, which cannot be successfully practiced, under the shelter of any written papers, however precise and complete they may appear to be." *Russell v. Southard*, 12 How. 139, 147, 13 L. Ed. 927; *Southard v. Russell*, 16 How. 546, 567, 14 L. Ed. 1052; *Babcock v. Wyman*, 19 How. 289, 299, 15 L. Ed. 644.

A conveyance is made that clearly indicates the creation of a lien, specifies the debt to secure which it is given, and the property upon which it is to take effect, but in the middle of the instrument, after the granting clause and the description, and before the warranty and defeasance clauses, is found this sentence, "this deed, made, executed, and delivered under the acts of the legislature of Georgia of 1871 and 1872, and found in the code of 1873, §§ 1969, 1970, 1971," these sections being in an article entitled "Sales to secure debts;" and applying only to those cases in which an absolute deed is made of the property, and a bond taken for reconveyance. It was held that although this instrument recites that it is executed under those sections, in fact it was not, for no bond for title back was taken nor was the instrument signed by the grantee, and it was, notwithstanding the declaration in it.

only a mortgage. *Woodward v. Jewell*, 140 U. S. 247, 250, 35 L. Ed. 478.

13. *Conway v. Alexander*, 7 Cranch 218, 237, 3 L. Ed. 321, where it is said: "To deny the power of two individuals, capable of acting for themselves, to make a contract for the purchase and sale of lands, defeasible by the payment of money at a future day, or, in other words, to make a sale, with a reservation to the vendor, of a right to repurchase the same land, at a fixed price, and at a specified time, would be to transfer to the court of chancery, in a considerable degree, the guardianship of adults as well as of infants. Such contracts are certainly not prohibited, either by the letter or the policy of the law."

If A advance money to B, and B thereupon convey land to trustees, in trust to convey the same to A in fee, in case B should fail to repay the money and interest on a certain day; and if B fail to repay the money on the day limited, and thereupon, the trustee convey the land to A, B has no equity of redemption. *Conway v. Alexander*, 7 Cranch 218, 3 L. Ed. 321.

Where at the time property is conveyed, the grantee enters into an agreement that if certain obligations of the grantee were canceled he would reconvey the property on receipt of the original consideration and the expenses incurred on the property, the assumption that the transaction is a mortgage is unfounded, as there were no extraneous facts shown to explain the object of executing the paper, such as a previous indebtedness of the grantor, or a liability on his part to secure the grantee against the obligations mentioned. *Horbach v. Hill*, 112 U. S. 144, 148, 28 L. Ed. 670.

In *Horbach v. Hill*, 112 U. S. 144, 148, 28 L. Ed. 670, "there were no extraneous facts shown to explain the object of executing the papers, such as a previous indebtedness of the father, or a liability on his part to secure the son against the bonds mentioned. Nor did it appear to whom the bonds were issued, nor for what consideration. Nor was it averred that the transaction was in any respect different from what the instruments imported—a sale to the son. The agreement can therefore be considered only as an independent contract to reconvey the lots on certain conditions."

Where property is conveyed under an agreement that the grantee shall pay certain debts of the grantor and if after a "disposition" of the property by the grantee anything remains of the proceeds after reimbursing himself for payment of the debts made for the grantor, the grantee shall pay the grantor one-half of

ments which go to show a deed, on its face absolute, was intended only as a mortgage, to be set up against the express terms of the deed, only on the ground of fraud; considering it a fraudulent attempt in the mortgagee, contrary to his own express agreement, to convert a mortgage into an absolute deed.<sup>14</sup> The court has no power over the transaction to make it other than, or different from, what the parties themselves made it. If it is a mortgage, it is the duty of the court to declare it a mortgage.<sup>15</sup>

**B. What Laws Govern.**—Upon a question as to whether a deed which purports upon its face to be an absolute deed, was in reality a deed or a mortgage, depending upon the general principles of equity jurisprudence, the supreme court does not hold itself bound by the decisions of the highest court of the state in which the land in question was, but will be governed by its own view of those principles.<sup>16</sup>

**C. Contemporaneous Agreement to Reconvey.**—There is great conflict of authority upon the point as to whether an absolute deed and a separate written contract to reconvey, both under seal, bearing even date, executed and delivered at the same time, between the same parties, and relating to the same land, the agreement to reconvey being conditional upon the payment by the grantor to the grantee of a certain sum of money within a certain period, constitute in law and fact a mortgage, which does not convey any interest in the premises, or entitle the grantee to the possession of the land described.<sup>17</sup> It has been generally held that a deed absolute upon its face, but intended as a security for the payment of money, is a mortgage, even at law, if accompanied by a separate contemporaneous agreement in writing to reconvey upon the payment of the deed.<sup>18</sup> But where a deed of lands, absolute in form with the general warranty of title, contains an agreement by the vendee to reconvey the property to the vendor or a third person, upon his payment of a fixed sum within a specified time; the fact that there is such a collateral agreement to reconvey is not inconsistent with the idea of a sale.<sup>19</sup> In the absence of proof of a debt or of other explanatory testimony, the parties will be held to have intended exactly what they have said upon the face of the instruments.<sup>20</sup> The condition upon which land is conveyed is usually inserted in the deed of conveyance, but the defeasance may be contained in a separate instrument; and if the deed be absolute in the first instance, and the defeasance be executed subsequently, it will relate

such excess, this does not constitute a mortgage though it must be conceded that in accepting the conveyance of the property the grantee becomes a trustee to manage the property and pay off the debts according to the terms of the trust. *Flagg v. Walker*, 113 U. S. 659, 676, 28 L. Ed. 1072.

14. *Sprigg v. Bank*, 14 Pet. 201, 10 L. Ed. 419.

15. *Dean v. Nelson*, 10 Wall. 158, 171, 19 L. Ed. 926.

16. **What law governs nature of transaction.**—*Russell v. Southard*, 12 How. 139, 13 L. Ed. 927; *Southard v. Russell*, 16 How. 546, 567, 14 L. Ed. 1052.

17. **Contemporaneous agreement to reconvey.**—*Bogk v. Gassert*, 149 U. S. 17, 27, 37 L. Ed. 631. And in that case it was held where there was no evidence of a pre-existing debt due from the grantor to the grantee, it was for the jury to decide whether the transaction was a deed or mortgage.

18. *Teal v. Walker*, 111 U. S. 242, 246, 28 L. Ed. 415, cited and distinguished in *Bogk v. Gassert*, 149 U. S. 17, 27, 37 L. Ed. 631.

Where a deed, absolute in form is accompanied by a defeasance from the grantee, stating that the deed was executed as security for certain promissory notes, the two documents, the deed and the defeasance, are to be taken together as if forming one instrument, and they together constitute a mortgage. *Lanahan v. Sears*, 102 U. S. 318, 321, 26 L. Ed. 180.

Where a mortgage deed contained a defeasance, that the mortgagor should pay the debt, according to the condition of a bond recited in the deed, by which it was payable on a day already past, at the time of the execution of the deed; held, that this circumstance did not avoid the mortgage deed in equity, where it was to be considered as a conveyance, absolute at law, but intended as a security merely, and to be treated in the same manner as an ordinary mortgage. *Hughes v. Edwards*, 9 Wheat. 489, 6 L. Ed. 142.

19. *Wallace v. Johnstone*, 129 U. S. 58, 64, 32 L. Ed. 619, cited in *Bogk v. Gassert*, 149 U. S. 17, 27, 37 L. Ed. 631.

20. *Wallace v. Johnstone*, 129 U. S. 58, 64, 32 L. Ed. 619, cited in *Bogk v. Gassert*, 149 U. S. 17, 27, 37 L. Ed. 631.



back to the date of the principal deed, and connect itself with it, so as to render it a security, in the nature of a mortgage.<sup>21</sup> A conveyance upon an absolute deed on its face with an oral agreement that it was to secure the payment of a note, and upon default was to be allowed to sell the property is in effect a mortgage.<sup>22</sup>

**D. Existence of Right to Redeem.**—It is the well-settled doctrine of courts of equity, that a conveyance of land, for the purpose of securing payment of a sum of money, is a mortgage, if it leaves a right to redeem upon payment of the debt.<sup>23</sup>

**E. Circumstances Considered in Determining Nature of Transaction.**—The question as to whether a conveyance constitutes an absolute deed or a mortgage is to be determined from the circumstances of the case,<sup>24</sup> and it is proper to consider the adequacy of the consideration,<sup>25</sup> the financial condition of the grantor,<sup>26</sup> the existence or acknowledgment of a debt or obligation,<sup>27</sup> the purport of papers subsequently executed referring to the same transaction,<sup>28</sup>

21. *Livingston v. Story*, 11 Pet. 351, 386, 9 L. Ed. 746.

And by the law of Louisiana, a contract of sale, and a power to redeem, need not be in one instrument. *Livingston v. Story*, 11 Pet. 351, 386, 9 L. Ed. 746.

22. *Jackson v. Lawrence*, 117 U. S. 679, 681, 29 L. Ed. 1024.

23. **Existence of right to redeem.**—*Shillaber v. Robinson*, 97 U. S. 68, 77, 24 L. Ed. 967.

A deed of land, with a power of sale, to secure the payment of a debt, whether made to the creditor or a third person, is, in equity, a mortgage, if there is left a right to redeem on payment of such debt. *Shillaber v. Robinson*, 97 U. S. 68, 24 L. Ed. 967.

24. **Circumstances considered in determining nature of transaction.**—*Wallace v. Johnstone*, 129 U. S. 58, 62, 32 L. Ed. 619; *Horbach v. Hill*, 112 U. S. 144, 148, 28 L. E. 670.

25. **Adequacy of consideration.**—In examining the question whether the transaction was a sale or mortgage, it is of great importance to inquire whether the consideration was adequate to induce a sale. *Russell v. Southard*, 12 How. 139, 148, 13 L. Ed. 927; *Southard v. Russell*, 16 How. 546, 567, 14 L. Ed. 1052; *Conway v. Alexander*, 7 Cranch 218, 241, 3 L. Ed. 321; *Howland v. Blake*, 97 U. S. 624, 627, 24 L. Ed. 1027; *Coyle v. Davis*, 116 U. S. 108, 112, 29 L. Ed. 583; *Morris v. Nixon*, 1 How. 118, 126, 11 L. Ed. 69.

26. **Financial condition of grantor.**—Necessitous men are not, truly speaking, free men; but, to answer a present emergency, will submit to any terms that the crafty may impose upon them, and a court of equity does not consider a consent thus obtained to be sufficient to fix the rights of the parties. *Russell v. Southard*, 12 How. 139, 152, 13 L. Ed. 927; *Southard v. Russell*, 16 How. 546, 567, 14 L. Ed. 1052. See the title **DURESS**, vol. 5, p. 683.

Where one is in jail and much pressed for a sum of money, though it does not deprive him of his right to dispose of his

property, it gives a complexion to his contracts, and must have some influence in a doubtful case in determining whether the conveyance was intended as a sale or mortgage. *Conway v. Alexander*, 7 Cranch 218, 240, 3 L. Ed. 321.

27. **Existence or acknowledgment of debt or obligation.**—The fact that there is no acknowledgment of a pre-existing debt, nor any covenant for repayment, may be taken into consideration in determining the nature of a transaction, as to whether it is a sale or a mortgage. *Conway v. Alexander*, 7 Cranch 218, 237, 3 L. Ed. 321; *Horbach v. Hill*, 112 U. S. 144, 148, 28 L. Ed. 670.

In determining whether a transaction constitutes a sale or mortgage the fact that the grantor made no expression, before or after the transaction, respecting a loan or a mortgage, is regarded as important; and the existence of a treaty, or any conversation respecting a loan or a mortgage, would render a conclusion more reasonable that the deed made was intended as a cover to veil a transaction differing in reality from the appearance it assumes. *Conway v. Alexander*, 7 Cranch 218, 239, 3 L. Ed. 321.

Where a loan is an inducement for the execution of a deed which is absolute on the face of it, though the loan is not recited as the consideration of the deed, or as any part of it, if the lender or grantee in the deed treats it substantially as the consideration, or a part of it, equity will declare the deed to be a security for money loaned. *Morris v. Nixon*, 1 How. 118, 119, 11 L. Ed. 69.

But the absence of a personal obligation by the grantor to repay the money furnishes no conclusive test to determine whether the conveyance was a mortgage or a conditional sale. *Russell v. Southard*, 12 How. 139, 13 L. Ed. 927; *Southard v. Russell*, 16 How. 546, 567, 14 L. Ed. 1052.

28. **Papers subsequently executed referring to same transaction.**—Where a deed, absolute in form, was made as security for a loan, papers thereafter executed, which refer to the transaction as



the subsequent conduct of the parties relative to the property,<sup>29</sup> the fact that the conveyance was made to a trustee<sup>30</sup> or that a bond accompanies the deed.<sup>31</sup>

**F. Pleading.**—Where a complainant in equity wishes to rely on the fact that a deed, in form absolute, was in reality a mortgage, which has been paid, he must allege the fact in his bill.<sup>32</sup>

**G. Evidence.**—1. PRESUMPTIONS.—In doubtful cases the court leans to the conclusion that the transaction was a mortgage and not a sale.<sup>33</sup>

2. ADMISSIBILITY.—Evidence, either written or oral, tending to show the real character of the transaction, is admissible.<sup>34</sup> When the question before a court of equity is, whether a deed which purports upon its face to be an absolute deed, was in reality a deed or a mortgage, extraneous evidence is admissible to show that it was only a mortgage.<sup>35</sup> It is common learning in the law that parol evidence is admissible to show that a deed absolute on its face is a mortgage.<sup>36</sup>

3. SUFFICIENCY.—Parol evidence to show that it was intended to secure a debt, and to operate only as a mortgage, must be clear, unequivocal, and con-

one of purchase, will be considered in connection with the deed, and will not be regarded in a court of equity as any more conclusive of a subsequent release than the form of the original instrument was of a sale of the property. *Peugh v. Davis*, 96 U. S. 332, 24 L. Ed. 775.

**29. Subsequent conduct of parties relative to the premises.**—Where a bill was filed to redeem what was alleged to be a mortgage, and the question in the case was whether it was a mortgage or a conditional sale, the fact that the grantor endeavored to obtain the relinquishment of his wife's dower and actually surrendered the paper under which he had the right to reclaim his land, was held not to amount to a bar of his claim; but the utmost effect justly attributable to these facts was that he thought he then had no further claim to the property, and this belief may as well have arisen from the terms of the paper, as from a knowledge that a sale was intended. *Russell v. Southard*, 12 How. 139, 153, 13 L. Ed. 927; *Southard v. Russell*, 16 How. 546, 567, 14 L. Ed. 1052.

In determining whether a conveyance is a mortgage or a sale it is a very material circumstance that the property conveyed is subsequently sold at a public sale and partitioned and improvements made upon it, all of which the grantor presumed to know as being within his view, and yet no suggestion is made by him that he retains any interest in the lands. *Conway v. Alexander*, 7 Cranch 218, 240, 3 L. Ed. 321.

**30. Conveyance to trustee.**—That the conveyance is made to trustees is not a circumstance of much weight in determining whether the conveyance is a sale or a mortgage. *Conway v. Alexander*, 7 Cranch 218, 238, 3 L. Ed. 321.

The fact that the conveyance is made to trustees manifests an intention, in the drawer of the instrument, to avoid the usual forms of a mortgage; but this intention will have no influence on the case, if the instrument was really a security for money advanced, and to be repaid. *Con-*

*way v. Alexander*, 7 Cranch 218, 238, 3 L. Ed. 321.

**31. Where bond accompanies the deed.**—Where there is proof of parties meeting upon the footing of borrowing and lending, with an offer to secure the lender by a mortgage upon particular property, if a deed of the property, absolute on the face of it, be given to the lender, and the lender also take a bond from the borrower, equity will interpret the deed to be a security for money loaned, unless the lender shall show, by proofs, that the borrower and himself subsequently bargained upon another footing than a loan. *Morris v. Nixon*, 1 How. 118, 119, 11 L. Ed. 69.

**32. Pleading.**—*Grosholz v. Newman*, 21 Wall. 481, 22 L. Ed. 471.

**33. Presumptions.**—*Russell v. Southard*, 12 How. 139, 13 L. Ed. 927; *Southard v. Russell*, 16 How. 546, 567, 14 L. Ed. 1052; *Conway v. Alexander*, 7 Cranch 218, 237, 3 L. Ed. 321; *Coyle v. Davis*, 116 U. S. 108, 112, 29 L. Ed. 583.

**34. Admissibility of evidence.**—*Peugh v. Davis*, 96 U. S. 332, 24 L. Ed. 775; *Brick v. Brick*, 98 U. S. 514, 516, 25 L. Ed. 256; *Jackson v. Lawrence*, 117 U. S. 679, 681, 29 L. Ed. 1024; *Russell v. Southard*, 12 How. 139, 13 L. Ed. 927; *Babcock v. Wyman*, 19 How. 289, 15 L. Ed. 644.

**35. Russell v. Southard**, 12 How. 139, 13 L. Ed. 927; *Southard v. Russell*, 16 How. 546, 567, 14 L. Ed. 1052; *Morris v. Nixon*, 1 How. 118, 11 L. Ed. 69; *Babcock v. Wyman*, 19 How. 289, 299, 15 L. Ed. 644; *Conway v. Alexander*, 7 Cranch 218, 238, 3 L. Ed. 321.

**36. Jones v. Guaranty, etc., Co.**, 101 U. S. 622, 631, 25 L. Ed. 1030; *Risher v. Smith*, 131 U. S. appx. clvi, 24 L. Ed. 808; *Babcock v. Wyman*, 19 How. 289, 15 L. Ed. 644; *Morgan v. Shinn*, 15 Wall. 105, 110, 21 L. Ed. 87; *Peterson v. Willing*, 3 Dall. 506, 508, 1 L. Ed. 698.

The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That cannot be

vincing, or the presumption that the instrument is what it purports to be must prevail.<sup>37</sup>

**H. Questions of Law and Fact.**—The question as to whether a conveyance constitutes an absolute deed or a mortgage is a question of fact to be determined by the jury.<sup>38</sup>

### III. Equitable Mortgages.

**A. What Constitutes**—1. BY AGREEMENT OF PARTIES.—A party may, by agreement, create a charge or claim in the nature of a lien on real as well as on personal property whereof he is the owner or in possession, which a court of equity will enforce against him, and volunteers or claimants under him with notice of the agreement.<sup>39</sup>

2. INFORMAL WRITINGS.—Contracts, which are wanting in one or more of the characteristics of a common-law mortgage, given with the intention that they shall have effect as mortgages, are considered as mortgages in equity.<sup>40</sup>

3. ABSOLUTE DEEDS AS EQUITABLE MORTGAGES.—A treatment of absolute deeds intended by the parties as a security for a debt, will be found elsewhere in this article.<sup>41</sup>

4. DEPOSIT OF TITLE DEEDS.—The lien acquired by delivery of a title deed as security for a debt is equivalent to an equitable mortgage,<sup>42</sup> but it must be clearly established that the deposit was made as security for the debt.<sup>43</sup>

5. RESERVATION OF PURCHASE MONEY LIEN.—The acceptance by the vendee of a deed containing the reservation of a lien for the payment of the purchase money amounts to an express agreement on his part that the land shall be held as security for the payment of what he owes on account of the purchase money, and creates an equitable mortgage.<sup>44</sup>

6. DEEDS IN ESCROW.—A deed that remains in escrow, until the first payment is made, and is then delivered, as the deed of the parties, is equivalent to a mortgage of the premises, to secure the first payment.<sup>45</sup>

7. ASSIGNMENT OF RENTS AND PROFITS.—An assignment of the rents and profits of land as security for a debt constitutes an equitable lien.<sup>46</sup>

8. BONDS OF CANAL COMPANY.—As to the issuance of bonds of a canal com-

qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument. *Brick v. Brick*, 98 U. S. 514, 516, 25 L. Ed. 256.

**37. Sufficiency of evidence.**—*Cadman v. Peter*, 118 U. S. 73, 80, 30 L. Ed. 78; *Howland v. Blake*, 97 U. S. 624, 24 L. Ed. 1027; *Coyle v. Davis*, 116 U. S. 108, 29 L. Ed. 583.

**38. Questions of law and fact.**—*Wallace v. Johnstone*, 129 U. S. 58, 62, 32 L. Ed. 619; *Bogk v. Gassert*, 149 U. S. 17, 27, 37 L. Ed. 631.

**39. By agreement of parties.**—*Ketchum v. St. Louis*, 101 U. S. 306, 25 L. Ed. 999; *Fourth Street Bank v. Yardley*, 165 U. S. 634, 644, 41 L. Ed. 855; *Walker v. Brown*, 165 U. S. 654, 664, 41 L. Ed. 865.

**Making improvements upon faith of agreement.**—Where a father in law who possessed large estates, verbally agreed to grant to his son in law certain property provided he would repair the same saying that he intended it for his daughter, and the son in law entered into the possession of the property and made extensive improvements and repairs thereon, and later the father in law died insolvent without having made the conveyance, the improve-

ments and repairs made on the property were held to have created an equitable mortgage. *King v. Thompson*, 9 Pet. 204, 221, 9 L. Ed. 102.

**Agreement extending amount of property secured.**—A stipulation between parties extending the area of property to be covered by a lien is tantamount to an equitable mortgage. *Sheffield Furnace Co. v. Witherow*, 149 U. S. 574, 578, 37 L. Ed. 853; *Ketchum v. St. Louis*, 101 U. S. 306, 316, 317, 25 L. Ed. 999.

**40. Informal writings.**—*Ketchum v. St. Louis*, 101 U. S. 306, 317, 25 L. Ed. 999.

**41. Absolute deeds as equitable mortgages.**—See ante, "Transaction Either Mortgages or Sales," II.

**42. Deposit of title deeds.**—*Mandeville v. Welch*, 5 Wheat. 277, 286, 5 L. Ed. 87.

**43. Mandeville v. Welch, 5 Wheat. 277, 286, 5 L. Ed. 87; *Biebinger v. Continental Bank*, 99 U. S. 143, 25 L. Ed. 371.**

**44. Reservation of purchase money lien.**—*Ober v. Gallagher*, 93 U. S. 199, 206, 23 L. Ed. 829.

**45. Deeds in escrow.**—*Brown v. Gilman*, 4 Wheat. 255, 290, 4 L. Ed. 564.

**46. Assignment of rents and profits.**—*Gisborn v. Charter Oak Life Ins. Co.*, 142 U. S. 326, 336, 35 L. Ed. 1029.



pany as constituting an equitable mortgage, see the title CANALS, vol. 3, p. 548.

**B. Binding Effect.**—An equitable mortgage, in a court of chancery, is as binding on the parties as if a mortgage in form, had been duly executed,<sup>47</sup> and will be given effect according to the intention of the contracting parties.<sup>48</sup>

#### IV. Form, Requisites and Validity.

**A. Necessity for Writing.**—Under the Louisiana laws it is necessary that the antichresis shall be reduced to writing.<sup>49</sup>

**B. Form of Words.**—While it may be conceded that no precise form of words is necessary to constitute a mortgage, yet there must be a present purpose of the mortgagor to pledge his land for the payment of a sum of money, or the performance of some other act, or it cannot be construed to be a mortgage.<sup>50</sup>

**C. Description of Indebtedness Secured.**—If the items which make up the debt are particularly described in the mortgage, it may save trouble in establishing the facts; but if there has been no fraud, and subsequent creditors have not been injured by the omission of specifications, identity may be established by parol. In making the proof, the debt must come fairly within the general description which has been given; but if it does, and the identity is satisfactorily made out, the mortgage will be sustained where good faith exists.<sup>51</sup>

**D. Property Subject.**—Whenever a party undertakes, by mortgage, to grant property in presenti, which does not belong to him or has no existence, the mortgage is inoperative and void, and this either in a court of law or equity.<sup>52</sup> However, an imperfect Spanish title claimed by virtue of a concession was, by the laws of Missouri, subject to be mortgaged for a debt.<sup>53</sup> And where there was a sale of wild lands in Florida, occupied by Indians, and the purchasers gave a mortgage to secure the payment of some outstanding installments of the purchase money, the fact that the purchasers had not complete possession of the lands was held not a sufficient objection to their being charged with interest from the time when the money was due.<sup>54</sup> Equitable interests may be mortgaged.<sup>55</sup>

**47. Binding effect of equitable mortgages.**—King *v.* Thompson, 9 Pet. 204, 221, 9 L. Ed. 102; White Water Val. Canal Co. *v.* Vallette, 21 How. 414, 422, 16 L. Ed. 154.

**48.** White Water Val. Canal Co. *v.* Vallette, 21 How. 414, 422, 16 L. Ed. 154.

**49. Necessity for writing.**—Livingston *v.* Story, 11 Pet. 351, 388, 9 L. Ed. 746.

**50. Form of words.**—New Orleans, etc., Ass'n *v.* Adams, 109 U. S. 211, 214, 27 L. Ed. 910.

**51. Description of indebtedness secured.**—Wood *v.* Weimar, 104 U. S. 786, 793, 26 L. Ed. 779.

The general rule is that it is not necessary to the validity of a mortgage, that it should truly state the debt it is intended to secure; but it will stand as a security for the real equitable claims of the mortgagees, whether they existed at the date of the mortgage, or arose afterwards, upon the faith of the mortgage, before notice of the defendants' equity. Shirras *v.* Caig, 7 Cranch 34, 3 L. Ed. 260.

But the supreme court is bound to follow the courts of the state of Connecticut in their uniform decisions, in construing the recording acts of that state, that a mortgage must truly describe the debt intended to be secured; and that it is not

sufficient that the debt be of such a character that it might have been secured by the mortgage had it been truly described. Townsend *v.* Todd, 91 U. S. 452, 23 L. Ed. 413.

A mortgage which misrepresents the transaction it recites, and the consideration on which it is executed, is liable to suspicion; but if, upon investigation, the real transaction should appear to be fair, though somewhat variant from that which is described, it will not deprive the person claiming under the mortgage, of his real equitable rights, unless it be in favor of a person who has been, in fact, injured and deceived by the misrepresentation. Shirras *v.* Caig, 7 Cranch 34, 51, 3 L. Ed. 260.

**52. Property subject to mortgage.**—Pennock *v.* Coe, 23 How. 117, 128, 16 L. Ed. 436.

**53.** Massey *v.* Papin, 24 How. 362, 16 L. Ed. 734.

**54.** Curtis *v.* Innerarity, 6 How. 146, 12 L. Ed. 380.

**55.** The act of congress of March 2, 1867, having provided for a confirmation of public lands settled upon and occupied as town sites, an occupant of a lot in such a town site has equitable interest in the premises that he can mortgage. Hussey



**E. Consideration.**—Where a mortgagee makes advances to his mortgagor who is financially embarrassed under an agreement with the holder of a prior mortgage that the mortgagee making the advance shall have priority under his mortgage, the advance in consideration of his mortgage being accorded priority, is enough to sustain the agreement to that effect.<sup>56</sup> Where a mortgage purports a consideration, it is unnecessary to prove one, and it is not vitiated, if it be shown that it was given without a valuable consideration; unless there be connected with the transaction, mistake, deception, incapacity or fraud.<sup>57</sup> When a deed is fatally defective for the want of a sufficient consideration to support it, such a consideration subsequently arising may cure the defect and give the instrument validity.<sup>58</sup> It is not necessary to go through the form of executing a second deed to take the place of the first one. This principle applies to the mortgage after all the advances had been made, conceding that it had before been invalid for the reason insisted upon.<sup>59</sup>

**F. Remedy against Person of Debtor.**—It is a necessary ingredient in a mortgage, that the mortgagee should have a remedy against the person of the debtor. If this remedy really exists, its not being reserved in terms will not effect the case. But it must exist, in order to justify a construction which overrules the express words of the instrument.<sup>60</sup>

**G. Parties.**—As to corporations,<sup>61</sup> municipal corporations,<sup>62</sup> and married women<sup>63</sup> as proper parties to mortgages, see the appropriate titles.

**H. Sealing.**—As to the necessity for seals on corporate mortgages, see the titles CORPORATIONS, vol. 4, p. 650; RAILROADS.

**I. Reformation.**—As to reformation of mortgages to correct errors, see the title RESCISSION, CANCELLATION AND REFORMATION.

**J. Recording.**—As to the necessity for the effect of failure to properly record mortgages, see the title RECORDING ACTS.

**K. Validity**<sup>64</sup>—1. **FRAUD.**—A mortgage on property that is made to stand for future advances is not in itself fraudulent,<sup>65</sup> nor is it a badge of fraud for a mortgage, which is a mere security, to cover more property than will secure the debt due.<sup>66</sup>

2. **DURESS OR UNDUE INFLUENCE.**—As to the effect of duress or undue influence in the procurement of a mortgage, see the titles DURESS, vol. 5, p. 682; UNDUE INFLUENCE.

3. **MORTGAGE GIVEN FOR INDEMNITY.**—As to a mortgage made by a collector of the revenue, to the surety in his official bond, to indemnify him from his responsibility as surety on the bond, see the title REVENUE LAWS.

4. **MORTGAGES FOR FUTURE ADVANCES.**—As to the validity of mortgages for future advances, see post, "Mortgages for Future Advances," V, B, 2.

5. **STIPULATIONS FOR PAYMENT OF COSTS AND FEES.**—See post, "Stipulations for Payment of Costs and Fees," V, B, 3.

*v. Smith*, 99 U. S. 20, 25 L. Ed. 314. See the title PUBLIC LANDS.

56. **Consideration.**—*Stockmeyer v. Tobin*, 139 U. S. 176, 189, 35 L. Ed. 123.

57. *Jackson v. Ashton*, 11 Pet. 229, 248, 9 L. Ed. 698.

58. *Summer v. Hicks*, 2 Black 532, 17 L. Ed. 355; *Jones v. Guaranty, etc., Co.*, 101 U. S. 622, 627, 25 L. Ed. 1030.

59. *Jones v. Guaranty, etc., Co.*, 101 U. S. 622, 627, 25 L. Ed. 1030.

60. **Remedy against person of debtor.**—*Conway v. Alexander*, 7 Cranch 218, 237, 3 L. Ed. 321.

61. **Parties to mortgages.**—See the titles BANKS AND BANKING, vol. 3, p. 1; CORPORATIONS, vol. 4, p. 739; RAILROADS.

62. See the titles MUNICIPAL CORPORATIONS; MUNICIPAL, COUNTY, STATE AND FEDERAL AID.

63. See the titles HUSBAND AND WIFE, vol. 6, p. 716; SEPARATE ESTATE OF MARRIED WOMEN.

64. **Validity of mortgages.**—As to illegal contracts generally, see the title ILLEGAL CONTRACTS, vol. 6, p. 737.

65. **Fraud.**—*United States v. Hooe*, 3 Cranch 73, 89, 2 L. Ed. 370. See, generally, the titles FRAUD AND DECEIT, vol. 6, p. 394; FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 472.

66. *Downs v. Kissam*, 10 How. 102, 108, 13 L. Ed. 346.

6. **ESTOPPEL TO QUESTION.**—As to estoppel to contest the validity of the mortgage, see the titles *CORPORATIONS*, vol. 4, p. 752; *ESTOPPEL*, vol. 5, p. 913.

7. **REMEDIES.**—As to the cancellation of a mortgage or deed of trust for invalidity in the transaction, see the title *RESCISSION, CANCELLATION AND REFORMATION*.

8. **EVIDENCE TO IMPEACH.**—A person dealing with an unlettered man who can neither read nor write, and taking from him a promissory note for the payment of money and a deed for property, in trust, to secure the payment, is bound to show, when he seeks to enforce them, that they, or the material parts of them, were read and fully explained to the party before they were executed, and that he fully understood their meaning and effect. If this fact is established by positive and unimpeached testimony, parol evidence cannot be received, to show that the contract was different from that expressed in the writings, or that nothing was at that time due from the party who executed the instruments.<sup>68</sup> When a mortgage, regular in appearance, and bearing the genuine signature and duly certified acknowledgment of the grantor or mortgagor is attacked, the evidence to impeach it should be clear and convincing.<sup>69</sup>

## V. Operation and Effect.

**A. Property Conveyed**—1. **CHARACTER OF TITLE PASSING.**—At law a mortgage was originally held to carry with it all the rights and incidents of ownership,<sup>71</sup> when the condition of the mortgage was broken, the estate of the mortgagee becoming indefeasible.<sup>72</sup> And according to the long-settled rules of law and equity in all of the states whose jurisprudence has been modeled upon the principles of the common law, a certain legal title to the premises vests in the mortgagee, upon the failure of the mortgagor to comply with the conditions contained in the proviso.<sup>73</sup> Courts of equity, as courts of law, have always regarded a certain legal title to be in the mortgagee until redemption,<sup>74</sup> even though the debt may have been paid.<sup>75</sup> But the strict legal title to land does not now pass by a mortgage.<sup>76</sup> Although in the absence of stipulations as to the possession, the mortgagee may enter upon the premises, his interest is widely

68. **Evidence to impeach.**—*Selden v. Myers*, 20 How. 506, 15 L. Ed. 976. See, generally, the title *PAROL EVIDENCE*.

69. In a suit to foreclose a mortgage made by husband and wife as to land, a part of which belonged to the husband and part to the wife, her answer averred that she was compelled to sign the mortgage by force and threats of her husband and that her husband and the officer who certified to the acknowledgment of the mortgage stated to her that the mortgage was not to cover her land; both her husband and the officer were dead when the answer was filed. Held, that her testimony was insufficient to overcome the effect of the mortgage and the officer's certificate. *Insurance Co. v. Nelson*, 103 U. S. 544, 548, 26 L. Ed. 436.

71. **Character of title passing.**—*Hutchins v. King*, 1 Wall. 53, 57, 17 L. Ed. 544; *Bell Silver, etc., Min. Co. v. First Nat. Bank*, 156 U. S. 470, 475, 39 L. Ed. 497; *Gilman v. Illinois, etc., Tel. Co.*, 91 U. S. 603, 615, 23 L. Ed. 405; *Scott v. Neely*, 140 U. S. 106, 112, 35 L. Ed. 358; *Hutchins v. King*, 1 Wall. 53, 17 L. Ed. 544.

72. *Clark v. Reyburn*, 8 Wall. 318, 322, 19 L. Ed. 354; *Terrell v. Allison*, 21 Wall. 289, 292, 22 L. Ed. 634.

73. *Bronson v. Kinzie*, 1 How. 311, 318,

11 L. Ed. 143. See, also, *Bradley v. Lightcap*, 195 U. S. 1, 17, 49 L. Ed. 65.

74. *Brobst v. Brock*, 10 Wall. 519, 530, 19 L. Ed. 1002.

75. *Brobst v. Brock*, 10 Wall. 519, 536, 19 L. Ed. 1002.

76. *Eyster v. Gaff*, 91 U. S. 521, 523, 23 L. Ed. 403; *Wall v. Bissell*, 125 U. S. 382, 387, 31 L. Ed. 772. See ante, "Definition and Nature," I.

"To such a degree has this equitable view prevailed that the interest of the mortgagee is now generally treated by the courts of law as real estate, only so far as it may be necessary for the protection of the mortgagee and to give him the full benefit of his security." *Hutchins v. King*, 1 Wall. 53, 58, 17 L. Ed. 544.

It is true, that a mortgagee may avail himself of his legal title to recover in ejectment, in a court of law. Yet, even there, he is considered as having but a chattel interest, while the mortgagor is treated as the true owner. The land will descend to the heir of the mortgagor. His widow will be entitled to dower. But on the death of the mortgagee, the debt secured by the mortgage will be assets in the hands of his executor, and although the technical legal estate may descend to his heir, it can be used only for the pur-

different from that of owner. He cannot by conveyance transfer any interest in the premises without a transfer of the debt secured;<sup>77</sup> his interest is not subject to attachment or seizure on execution;<sup>78</sup> he cannot remove the buildings on the premises, nor the fixtures attached; nor can he subject the premises to any uses but such as may furnish the means for the payment of the debt secured without impairing the value of the estate.<sup>79</sup> In equity, the title is regarded as a trust estate, to secure the payment of the money; and, therefore, when the debt is discharged, there is a resulting trust for the mortgagor,<sup>80</sup> the equity of redemption, however, being a distinct estate from that which is vested in the mortgagee before or after condition broken.<sup>81</sup> The interest of a mortgagee in the land is conveyed to him by the mortgagor,<sup>82</sup> all the right a mortgagor retaining in the premises being an equity of redemption.<sup>83</sup> Under a deed of trust the legal title to the estate vests in the trustee.<sup>84</sup>

2. UNDER WORDS OF GENERAL DESCRIPTION.—A mortgage which contains words of general description, conveys land held by a full equitable, as well as that held by a legal title.<sup>85</sup>

3. PROPERTY OMITTED BY MISTAKE.—Where property is omitted by accident in a trust deed, that both parties supposed covered it, the lien holder is entitled to have it sold under foreclosure proceedings.<sup>86</sup>

pose of obtaining satisfaction of the debt. The heir will be but a trustee for the executor. *Sheldon v. Sill*, 8 How. 441, 449, 12 L. Ed. 1147.

Under the system of mortgages prevailing in the countries governed by the civil law, the title to mortgaged property remains in the mortgagor and the effect of the mortgage is not, therefore, to deprive the mortgage debtor of his right to administer the property before the obligation falls due. In other words, whilst the mortgage dismembers the ownership by depriving the owner of the right of *abusus*, and therefore divests him of the perfect ownership, it leaves him the imperfect ownership, with the full *usus* and *fructus* of the property mortgaged. *Royal Ins. Co. v. Miller*, 199 U. S. 353, 361, 50 L. Ed. 226.

The mortgagee of real estate in Georgia does not take the title to the property. The mortgage is only a security for the debt for which it is made. The title remains in the mortgagor. The cases in that state go no further than to hold that a purchaser of the legal title, or possibly a mortgagee in possession, may, when sued, plead the statute of limitations as a defense to a prior debt, or mortgage or incumbrance, made by the holder of the legal title, but not a mortgagee out of possession. *Sanger v. Nightingale*, 122 U. S. 176, 185, 30 L. Ed. 1105.

In Wisconsin the fee of mortgaged premises rests in the mortgagee or assignee only after foreclosure and sale; not upon the mere default of the mortgagor. *Russell v. Ely*, 2 Black 575, 17 L. Ed. 258.

Under the Louisiana antichresis the creditor does not become proprietor of the pledged immovables by failure of payment at the stated time, and this is true notwithstanding any clause in the original agreement or any subsequent instrument

to the contrary. *Livingston v. Story*, 11 Pet. 351, 389, 9 L. Ed. 746.

77. See post, "Transfer or Lease of Incumbered Property," X.

78. See the titles ATTACHMENT AND GARNISHMENT, vol. 2, p. 676; EXECUTIONS, vol. 6, p. 93.

79. See post, "Proper Use of Premises," VII, C, 7.

80. *Bronson v. Kinzie*, 1 How. 311, 318, 11 L. Ed. 143; *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 441, 7 L. Ed. 189. See post, "Redemption," XIII.

81. *Clark v. Reyburn*, 8 Wall. 318, 321, 19 L. Ed. 354.

82. *United States v. Commonwealth, etc.*, Trust Co., 193 U. S. 651, 655, 48 L. Ed. 830.

83. *Van Ness v. Hyatt*, 13 Pet. 294, 298, 10 L. Ed. 168; *Hughes v. Edwards*, 9 Wheat. 489, 498, 6 L. Ed. 142; *Bradley v. Lightcap*, 195 U. S. 1, 17, 49 L. Ed. 65. See post, "Redemption," XIII.

84. *Bank v. Gutschlick*, 14 Pet. 19, 28, 10 L. Ed. 335.

85. Under words of general description. —*Toledo, etc., R. Co. v. Hamilton*, 134 U. S. 296, 305, 33 L. Ed. 905; *Massey v. Papin*, 24 How. 362, 16 L. Ed. 734.

A mortgage of land, made by one who has a legal and equitable title to a moiety of the property which the mortgage purports to convey, passes only his legal right, although he had a power, from the person who held the residue of the legal, but not of the equitable estate in the land, to sell and convey his right also; the mortgagor not having affected to convey any part of it under his power from the other person, although his deed purported to mortgage the whole; and the equitable title not being in the person who gave the power. *Shirras v. Caig*, 7 Cranch 34, 3 L. Ed. 260.

86. Property omitted by mistake.—*Shepherd v. Pepper*, 133 U. S. 626, 649, 33 L. Ed. 706.



4. **AFTER-ACQUIRED PROPERTY.**—The law will permit the grant or conveyance to take effect upon the property when it is brought into existence and belongs to the grantor, in fulfillment of an express agreement, if founded on a good consideration, and it appears that no rule of law is infringed and the rights of third persons are not prejudiced.<sup>87</sup>

5. **EFFECT OF VOLUNTARY PARTITION.**—The fact of voluntary partition of the property covered by a mortgage does not operate to prevent the mortgage creditor from enforcing his mortgage against either part thereof.<sup>88</sup>

6. **IMPROVEMENTS AND EASEMENTS.**—The general rule is that permanent improvements or easements, placed upon the mortgaged premises, become subject to the mortgage.<sup>89</sup> But machinery placed upon certain premises caused by a mortgage since the mortgage was made, seems not to be subject to the lien of a mortgage, if there is no clause in the mortgage covering after-acquired property, and when the title is reserved by the vendor until the satisfaction of the mortgage.<sup>90</sup>

7. **RENTS, ISSUES AND PROFITS.**—As to whether the rents, issues and profits pass under the mortgage, see post, "Right to Rents and Profits," VII, C, 4.

8. **GROWING CROPS AND TIMBER.**—Growing crops or timber in the premises incumbered are subject to the mortgage.<sup>91</sup>

**87. After-acquired property.**—See *Pennock v. Coe*, 23 How. 117, 16 L. Ed. 436; *Massey v. Papin*, 24 How. 362, 364, 16 L. Ed. 734; *Dunham v. Cincinnati, etc., R. Co.*, 1 Wall. 254, 17 L. Ed. 584; *Galveston Railroad v. Cowdrey*, 11 Wall. 459, 481, 20 L. Ed. 199; *United States v. New Orleans Railroad*, 12 Wall. 362, 20 L. Ed. 434; *Beall v. White*, 94 U. S. 382, 386, 24 L. Ed. 173; *Myer v. Car Co.*, 102 U. S. 1, 10, 26 L. Ed. 59; *Toledo, etc., R. Co. v. Hamilton*, 134 U. S. 296, 33 L. Ed. 905; *Central Trust Co. v. Kneeland*, 138 U. S. 414, 34 L. Ed. 1014; *United Lines Tel. Co. v. Boston, etc., Trust Co.*, 147 U. S. 431, 447, 37 L. Ed. 231; *Wade v. Chicago, etc., R. Co.*, 149 U. S. 327, 341, 37 L. Ed. 755; *Bear Lake, etc., Irrigation Co. v. Garland*, 164 U. S. 1, 15, 41 L. Ed. 327. And see the titles **CHATTEL MORTGAGES**, vol. 3, p. 749, et seq.; **RAILROADS**.

One company agreed to construct or acquire, and to deliver to another company, a telegraph line connecting certain designated points, and the latter agreed to issue and deliver to the former certain first mortgage gold bonds, to be secured by a mortgage covering all the franchises and property, including patents, of the latter, "as now owned by it, or hereafter to be acquired by it, including the lines and property to be constructed or acquired under the provisions of this contract." It was held that the telegraph line constructed became the property of the latter and was subject to the mortgage made by that company, and the lien of the mortgage was paramount to that of a mortgage subsequently created. *United Lines Tel. Co. v. Boston, etc., Trust Co.*, 147 U. S. 431, 37 L. Ed. 231.

**88. Effect of voluntary partition.**—*Groves v. Sentell*, 153 U. S. 465, 482, 38 L. Ed. 785. See, generally, the title **PARTITION**.

**89. A deed of trust upon certain described property "with all and singular**

the improvements, ways, easements, rights, privileges and appurtenances to the same belonging or in anywise appertaining, etc., to have and to hold to the second parties, their heirs and assigns," is not precluded from an easement on a building erected so close to and overlapping upon the adjoining property of the grantor which is necessary for the proper use and enjoyment of the property, and the building passes under the deed although said property contained no building upon it when the said deed of trust was executed, if it was the purpose of the parties that a building should be constructed, which would be the principal security for the money loaned. *Warner v. Grayson*, 200 U. S. 257, 268, 50 L. Ed. 470.

**90. York Mfg. Co. v. Cassell**, 201 U. S. 344, 351, 50 L. Ed. 782.

**91. Growing crops and timber.**—By the laws of Porto Rico, the growing crops, which, at the time the obligation falls due, are growing on the trees and plants, or have already been harvested, but not yet "removed or warehoused," are subject to a mortgage. *Royal Ins. Co. v. Miller*, 199 U. S. 353, 361, 50 L. Ed. 226.

Growing timber constitutes a portion of the realty, and is embraced by a mortgage of the land. When it is severed from the freehold without the consent of the mortgagee, his right to hold it as a portion of his security is not impaired. *Hutchins v. King*, 1 Wall. 53, 17 L. Ed. 544.

By the law of New Hampshire, the interest of a mortgagee is treated as real estate only so far as it may be necessary for his protection, and to give him the full benefit of his security; he holds the timber growing on the land as a portion of the security only, and does not become its absolute owner when it is severed from the land. *Hutchins v. King*, 1 Wall. 53, 17 L. Ed. 544. And see the title **TREES AND TIMBER**.

9. **WITHDRAWAL OF SECURITY.**—Where land held subject to conditions is mortgaged, the performance of the conditions does not withdraw part of the security provided in the mortgage.<sup>92</sup>

**B. Indebtedness Secured.**—1. **DIVISIBILITY.**—That divisibility of a debt does not necessarily import the divisibility of the mortgage securing it, is unanimously held by the civil law writers.<sup>93</sup> Parties in Louisiana having the power, in contracting a mortgage, to exclude indivisibility, and not doing so, indivisibility applies, not alone as a result of their silence, but also because, being the general rule and of the nature of the contract, it exists unless excluded by the express terms or by plain "implication deducible from the contract."<sup>94</sup> The doctrine common to all countries governed by the civil law is that a mortgage is indivisible, and that the mortgage creditor has an undoubted right to assert the entirety of his mortgage rights against any or all of the property affected by the mortgage, and a junior incumbrancer is entitled to compel the mortgage creditor to exhaust the other property covered by the mortgage before attempting to irrevocably impute or apply the frauds of the insurance to the pro tanto extinction of the mortgage debt.<sup>95</sup>

2. **MORTGAGES FOR FUTURE ADVANCES.**—Mortgages for future advances are believed to be held valid throughout the United States, except where forbidden by the local law;<sup>96</sup> the only question that properly arises in such cases, is the bona fides of the transaction.<sup>97</sup>

3. **STIPULATIONS FOR PAYMENT OF COSTS AND FEES.**—Where a clause in a mortgage provides that the trustee shall be indemnified for all costs, charges, damages and expenses incurred by him in execution of the trust, this will cover counsel fees and costs paid out in suit.<sup>98</sup> Under the statutes of some states a stipulation to pay attorneys' fees cannot be enforced.<sup>99</sup> But as to the power of federal courts sitting as courts of equity to grant allowances for attorneys' fees, see post, "Of Trustees," VII, D.

**92. Withdrawal of security.**—Where a grant of lands was made on condition that the grantees should give security that they would place a certain number of settlers on the land within a certain time and these lands were afterwards mortgaged by a subsequent grantee, the appropriation of lots in the lands to settlers was not a withdrawal of any part of the security provided by the mortgage, as the mortgage itself must have contemplated such an arrangement, it was an open and express condition of the title of the property which was held as security. *Foxcroft v. Mallett*, 4 How. 353, 377, 11 L. Ed. 1008.

**93. Divisibility.**—*Groves v. Sentell*, 153 U. S. 465, 478, 38 L. Ed. 785.

**94.** *Groves v. Sentell*, 153 U. S. 465, 478, 38 L. Ed. 785.

**95.** *Royal Ins. Co. v. Miller*, 199 U. S. 352, 364, 565, 50 L. Ed. 226.

**96. Mortgages for future advances.**—*United States v. Hooe*, 3 Cranch 73, 2 L. Ed. 370; *Shirras v. Caig*, 7 Cranch 34, 3 L. Ed. 260; *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 448, 7 L. Ed. 189; *Lawrence v. Tucker*, 23 How. 14, 27, 16 L. Ed. 474; *Townsend v. Todd*, 91 U. S. 452, 453, 23 L. Ed. 413; *Jones v. Guaranty, etc., Co.*, 101 U. S. 622, 626, 25 L. Ed. 1030.

The contrary rule seems to be well settled in Connecticut. *Townsend v. Todd*, 91 U. S. 452, 453, 23 L. Ed. 413.

A mortgage on property for future advances secures advances actually made or

incurred prior to the receipt of actual notice of the title of a subsequent claimant of the property. *Shirras v. Caig*, 7 Cranch 34, 51, 3 L. Ed. 260.

Where a mortgage is given in Louisiana for an unliquidated account in the form of future advances, the balance of which was to be ascertained, it is none the less efficacious as a mortgage and to ascertain this balance for the purpose of an executory process all that is required under the code is an acknowledgment of the debtor, and such an acknowledgment, if made in solemn form before a notary, satisfies the conditions of the law. *New Orleans, etc., Ass'n v. Le Breton*, 120 U. S. 765, 771, 30 L. Ed. 821.

**97.** *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 387, 7 L. Ed. 189.

**98. Stipulations for payment of costs and fees.**—*Memphis, etc., Railroad v. Dow*, 120 U. S. 287, 302, 30 L. Ed. 595. See post, "Costs and Fees," XII, C, 13, g, (9).

**99.** Under the law of Michigan, as settled by the supreme court of that state, a stipulation in a mortgage to pay an attorney's or solicitor's fee of a fixed sum is unlawful and void, and cannot be enforced in the foreclosure, either under the statutes of the state, or by bill in equity; and upon such question, and upon a foreclosure of the mortgage of lands, made and payable in that state it cannot be enforced in a federal court held therein. *Bendey v. Townsend*, 109 U. S. 665, 668,



## VI. Interpretation and Construction.<sup>1</sup>

**A. Intention of Parties.**—In construction of mortgages the intention of the parties at the time of making the contract, should be inquired into.<sup>2</sup>

**B. Nature and Object of Provisions.**—The nature of the provision and the character of its object must be taken into consideration as furnishing the rule of its interpretation.<sup>3</sup>

**C. Construction as Entirety.**—The whole article must be taken together.<sup>4</sup>

**D. Construction According to Existing Laws.**—The parties are assumed to have contracted with reference to the laws which controlled or affected the obligations when the mortgage was executed.<sup>5</sup>

**E. Instruments Construed Together.**—The various written instruments which constitute the mortgage contract should be construed together.<sup>6</sup> And where a mortgage is given to secure the payment of bonds, the terms of the bonds should control.<sup>7</sup>

**F. Questions of Law and Fact.**—It is the duty of the court to give a construction to a mortgage so far as the intention of the parties can be elicited therefrom; but the doubt in the application of the descriptive portion of a mortgage to external objects usually arises from what is called a latent ambiguity, which has its origin in parol testimony and must necessarily be solved in the same way. It therefore, in such cases, becomes a question to be decided by a jury, what was the intention of the parties to a deed.<sup>8</sup>

## VII. Rights, Duties and Liabilities of Parties.

**A. Relation between Mortgagor and Mortgagee.**—The common saying that a mortgagor in possession is tenant at will to the mortgagee has been often recognized to be a most unsafe guide in defining the relation of mortgagee

27 L. Ed. 1065, cited in *Dodge v. Tulleys*, 144 U. S. 451, 457, 36 L. Ed. 501.

**1. Interpretation and construction.**—As to interpretation and construction of written instruments generally, see the title INTERPRETATION AND CONSTRUCTION, vol. 7, p. 257. See, also, the titles CONTRACTS, vol. 4, p. 570; DEEDS, vol. 5, p. 265.

As to the interpretation of power of sale, see post, "Interpretation and Construction of Powers of Sale," XII, B, 2.

**2. Intention of parties.**—*Reed v. Proprietors of Locks and Canals*, 8 How. 274, 12 L. Ed. 1077.

**3. Nature and object of provisions.**—*Chicago, etc., R. Co. v. Fosdick*, 106 U. S. 47, 77, 27 L. Ed. 47.

**4. Construction as entirety.**—*Chicago, etc., R. Co. v. Fosdick*, 106 U. S. 47, 77, 27 L. Ed. 47; *Jackson v. Lawrence*, 117 U. S. 679, 682, 29 L. Ed. 1024.

**5. Construction according to existing laws.**—*Connecticut Mut. Life Ins. Co. v. Cushman*, 108 U. S. 51, 65, 27 L. Ed. 648; *East Tennessee, etc., R. Co. v. Frazier*, 139 U. S. 288, 293, 35 L. Ed. 196; *Hooker v. Burr*, 194 U. S. 415, 420, 48 L. Ed. 1046; *Brine v. Insurance Co.*, 96 U. S. 627, 638, 24 L. Ed. 858.

**Law of state where land is situated.**—Mortgages are construed and given effect according to the laws of the state where land is situated. *Brine v. Insurance Co.*, 96 U. S. 627, 24 L. Ed. 858. See the title CONFLICT OF LAWS, vol. 3, p. 1020.

**6. Instruments construed together.**—A mortgage being executed on the same day

that the mortgagor received his title, and containing a reference to the deed to the mortgagor, both deeds may be considered parts of one transaction, and be construed together. *Foxcroft v. Mallett*, 4 How. 353, 11 L. Ed. 1008.

Where a bill for foreclosure contained a proviso that the trustee, upon the written request of the holders of a majority of the bonds then outstanding, should proceed to collect both principal and interest of all such bonds outstanding, by foreclosure and sale of said property, or otherwise, as therein provided, it was argued that the office of this clause was merely to make the obligation of the trustees imperative instead of optional, but the court held that the whole article must be taken together as a unit, and "the nature of the provision and the character of its object must be taken into consideration as furnishing the rule of its interpretation." *Guaranty Trust, etc., Co. v. Green Cove Spring, etc., R.*, 139 U. S. 137, 141, 35 L. Ed. 116.

Instruments absolute in form accompanied by a defeasance from the grantee executed as security for certain promissory notes should be construed together to form one instrument and to constitute a mortgage. *Lanahan v. Sears*, 102 U. S. 318, 321, 26 L. Ed. 180. See ante, "Transactions Either Mortgages or Sales." II.

**7. Railway Co. v. Sprague**, 103 U. S. 756, 761, 26 L. Ed. 554.

**8. Questions of law and fact.**—*Reed v.*



and mortgagor, or in construing statutes authorizing landlords to recover possession against their tenants by summary process before a justice of the peace. The mortgagor, though loosely called a tenant at will of the mortgagee, is such in no other sense than that his possession may be put to an end whenever the mortgagee pleases.<sup>9</sup> An express stipulation in the mortgage, that the mortgagor may remain in possession until breach of condition, is intended merely to put in definite binding form the understanding of the parties as to the exercise of their rights as mortgagor and mortgagee, and not to create between them a distinct relation of tenant and landlord.<sup>10</sup> The principle of estoppel applies to the relation of mortgagee and mortgagor, and operates in its full force to prevent the mortgagee from violating his contract by disputing the title of the mortgagor, under which he obtains possession of the property.<sup>11</sup> The mortgagor of the pre-emption right acquired by a deed in fee simple, with a covenant of general warranty, is estopped by his deed from denying seisin.<sup>12</sup> A mortgagee of a tenant assumes his relations to the landlord, with all their legal consequences, and is as much estopped from denying the tenancy.<sup>13</sup>

**B. Of Mortgagor**—1. RIGHT TO POSSESSION.—Usually in the United States, where, as a general rule, a mortgage is treated only as a lien or incumbrance, the mortgagor retains possession of the premises,<sup>14</sup> although a different rule prevails in some jurisdictions.<sup>15</sup> The mortgagee must recover the possession by regular entry by suit before he can treat the mortgagor, or the person holding under him, as a trespasser.<sup>16</sup>

2. CHARACTER OF POSSESSION.—It is well settled that the possession of the mortgagor or those claiming under him is not adverse to that of the mortgagee,<sup>17</sup> unless there be a known disavowal,<sup>18</sup> or if the tenancy be determined by the death of the mortgagor, and his heirs or devisees enter and hold without any recognition of the mortgagor's title by payment of interest or other act, an adverse possession may be considered to take place.<sup>19</sup>

3. RECOVERY OF POSSESSION.—Ejectment or bill in equity are the usual methods of recovering property wrongfully withheld from the mortgagor.<sup>20</sup>

Proprietors of Locks and Canals, 8 How. 274, 12 L. Ed. 1077.

**9. Relation between mortgagor and mortgagee.**—Willis v. Eastern Trust, etc., Co., 169 U. S. 295, 309, 42 L. Ed. 752.

**10.** Willis v. Eastern Trust, etc., Co., 169 U. S. 295, 310, 42 L. Ed. 752, wherein it is said: "When the mortgagor remains in possession with the assent of the mortgagee, without formal agreement, no one would think of saying that there was a lease from the mortgagee to the mortgagor, or that the relation of landlord and tenant existed between them."

**11. Application of doctrine of estoppel.**—Willison v. Watkins, 3 Pet. 43, 48, 7 L. Ed. 596. See, generally, the title ESTOPPEL, vol. 5, p. 913.

**12.** Bush v. Marshall, 6 How. 284, 288, 12 L. Ed. 440.

**13.** Willison v. Watkins, 3 Pet. 43, 51, 7 L. Ed. 596.

**14. Mortgagor's right to possession.**—The Siren, 7 Wall. 152, 158, 19 L. Ed. 129. See, also, Willis v. Eastern Trust, etc., Co., 169 U. S. 295, 304, 42 L. Ed. 752; Van Ness v. Hyatt, 13 Pet. 294, 299, 10 L. Ed. 168.

As to when the mortgagee is entitled to possession, see post, "Right to Possession," VII, C, 2.

The possession universally remains with the grantor, until the creditor be-

comes entitled to his money, and either chooses or is compelled to exert his right. United States v. Hooe, 3 Cranch 73, 89, 2 L. Ed. 370.

**15.** See post, "Right to Possession," VII, C, 2.

**16.** Teal v. Walker, 111 U. S. 242, 250, 28 L. Ed. 415.

**17. Character of possession.**—Higginson v. Mein, 4 Cranch 415, 419, 2 L. Ed. 664; Union Bank v. Stafford, 12 How. 327, 341, 13 L. Ed. 1008; New Orleans Canal, etc., Co. v. Stafford, 12 How. 343, 13 L. Ed. 1015; Lewis v. Hawkins, 23 Wall. 119, 127, 23 L. Ed. 113; Hardin v. Boyd, 113 U. S. 756, 765, 28 L. Ed. 1141; Smith v. Woolfolk, 115 U. S. 143, 150, 29 L. Ed. 357. See post, "Limitations and Laches," XII, C, 5.

**18.** The possession of the mortgagee is the possession of the mortgagor, while the mortgagee admits himself to be in possession as mortgagee, and therefore liable to redemption; but from the time of known disavowal it becomes adverse. Willison v. Watkins, 3 Pet. 43, 52, 7 L. Ed. 596.

**19.** Hardin v. Boyd, 113 U. S. 756, 765, 28 L. Ed. 1141.

**20. Recovery of possession.**—The only remedy for a mortgagor or his assignee, after payment of the debt, if the mortgagee, having entered for condition

4. **LIABILITY FOR RENT.**—A mortgagor of real estate is not liable for rent while in possession.<sup>21</sup>

5. **RIGHT TO RENTS AND PROFITS.**—But so long as the mortgagor remains in possession, or until actual entry by the mortgagee, he may receive the rents and profits to his own use, and is not accountable for them to the mortgagee,<sup>22</sup> even though the land, when sold, should be insufficient to pay the debt.<sup>23</sup>

6. **RIGHTS AND LIABILITIES IN REGARD TO INSURANCE.**—As to the rights and liabilities of the parties in regard to insurance of mortgaged property, see the title **INSURANCE**, vol. 7, p. 66.

broken, refuses to relinquish possession of the mortgaged premises, is by bill in equity. If it were not so, a mortgagor might remain quiet until his mortgagee in possession (the property being unimproved, as in this case) had made improvements necessary for obtaining any income therefrom. He might then tender the debt and interest, and recover the possession without making any compensation for the improvements. The mortgagee in such a case would have no remedy for his disbursements. But if the mortgagor must file a bill to redeem, asking for equity, he may be compelled to do equity. *Brobst v. Brock*, 10 Wall. 519, 536, 19 L. Ed. 1002.

A mortgagor of land, as between himself and his mortgagee, has only an equitable title. He cannot, therefore, recover in ejectment against the mortgagee in possession, after breach of the condition, or against persons holding possession under the mortgagee. *Brobst v. Brock*, 10 Wall. 519, 19 L. Ed. 1002. See the title **EJECTMENT**, vol. 5, p. 695.

In order to sustain a summary process to recover possession of land under the Revised Statutes of the District of Columbia, §§ 680-691, entitled, "Landlord and Tenant," the conventional relation of landlord and tenant must exist or have existed between the parties; a mortgagee holds no such relation to a mortgagor in possession, and he cannot maintain the action against his mortgagor in possession, on breach of condition, even where there is a provision that, until default, the mortgagor "shall be permitted and suffered to possess, manage, develop, operate and enjoy the plant and property herein conveyed, and intended so to be, and to take and use the income, rents, issues and profits thereof, in the same manner, to the same extent, and with the same effect, as if this deed had not been made, and the result is, that he is not entitled to maintain this process, but must be left, so far as the aid of a court of justice is requisite to secure the rights conferred by the mortgage, to the appropriate remedy of a writ of ejectment, or a bill of foreclosure. *Willis v. Eastern Trust, etc., Co.*, 169 U. S. 295, 310, 42 L. Ed. 752.

Where a mortgagor has been evicted from the property by a judgment not binding upon him by reason of the fact that he was not made a party to the pro-

ceeding, a bill of review is not the proper remedy by which he should seek to enforce his rights. *Lacassagne v. Chapuis*, 144 U. S. 119, 125, 36 L. Ed. 368.

21. **Liability of mortgagor to pay rent.**—*Gilman v. Illinois, etc., Tel. Co.*, 91 U. S. 603, 616, 23 L. Ed. 405; *Willis v. Eastern Trust, etc., Co.*, 169 U. S. 295, 310, 42 L. Ed. 752.

In *Hughes v. Edwards*, 9 Wheat. 489, 500, 6 L. Ed. 142, a mortgagor was not accountable to the mortgagee for the rents and profits received by him during his possession, even after default, and even though the land, when sold, should be insufficient to pay the debt, and that the purchaser of the equity of redemption was not accountable for any part of the debt beyond the amount for which the land was sold. *Teal v. Walker*, 111 U. S. 242, 250, 28 L. Ed. 415.

22. **Mortgagor's right to rents and profits.**—*Union Pac. R. Co. v. United States*, 99 U. S. 402, 429, 25 L. Ed. 274; *Teal v. Walker*, 111 U. S. 242, 249, 28 L. Ed. 415; *Gilman v. Illinois, etc., Tel. Co.*, 91 U. S. 603, 617, 23 L. Ed. 405; *Kountze v. Omaha Hotel Co.*, 107 U. S. 378, 392, 27 L. Ed. 609; *Freedman's Sav., etc., Co. v. Shepherd*, 127 U. S. 494, 502, 32 L. Ed. 163; *Willis v. Eastern Trust, etc., Co.*, 169 U. S. 295, 310, 42 L. Ed. 752.

Property is mortgaged to secure certain notes, and on the mortgagor's being declared a bankrupt it is sold free from incumbrances by order of court to the holder of two of the notes, who conveys it to a certain company; but the record of the case does not show that the holder of the other two notes was made a party to the proceedings, though an agent in possession of the notes averred that he represented him therein, which the record of the case does not sustain, he appearing to have acted for another only. Subsequently the holder of the notes not a party to the proceeding institutes a suit to foreclose the mortgage and alleges that the effect of the sale was to extinguish the mortgage as to the notes held by the company, and all other liens but his. It was held, in the suit instituted by the plaintiff, that the defendant company should account for rents and profits if there were any. *Factors', etc., Ins. Co. v. Murphy*, 111 U. S. 738, 28 L. Ed. 582.

23. *Hughes v. Edwards*, 9 Wheat. 489, 500, 6 L. Ed. 142.



7. **DEALINGS WITH THE PROPERTY.**—As to the right of the mortgagor to deal with the mortgaged premises, see post, "Transfer or Lease of Encumbered Property," X.

**C. Of Mortgagee**—1. **TITLE ACQUIRED.**—As to the title passing under the mortgage, see ante, "Character of Title Passing," V, A, 1.

2. **RIGHT TO POSSESSION.**—In some jurisdictions, it is held that the mortgagee may take possession at any time; but, so long as there has been no breach of condition of the mortgage, this right is rarely exercised, and the mortgagor is usually permitted, by oral or tacit agreement with the mortgagee, or by express stipulation in the mortgage, to remain in possession;<sup>24</sup> while in others a different rule prevails.<sup>25</sup> But if the mortgagee is in lawful possession<sup>26</sup> of the mortgaged premises, after condition broken, he will not be turned out until the debt is paid.<sup>27</sup>

3. **WITHHOLDING POSSESSION AFTER SATISFACTION OF DEBT.**—A mortgagee in possession is bound by contract, implied if not expressed, to deliver up possession of the mortgaged premises when his debt is satisfied; but he is not regarded as guilty of breach of trust if he neglects or refuses to do so, but only of a breach of contract.<sup>28</sup>

4. **RIGHT TO RENTS AND PROFITS.**—An ordinary mortgagee of real estate, who has not taken possession under his mortgage, is not entitled to the rents and profits,<sup>29</sup> unless there shall have been a lien reserved thereon by the terms of

**24. Right to possession.**—*Willis v. Eastern Trust, etc., Co.*, 169 U. S. 295, 309, 42 L. Ed. 752; *Van Ness v. Hyatt*, 13 Pet. 294, 299, 10 L. Ed. 168. See ante, "Character of Title Passing," V, A, 1; "Right to Possession," VII, B, 1.

According to the law of Illinois in regard to mortgages, the mortgagee after condition broken becomes entitled to possession of the mortgaged premises and can maintain an action of ejectment. *Bradley v. Lightcap*, 195 U. S. 1, 17, 49 L. Ed. 65.

And the same rule prevails in Pennsylvania. *Brobst v. Brock*, 10 Wall. 519, 530, 19 L. Ed. 1002.

**25.** In *Willis v. Eastern Trust, etc., Co.*, 169 U. S. 295, 304, 42 L. Ed. 752, citing *Van Ness v. Hyatt*, 13 Pet. 294, 299, 10 L. Ed. 168, the court said: "It is true, as has been heretofore observed by this court, that in the state of New York the courts of law had, by a gradual progress, adopted the views of courts of equity in relation to mortgages, and considered the mortgagor, whilst in possession and before foreclosure, as the real owner, except as against the mortgagee, and as having the right of possession, even as against the mortgagee."

But by the laws of Louisiana, under a contract denominated an antichresis, possession of the property is transferred to the person advancing the money, and the debtor cannot before full payment of the debt claim the enjoyment of the immovables which he has given in pledge. Possession accompanying the execution of a deed and continuing in the grantee, as a part of the contract, is entirely inconsistent with a mortgage. *Livingston v. Story*, 11 Pet. 351, 388, 9 L. Ed. 746.

**26.** Possession obtained by the mortgagee through an arrangement with the

tenant of the mortgagor whose lease has expired, without the consent of the mortgagor, is not lawful possession. *Russell v. Ely*, 2 Black 575, 17 L. Ed. 258.

Twenty-five adjoining tracts of wild and uninhabited land, surveyed in a block, and separated by no marks on the ground, were purchased from the commonwealth by one person at one time, and subsequently conveyed by him as an entirety by one deed. His grantee also conveyed them as a whole by one deed, and the second grantee mortgaged them as a whole in the same way. After the debt secured by the mortgage fell due, the mortgagee placed a tenant upon the lands, whose actual occupancy, or *pedis possessio*, did not extend beyond the limits of a single tract. Held, that the possession of the whole body of land, as described in the deed, must be presumed to have been taken by the mortgagee in right of the mortgage. *Brobst v. Brock*, 10 Wall. 519, 19 L. Ed. 1002.

**27.** *Russell v. Ely*, 2 Black 575, 17 L. Ed. 258; *Romig v. Gillett*, 187 U. S. 111, 117, 47 L. Ed. 97; *Bryan v. Brasius*, 162 U. S. 415, 40 L. Ed. 1022; *Brobst v. Brock*, 10 Wall. 519, 530, 19 L. Ed. 1002.

**28. Withholding possession after satisfaction of debt.**—*Hennequin v. Clews*, 111 U. S. 676, 682, 28 L. Ed. 565.

**29.** *Macalester v. Maryland*, 114 U. S. 598, 604, 29 L. Ed. 233; *Teal v. Walker*, 111 U. S. 242, 248, 28 L. Ed. 415; *American Bridge Co. v. Heidelberg*, 94 U. S. 798, 24 L. Ed. 144. See the titles BRIDGES, vol. 3, p. 516; CANALS, vol. 3, p. 546; MUNICIPAL, COUNTY, STATE AND FEDERAL AID; RAILROADS. And see ante, "Rights to Rents and Profits," VII, B, 5.

"In the case of a mortgage, the land is in the nature of a pledge; and it is only



mortgage,<sup>30</sup> and that although the mortgagee may have the right to take possession upon conditions broken, if he does not exercise the right he cannot claim the rents.<sup>31</sup> But after the mortgagee has taken possession he is entitled to have the accruing rents and profits, damages against trespassers, timber cut on the premises, and growing crops.<sup>32</sup> The creditor under the Louisiana antichresis acquired by this contract the right of reaping fruits or other revenues of the immovables given to him in pledge, on condition of deducting annually their proceeds from the interest, if any be due to him, and afterwards from the principal of his debt.<sup>33</sup>

5. LIABILITY FOR RENTS AND PROFITS.—A mortgagee in possession is accountable for the net rents and profits of the estate, and if his possession is by tenant, he is accountable for such net rents and profits as he could with reasonable diligence have received.<sup>34</sup> Although a mortgagee who takes possession of the mortgaged premises, under what purported to be a sale of the property, may be liable for rents and profits of the estate notwithstanding that the sale was wholly void, yet to be so liable he must have had such a possession as gives an actual enjoyment and pernancy of profits. A false claim of title is of itself insufficient.<sup>35</sup>

6. WHERE PROPERTY IS CONDEMNED UNDER EMINENT DOMAIN.—Where mort-

the land itself—the specific thing—which is pledged. The rents and profits are not pledged; they belong to the tenant in possession, whether the mortgagor or a third person claiming under him." *Kountz v. Omaha Hotel Co.*, 107 U. S. 378, 392, 27 L. Ed. 609; *Teal v. Walker*, 111 U. S. 242, 250, 28 L. Ed. 415; *Freedman's Sav., etc., Co. v. Shepherd*, 127 U. S. 494, 502, 32 L. Ed. 163.

Where the lease of a tenant of property is subsequent to a mortgage of the premises, the rule is well settled in this country, that, as no reversion vests in the mortgagee, and no privity of estate or contract is created between him and the lessee, he cannot proceed, either by distress or action, for the recovery of the rent. *Teal v. Walker*, 111 U. S. 242, 248, 28 L. Ed. 415.

The provision of the Oregon statute, which declares that "a mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law," establishes absolutely the rule that the mortgagee is not entitled to the rents and profits until he gets possession under a decree of foreclosure. *Teal v. Walker*, 111 U. S. 242, 251, 28 L. Ed. 415.

30. *McGahan v. Bank*, 156 U. S. 218, 235, 39 L. Ed. 403.

Where a company, to secure the payment of its bonds, mortgaged its property, and the rents, issues and profits arising therefrom, with the provision that, if there was default in paying the interest, the mortgagee might take possession of the property, manage the same, and receive and collect all rents and claims due and to become due to the company, on taking possession, the income thereafter would be the mortgagee's, and the mortgage could have no retrospective effect as

to previous income and earnings. *American Bridge Co. v. Heidelberg*, 94 U. S. 798, 800, 24 L. Ed. 144.

"It is, of course, competent for the parties to provide, in the mortgage, for the payment of rents and profits to the mortgagee, while the mortgagor remains in possession. But when the mortgage contains no such provision, and even where the income is expressly pledged as security for the mortgage debt, with the right in the mortgagee to take possession upon the failure of the mortgagor to perform the conditions of the mortgage, the general rule is that the mortgagee is not entitled to the rents and profits of the mortgaged premises until he takes actual possession, or until possession is taken, in his behalf, by a receiver. *Teal v. Walker*, 111 U. S. 242, 28 L. Ed. 415; *Grant v. Phoenix Life Ins. Co.*, 121 U. S. 105, 117, 30 L. Ed. 905; or until, in proper form, he demands and is refused possession. *Dow v. Memphis, etc., R. Co.*, 124 U. S. 652, 654, 31 L. Ed. 565. See, also, *Sage v. Memphis, etc., R. Co.*, 125 U. S. 361, 31 L. Ed. 694." *Freedman's Sav., etc., Co. v. Shepherd*, 127 U. S. 494, 502, 32 L. Ed. 163.

31. *McGahan v. Bank*, 156 U. S. 218, 235, 39 L. Ed. 403; *Teal v. Walker*, 111 U. S. 242, 28 L. Ed. 415; *Freedman's Sav., etc., Co. v. Shepherd*, 127 U. S. 494, 502, 32 L. Ed. 163.

32. *Waterman v. MacKenzie*, 138 U. S. 252, 259, 34 L. Ed. 923.

33. *Livingston v. Story*, 11 Pet. 351, 388, 9 L. Ed. 746.

34. Liability for rents and profits.—*Scruggs v. Memphis, etc., R. Co.*, 108 U. S. 368, 375, 27 L. Ed. 756; *Waterman v. MacKenzie*, 138 U. S. 252, 259, 34 L. Ed. 923.

35. *Bieler v. Waller*, 14 Wall. 297, 20 L. Ed. 891.

gaged property is condemned by a city for a street, and possession of the premises is taken with the consent of the mortgagee who expressly stipulates that he waives no rights against the city or the mortgagor, and a part of the damages in the condemnation proceedings is paid and a voucher is given for the balance which is transferred to the mortgagee, the mortgagee, or his assignee standing in the position of a mortgagee of the land, is entitled to a decree for the balance due on the award.<sup>36</sup>

7. **PROPER USE OF PREMISES.**—The mortgagee cannot remove the buildings on the premises, nor the fixtures attached; nor can he subject the premises to any uses but such as may furnish the means for the payment of the debt secured without impairing the value of the estate.<sup>37</sup>

8. **DUTIES AND LIABILITIES AS TO REPAIRS.**—The creditor under an antichresis is bound, under penalty of damages, to provide for keeping the useful and necessary repairs under the pledged estate, and may levy out of the revenues of the estate sufficient for such expenses,<sup>38</sup> but the creditor who wishes to free himself from the obligations arising by virtue of the antichresis, may always, unless he has renounced his right, compel the debtor to retake the enjoyment of his immovables.<sup>39</sup>

9. **RIGHTS AND LIABILITIES IN REGARD TO INSURANCE.**—As to the rights and liabilities of the parties in regard to insurance of mortgaged property, see the title **INSURANCE**, vol. 7, p. 66.

10. **RESPONSIBILITY FOR DEALINGS OF MORTGAGOR WITH THIRD PARTIES.**—Until the filing of his bill of foreclosure and the appointment of a receiver, a mortgagee has no concern or responsibility for or in the dealings of a mortgagor with third parties, such as confessing judgment, and leasing its property subject to the terms of the mortgage.<sup>40</sup>

11. **REMEDIES FOR WASTE.**—The mortgagee cannot recover for waste in the cutting of timber from the mortgaged land by the mortgagor unless the severance be wrongful.<sup>41</sup> But even against a mortgagor in possession, the mortgagee may obtain an injunction or damages for such cutting of timber as tends to impair the value of the mortgage security, or as is not allowed by good husbandry or by express or implied license from the mortgagee.<sup>42</sup> The right of action against a stranger for an injury to property mortgaged, generally, though not always, depends upon the right of possession. When the right of possession is in the mortgagor, he is usually the proper party to sue. But even a mortgagee out of possession may sometimes maintain an action for an injury to his interest. And when the right of possession, as well as the general right of property, is in the mortgagee, the suit must be brought by the mortgagee and not by the mortgagor or any one claiming under a subsequent conveyance from him.<sup>43</sup>

**D. Of Trustees.**—The trustee will be allowed reasonable counsel fees when his claim comes before a federal court, irrespective of any state legislation.<sup>44</sup>

36. Where property is condemned under eminent domain.—*Chicago v. Tebbetts*, 104 U. S. 120, 124, 26 L. Ed. 655.

37. Proper use of premises.—*Hutchins v. King*, 1 Wall. 53, 58, 17 L. Ed. 544.

38. Duties and liabilities as to repairs.—*Livingston v. Story*, 11 Pet. 351, 389, 9 L. Ed. 746.

39. *Livingston v. Story*, 11 Pet. 351, 389, 9 L. Ed. 746.

40. Responsibility for dealings of mortgagor with third parties.—*Bronson v. La Crosse, etc., R. Co.*, 2 Wall. 283, 17 L. Ed. 725.

41. Remedies for waste.—*McGahan v. Bank*, 156 U. S. 218, 235, 39 L. Ed. 403.

42. *Waterman v. MacKenzie*, 138 U. S. 252, 259, 34 L. Ed. 923; *Kountze v. Omaha*

*Hotel Co.*, 107 U. S. 378, 395, 27 L. Ed. 609.

As between mortgagor and mortgagee, whether the mortgage be regarded as passing the legal estate or as giving merely a lien for the debt, the right of the mortgagee, to be protected from the impairment of his security is alike recognized. *McGahan v. Bank*, 156 U. S. 218, 235, 39 L. Ed. 403.

43. *Waterman v. MacKenzie*, 138 U. S. 252, 259, 34 L. Ed. 923.

44. Right of trustee to claim counsel fees.—*Dodge v. Tulleys*, 144 U. S. 451, 457, 36 L. Ed. 501, citing *Bendey v. Townsend*, 109 U. S. 665, 27 L. Ed. 1065; *Holland v. Challen*, 110 U. S. 15, 28 L. Ed. 52; *Trustees v. Greenough*, 105 U. S. 527, 26



Where the land in question is unoccupied and wild land, and there being no adverse holding, upon breach of condition, if not before, the legal title which the trustee holds draws to it the possession, although in subjection to the right of redemption in grantor and his grantees.<sup>45</sup> Though statute may enact that a trustee to whom property is assigned in trust for any person, "before entering upon the discharge of his duty, shall give bond" for the faithful discharge of his duties, his omission to give such bond does not divest the trustee of a legal estate once regularly conveyed to him.<sup>46</sup> While a state of mutual ill-will or hostile feeling may justify a court in removing a trustee, in a case where he has a discretionary power over the rights of the cestui que trust, and has duties to discharge which necessarily bring the parties into personal intercourse with each other, it is not sufficient cause where no such intercourse is required and the duties are merely formal and ministerial, and no neglect of duty or misconduct is established against him.<sup>47</sup> A personal decree will not be rendered against a trustee by reason of the fact that he has negligently executed a release to the grantor.<sup>48</sup>

**E. Of Subsequent Claimants.**—Where there is a mortgage given on an undivided three-fourths of a certain parcel of land, it is properly decreed that a subsequent claimant of the whole of the premises account for the three-fourths of the proceeds realized by the timber thereon cut and sold.<sup>49</sup>

**F. Of Bondholders.**—Bondholders claiming under the mortgage can have no interest in the security except that which the trustee holds and represents.<sup>50</sup>

### VIII. Lien and Priorities.

**A. Duration of Lien.**—If a note secured by a mortgage be renewed or otherwise changed, the lien of the mortgage continues until the debt is paid, changes in the form of the instrument being immaterial.<sup>51</sup>

**B. Priorities between Mortgages**—1. AS DEPENDENT UPON TIME OF EXECUTION.—Where two mortgages are made upon the same property, the earlier one in point of time will be given precedence unless it be improperly recorded.<sup>52</sup>

2. AS AFFECTED BY NOTICE.—As to priority as affected by notice either actual or constructive, see post, "As Affected by Notice," VIII, D, 2.

3. FORECLOSURE BY SECOND MORTGAGEE.—In the case of a first and second mortgage, either may proceed where the condition is broken, to foreclose; but if the second mortgagee proceeds first, his decree of foreclosure does not supersede or impair the rights of the first mortgagee.<sup>53</sup> It will not constitute fraud

L. Ed. 1157; *Central Railroad, etc., Co. v. Pettus*, 113 U. S. 116, 28 L. Ed. 915. See the titles RAILROADS; TRUSTS AND TRUSTEES.

45. **Trustee's title and possession.**—*Harter v. Twohig*, 158 U. S. 448, 453, 39 L. Ed. 1049.

46. **Effect of omission to give bond as required by statute.**—*Gardner v. Brown*, 21 Wall. 36, 22 L. Ed. 527.

47. **Removal of trustee.**—*McPherson v. Cox*, 96 U. S. 404, 24 L. Ed. 746.

48. **Trustee's liability for wrongful release.**—Where the holder of notes secured by a deed of trust files a bill in equity against the trustee who negligently executed a release of a deed of trust to the grantor who subsequently executed another deed of trust to secure a loan made bona fide, and the main purpose of his bill is to set aside a deed or release and to satisfy his debt out of the land, the attempt to charge the trustee with the amount of the debt, by reason of his negligence in executing the release, is wholly

inconsistent with this, as one treats the release as void, and the other assumes that it is valid; in one view the trustee is made a party in his capacity as trustee only, and in the other it is sought to charge him personally, a decree refusing personal relief against the trustee is right. *Williams v. Jackson*, 107 U. S. 478, 484, 27 L. Ed. 529.

49. **Liabilities of subsequent claimants.**—*McGahan v. Bank*, 156 U. S. 218, 235, 39 L. Ed. 403.

50. *Richter v. Jerome*, 123 U. S. 233, 246, 31 L. Ed. 132. See the titles CORPORATIONS, vol. 4, p. 621; RAILROADS.

51. *Jones v. Guaranty, etc., Co.*, 101 U. S. 622, 630, 25 L. Ed. 1030.

52. **Priority between mortgages as dependent upon time of execution.**—*Beals v. Hale*, 4 How. 37, 51, 11 L. Ed. 865.

53. **Foreclosure by second mortgagee.**—*Howard v. Railway Co.*, 101 U. S. 837, 845, 25 L. Ed. 1081.



on the part of the second mortgagee that he has not notified the first mortgagee of his application for the appointment of a receiver prior to such application, where such first mortgagee is not injured.<sup>54</sup> Statutes have regulated the question as to whether the second mortgage may be foreclosed unless the price bid be sufficient to discharge the prior mortgage.<sup>55</sup> On a bill filed to foreclose and for appointment of a receiver, the authorities limit the exclusive right of the second mortgagee to the income of the receivership created under the bill filed by him, to a case where the first mortgagee is not a party to the suit.<sup>56</sup>

4. WHERE FIRST MORTGAGE COVERS AFTER-ACQUIRED PROPERTY.—As to conflicting rights in after-acquired property covered by the terms of the mortgage, see ante, "After-Acquired Property," V, A, 4.

5. WHERE RELEASE HAS BEEN EXECUTED.—A release of the mortgage debt will control in a question of priority.<sup>57</sup>

6. BETWEEN LEGAL AND EQUITABLE MORTGAGES.—The mortgagee of a grantee under a deed absolute on its face but intended as a mortgage will have priority in the absence of fraud.<sup>58</sup>

7. MODES OF PROTECTING SECOND MORTGAGEES.—Where property in Louisiana is seized and sold by virtue of executory process under a mortgage, the security of owners of subsequent mortgages is transferred to the proceeds of the sale, and their protection consists in the requirement that no sale shall take place for less than two-thirds of the value of the mortgaged property, as appraised for that purpose.<sup>59</sup>

8. RENTS AND PROFITS IN HANDS OF RECEIVER.—Proceeds of sale under a mortgage will be applied first to reimbursing party paying taxes and insurance, and then to the creditors according to their proportionate rights.<sup>60</sup>

54. Where the second mortgagee in a bill to foreclose a mortgage obtains the appointment of a receiver without notice to the first mortgagee, although a party to the suit, and the order appointing the receiver is served on the first mortgagee within three days after it is made, and its broad terms, as to the powers conferred on the receiver, call upon the first mortgagee to appear in the suit promptly, to protect his interests, the requirement being to appear and answer on or before a day designated, there is no warranty for a charge of fraud. *Miltenberger v. Logansport R. Co.*, 106 U. S. 286, 306, 27 L. Ed. 117.

55. Under articles 679, 683, and 684 of the code of practice of Louisiana, if a prior mortgage is conventional or special, and has been properly recorded and not legally renounced, no sale of the mortgaged property can be made under a junior incumbrance, unless the price bid is sufficient to discharge the prior lien; but if the prior mortgage is legal or judicial, this requirement does not apply, and the property passes to the purchaser subject to the payment of the prior lien. *Nalle v. Young*, 160 U. S. 624, 638, 40 L. Ed. 560.

56. *Miltenberger v. Logansport R. Co.*, 160 U. S. 286, 307, 27 L. Ed. 117.

57. Where release has been executed.—Where a deed of trust on property is given to secure payment of certain notes and the trustee negligently but under his authority executes a deed of release to the grantor reciting that the notes have been

paid and is joined therein by the original holder of the notes who has already transferred them to a bona fide endorsee for value, another subsequently loans money to the grantor in good faith on security of another deed of trust on the same property which is shown on the records to be free from incumbrances, the latter is entitled to priority of payment out of the property. *Williams v. Jackson*, 107 U. S. 478, 484, 27 L. Ed. 529.

Where to enforce a first mortgage on property suit is instituted against the mortgagor and a subsequent mortgagee, and the court, through its receiver, took possession of accruing rents in order to preserve them for the party who should ultimately prevail in the suit, and the first mortgage and the debt thereby secured was held to have been released and discharged, and the sum obtained for the land at the sale proved insufficient, by more than the whole of the fund in court, to pay the debt of the second mortgagee, it was held that the mortgagor had no right as against such second mortgage to any part of this fund. *Hitz v. Jenks*, 123 U. S. 297, 306, 31 L. Ed. 156.

58. Priority between legal and equitable mortgages.—*Balloch v. Hooper*, 146 U. S. 363, 369, 36 L. Ed. 1008.

59. Modes of protecting second mortgagees.—*Carite v. Trotot*, 105 U. S. 751, 755, 26 L. Ed. 1223.

60. Rents and profits in hands of receiver.—Where the owner of property gave two deeds of trust on a lot to secure payment of a loan and later gave another

**C. Priorities under Same Mortgage.**—There can, in fact, be but one decree of foreclosure of the same mortgage on the same property, and it is a necessity of that foreclosure, under the principles of the court of chancery, that all the sums secured by that mortgage must be protected according to their priority of lien.<sup>61</sup> A sale of the mortgaged premises, upon a judgment recovered on a part of the notes secured by the mortgage, does not preclude the holder of other notes secured by the same mortgage from proceeding to foreclose it. A sale on such a judgment could only affect the equity of redemption, and would leave the rights of the holder of other notes secured by the mortgage unaffected.<sup>62</sup>

**D. Priorities between Mortgages and Other Liens or Claims.**—1. **AS AFFECTED BY AGREEMENT.**—The recognition of the paramount lien of a receiver's certificate by the trustee in his suit of foreclosure is binding on the bondholders secured.<sup>63</sup>

2. **AS AFFECTED BY NOTICE.**—In the absence of actual notice trustees, cestui que trusts and mortgagees are regarded as bona fide purchasers without notice of adverse rights.<sup>64</sup> The general doctrine is that knowledge of an existing conveyance or mortgage is, in legal effect, the equivalent to notice by the registry.<sup>65</sup> A vendee cannot defend as a bona fide purchaser without notice, against an unrecorded mortgage, where his rights lie in an executory contract; nor where he has a right to call for no deed but that of a "quitclaim."<sup>66</sup> As to priority as affected by recording, see the title **RECORDING ACTS**.

3. **AS AFFECTED BY LACHES.**—As to the effect of laches in making conflicting claims, see the title **LACHES**, vol. 4, p. 792.

deed of trust on the same lot and another in the rear therefor to secure payment of a loan made by another person—and a dwelling house was situated on both lots but mainly on the first one—on default in payment and ensuing difficulties in getting one of the trustees to execute his trust, the first creditor filed a bill for the appointment of a receiver to receive the rents on the lot covered by the third deed and for the appointment of a trustee to sell the whole of such lot and improvements and that the rents and proceeds of the sale of the lot be first applied to pay his indebtedness, and the receiver was appointed and the entire property was decreed to be sold as a whole by the trustees appointed, and that the trustees should ascertain the relative values of the real estate covered by the first two deeds of trust, with the buildings and improvements thereon, and of the part in the rear, with the buildings and improvements thereon, and that the net proceeds of the sale which should appear to represent the value of that part of the real estate described in the first two deeds of trust, with the buildings and improvements thereon, after deducting therefrom the proper part of the expenses, should be applied toward the payment of the claims of the first creditor, and the residue of such net proceeds should be applied toward the claims of the second creditor, that the net amount of rents should be applied to the payment of the taxes and insurance premiums paid by the first creditor, and if the net proceeds of the sale applicable to the claims of the first creditor should prove insufficient to discharge them, he should recover a personal debt for the deficiency: it was held, that the appointment of the

receiver of the rents was proper as was the direction that those rents be applied to make up any deficiency in the proceeds of the sale of the two properties to satisfy the corpus of the debts, recognizing the right of the second creditor to his share of the proceeds of sale according to the proper apportionment, but dedicating the rents primarily to the satisfaction of the debts due to the first creditor. *Shepherd v. Pepper*, 133 U. S. 626, 647, 33 L. Ed. 706.

**61. Priorities under same mortgage.**—*Howell v. Western R. Co.*, 94 U. S. 463, 466, 24 L. Ed. 254.

**62.** *Pugh v. Fairmont Gold, etc., Min. Co.*, 112 U. S. 235, 244, 28 L. Ed. 684.

**63. Priority as affected by agreement.**—*Kent v. Lake Superior Ship Canal, etc., Co.*, 144 U. S. 75, 90, 36 L. Ed. 352.

**64. Priority as affected by notice.**—*Kesner v. Trigg*, 98 U. S. 50, 53, 25 L. Ed. 83; *New Orleans Canal, etc., Co. v. Montgomery*, 95 U. S. 16, 24 L. Ed. 346.

As to matters of notice generally, see the title **NOTICE**.

**65.** *Patterson v. De La Ronde*, 8 Wall 292, 300, 19 L. Ed. 415.

Where on the loan of money a mortgage is taken to secure its payment and the mortgagee receives notice, through his agent in the transaction, that a release of a prior mortgage on the property has been fraudulently obtained, a purchase by him of the property at a sale to enforce his mortgage does not vest the title in him discharged of the prior mortgage. *Connecticut, etc., Ins. Co. v. Burnstine*, 131 U. S. annex. clix., 24 L. Ed. 706.

**66.** *Villa v. Rodriguez*, 12 Wall. 323, 20 L. Ed. 406.



4. AS DEPENDENT UPON RESIDENCE OF CREDITORS.—As to the constitutionality of state statutes preferring resident creditors, see the title CONSTITUTIONAL LAW, vol. 4, p. 476.

5. BETWEEN MORTGAGES AND JUDGMENT LIENS.—Judgment liens acquired after the date of a mortgage upon the property have been held to be discharged by a foreclosure of the mortgage.<sup>67</sup>

6. BETWEEN MORTGAGE AND CONVEYANCE IN TRUST.—Conveyance in trust by the owner to himself and property recorded will take priority over a subsequent mortgage given by him.<sup>68</sup>

7. PROPERTY IN CUSTODIA LEGIS.—As to the enforcement of a mortgage where the mortgaged property is in custody of the law, see the titles ATTACHMENT AND GARNISHMENT, vol. 2, p. 674; EXECUTIONS, vol. 6, p. 84; JUDGMENTS AND DECREES, vol. 7, p. 544; RECEIVERS; REFERENCE.

8. BETWEEN MORTGAGES AND EXECUTIONS OR ATTACHMENTS.—Where mortgaged land is sold at a sheriff's sale, by virtue of a subsequent judgment and execution, the mortgage still remains a lien upon the land against the purchaser at the sale.<sup>69</sup> Where property is conveyed by a deed absolute on its face and there is an oral understanding that it is to secure a note and if not paid at maturity the grantor is to be allowed to sell the property, and on default in payment the property is sold with the knowledge and concurrence of the grantor to a purchaser without notice, but before the deed is delivered the property is attached by a creditor of the grantor and is sold under the statute, and the purchaser files a bill against the purchaser of the grantee to redeem the property by payment of note, it was held that full power of sale was conferred upon the grantee and that his right to sell the premises in default of payment was a right of property which he had bought and paid for, which could not be impaired by an attachment levied on the property by the grantor's prejudice, and the vendee of the grantee stood upon the same ground as if he had bought the premises at a foreclosure sale, and his title was indefeasible.<sup>70</sup>

9. BETWEEN MORTGAGES AND LIENS EXISTING ON AFTER-ACQUIRED PROPERTY.—Where a mortgage given on real property is made to cover after-acquired property, and such after-acquired property comes into the hands of the mortgagor subject to liens thereon, but becomes affixed to the realty, the general mortgage will take priority over the liens existing on such after-acquired property.<sup>71</sup>

67. Priority between mortgages and judgment liens.—*Bronson v. La Crosse, etc., R. Co.*, 2 Wall. 283, 17 L. Ed. 725. See the title JUDGMENTS AND DECREES, vol. 7, p. 651.

68. Priority between mortgage and conveyance in trust.—The owner of property in Georgia conveyed it to himself as trustee for the benefit of his children and his wife during her life time, and recorded the deed in the superior court of the county of his residence within two months thereafter. Subsequently he mortgaged this trust property with other land and the mortgage was afterward foreclosed, the mortgagee becoming the purchaser and caused a deed of the property to be made to him by the sheriff of the county and entered into possession thereof. Later the beneficiaries under the trust deed instituted suit for the enforcement of the trust. The defendant set up as a defense that he had no notice of the trust when the mortgage was made or when it was foreclosed, and that the trust deed was subsequent to the mortgage and that it

was fabricated, antedated, and not recorded. It was held that a voluntary settlement such as was made in this case was authorized by the statute law of Georgia in force at the time, and as the conveyance was recorded in the office of the clerk of the superior court of the county of the residence of the husband within three months after its execution, it was valid as against the defendant who had notice of it before the mortgage to him was executed, and before the sheriff's sale under foreclosure. *Wilson v. Riddle*, 123 U. S. 608, 31 L. Ed. 280.

69. Priority between mortgages and executions or attachments.—*Febeiger v. Craighead*, 4 Dall. 151, 1 L. Ed. 778. See, generally, the title EXECUTIONS, vol. 6, p. 115.

70. *Jackson v. Lawrence*, 117 U. S. 679, 682, 29 L. Ed. 1024.

71. Priority between mortgages and liens existing on after-acquired property.—*United States v. New Orleans Railroad*, 12 Wall. 362, 365, 20 L. Ed. 434.



10. BETWEEN MORTGAGES AND TAX LIENS OR SALES.—As to priorities between rights under mortgages as against liens and sales for taxes, see the title **TAXATION**.

11. BETWEEN MORTGAGES AND CLAIMS OF UNITED STATES.—As to the priority between rights arising under mortgages and claims of the United States, see the title **UNITED STATES**.

12. BETWEEN MORTGAGES AND MARITIME LIENS.—As to the priority between maritime liens and mortgages, see the title **MARITIME LIENS**, ante, p. 218.

13. BETWEEN MORTGAGES AND LIENS FOR WATER RENTS.—As to the priority between mortgages and liens acquired by municipality for water rents on such property, see the title **WATER COMPANIES AND WATERWORKS**.

14. BETWEEN MORTGAGES AND MECHANICS' LIENS.—As to priority between mortgages and mechanics' liens, see the title **MECHANICS' LIENS**, ante, p. 328.

15. BETWEEN MORTGAGES AND RIGHTS ACCRUING UNDER BANKRUPT PROCEEDINGS.—As to the right of a mortgage creditor in property sold under bankruptcy proceedings to which he has not been made a party, see the title **BANKRUPTCY**, vol. 2, p. 914.

16. BETWEEN MORTGAGES AND LIEN FOR IMPROVEMENTS.—As to priority between mortgages and liens for improvements, see the title **IMPROVEMENTS**, vol. 6, p. 898.

17. BETWEEN MORTGAGES AND PRIZE OR CONFISCATION.—As to mortgages on vessels or other property captured or confiscated in war, see the titles **PRIZE**; **WAR**.

18. BETWEEN MORTGAGES AND DEEDS.—As to priorities between mortgages and conveyances of the mortgaged premises, see post, "Transfer or Lease of Encumbered Property," X.

19. MORTGAGES FOR FUTURE ADVANCES.—As to priority as between mortgages for future advances and subsequent claimants, see ante, "Mortgages for Future Advances," V, B, 2.

**E. Priority as Affected by Estoppel.**—Estoppel in some instances controls the question of priorities.<sup>72</sup>

**F. Establishment of Priority.**—A court of equity, in a suit for the foreclosure of a mortgage, clearly has cognizance of all questions relating to priority of liens on the property in litigation, as between the parties to the suit and those whom they lawfully represent.<sup>73</sup> The mode in which the jurisdiction shall be exercised is not so much a matter of substance as of form. Ordinarily a reference to a master before the final decree would be the formal method to pursue, but where, from oversight or other cause, this has been omitted, the parties may certainly agree to submit the matter to the court, upon a statement

**72. Priority as affected by estoppel.**—Where a mortgage is made in express terms subject to certain bonds secured by prior mortgage, these bonds being negotiable in form, and having in fact passed into circulation before such former mortgage was given, the junior mortgagees, and all parties claiming under them, are estopped from denying the amount or the validity of such bonds so secured, if in the hands of bona fide holders. *Bronson v. La Crosse, etc., R. Co.*, 2 Wall. 283, 17 L. Ed. 725.

Where a party, who being about to lend money on real estate, applies to one who holds the prior mortgage, to ascertain whether he has any incumbrance on it, and if the person making the application discloses that he is about to lend money on the estate, he will be preferred to the first mortgagee, should the latter deny his

having a mortgage, or assert that it is satisfied. *Lee v. Munroe*, 7 Cranch 366, 368, 3 L. Ed. 373.

Where one having a contract for the conveyance of lands, which a court of equity will specifically enforce, permitted the other party to execute a deed of trust of the lands to a trustee to secure certain indebtedness, with a power to sell them, if necessary, for the payment of such indebtedness, held, that he had waived his right to the conveyance, or, at least, had subordinated it to the interest of the trustee and the purchasers under him. *Preston v. Preston*, 95 U. S. 200, 24 L. Ed. 494. See, generally, the title **ESTOPPEL**, vol. 6, p. 952.

**73. Establishment of priority.**—*United States v. New Orleans Railroad*, 12 Wall. 362, 364, 20 L. Ed. 434.

of facts, after the decree.<sup>74</sup> The question as to whether the deed of trust presented a true, valid, and authentic instrument executed at the time it purports to be or the question as to whether the defendant had actual, and not merely constructive, notice of the existence of a trust deed, at or before the execution of the mortgage to him, is not improper to be submitted to a jury in an advisory capacity.<sup>75</sup>

### IX. Assignment of Mortgages and Deeds of Trust.

**A. By Assignment of Debt Secured.**—The assignment of a debt carries with it the mortgage by which it is secured,<sup>76</sup> and where a part only of the debt is assigned, a pro tanto portion of the security follows it.<sup>77</sup>

**B. Parol Assignment.**—A mortgage may be assigned by parol.<sup>78</sup>

**C. Motive Immaterial.**—The assignment of a mortgage, having been properly executed and founded upon a valuable consideration, passes the title and interest of the assignor regardless of his motive.<sup>79</sup>

**D. Rights of Assignee.**—Generally, as to the rights of a holder of a note secured by mortgage, see the title *BILLS, NOTES AND CHECKS*, vol. 3, p. 314. Where a mortgage is given to the endorers of a note of the debtor to indemnify them from loss by their endorsement, and on the debtor's default in payment, the endorers pay the note entering the amount paid by them upon their books in their general account against the debtor and afterwards assign the mortgage together with the note or obligation therein also mentioned, the assignee is entitled to a decree for the foreclosure of the mortgage and also to a decree against the debtor himself for so much of the money paid by the endorers, with interest, as the money obtained by the sale of the land under the foreclosure should be insufficient to satisfy.<sup>80</sup>

**E. Assignment of Mortgage Held as Collateral Security.**—The assignee of a bond and mortgage, though by the terms of the assignment he holds it as collateral security for the payment of another debt, obtains the entire legal interest.<sup>81</sup> Where a debt is secured by certain bonds, stock and a mortgage on property, and the debtor in order to obtain use of the bonds and stock assigns a mortgage held as collateral security by him, to his creditor, under authority conferred upon him, it was held that while as between the original parties the mortgage assigned was to be regarded as a collateral security for loans made, it was an absolute and unconditional security as between the assignor and assignee.<sup>82</sup>

74. *United States v. New Orleans Railroad*, 12 Wall. 362, 364, 20 L. Ed. 434.

75. *Wilson v. Riddle*, 123 U. S. 608, 615, 31 L. Ed. 280.

76. *By assignment of debt secured.*—*Batesville Institute v. Kauffman*, 18 Wall. 151, 154, 21 L. Ed. 775; *Sheldon v. Sill*, 8 How. 441, 450, 12 L. Ed. 1147; *Ober v. Gallagher*, 93 U. S. 199, 207, 23 L. Ed. 829; *National Bank v. Whitney*, 103 U. S. 99, 101, 26 L. Ed. 443; *National Bank v. Matthews*, 98 U. S. 621, 625, 25 L. Ed. 188; *Drury v. Hayden*, 111 U. S. 223, 227, 28 L. Ed. 408, citing *New Orleans Canal, etc., Co. v. Montgomery*, 95 U. S. 16, 24 L. Ed. 346; *Swift v. Smith*, 102 U. S. 442, 26 L. Ed. 193; *Fosdick v. Schall*, 99 U. S. 235, 253, 25 L. Ed. 339; *Union Trust Co. v. Walker*, 107 U. S. 596, 27 L. Ed. 490.

An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity. The note and mortgage are inseparable; the former as essential, the latter as an incident. *Carpenter v. Longan*, 16 Wall. 271, 274, 21 L. Ed. 313.

77. *Batesville Institute v. Kauffman*, 18 Wall. 151, 154, 21 L. Ed. 775.

78. *Parol assignment.*—*Jones v. Guaranty, etc., Co.*, 101 U. S. 622, 631, 25 L. Ed. 1030.

79. *Motive immaterial.*—*Smith v. Kernochen*, 7 How. 198, 216, 12 L. Ed. 660; *Lehigh Min., etc., Co. v. Kelly*, 160 U. S. 327, 334, 40 L. Ed. 444.

The fact that the assignment of the mortgage is made to give the federal court jurisdiction of an action upon it does not prevent passage of the title and interest in the assignor. *Smith v. Kernochen*, 7 How. 198, 216, 12 L. Ed. 660.

80. *Rights of assignee.*—*Bendey v. Townsend*, 109 U. S. 665, 668, 27 L. Ed. 1065.

81. *Assignment of mortgage held as collateral security.*—*Chew v. Brumagen*, 13 Wall. 497, 504, 20 L. Ed. 663. And see the title *PLEDGE AND COLLATERAL SECURITY*.

82. *Matthews v. Warner*, 145 U. S. 475, 485, 36 L. Ed. 782.



## X. Transfer or Lease of Encumbered Property.

**A. Operation and Extent of Powers.**—The general rule now is that the equity of redemption may be sold and conveyed in any of the ordinary modes of transfer, subject only to the lien of the mortgage.<sup>83</sup> Where at the time a mortgage is executed a contract is entered into between the mortgagee and the mortgagor by which the mortgagee agrees to hold the security for a certain time and further agrees that the mortgagor shall have the right to sell the property named in the conveyance and make title thereto, the proceeds of the sale to go to the credit of the mortgagee, it does not empower the mortgagor to sell subject to the mortgage, that is, to transfer simply his equity of redemption, for that he had without the stipulation.<sup>84</sup> But after the mortgagee has taken possession, the mortgagor has no power to lease.<sup>85</sup> Although in the absence of stipulations as to the possession, the mortgagee may enter upon the premises, his interest is widely different from that of owner. He cannot by conveyance transfer any interest in the premises without a transfer of the debt secured.<sup>86</sup> As to result of a conveyance by the mortgagor to the mortgagee, see post, "Release, Merger and Waiver," XIII, A, 11. Power given the mortgagor to sell the property does not include the power to exchange it,<sup>88</sup> nor does such authority constitute a power of attorney to the mortgagor or become a deed.<sup>89</sup>

**B. Effect on Mortgage Debt.**—There is no doctrine better established, than that the purchase of land, subject to a mortgage debt, does not make the debt personal; and on the question being raised, such debt has been uniformly charged on the land. And this principle is not changed, where additional security has been given.<sup>90</sup>

**C. As Affecting Rights of Mortgagee to Foreclosure.**—The right of a mortgagee to call for a foreclosure and sale of the mortgaged property is not affected by the fact that the property has been sold by the mortgagor to several

83. *Hutchins v. King*, 1 Wall. 53, 58, 17 L. Ed. 544; *Terrell v. Allison*, 21 Wall. 289, 292, 22 L. Ed. 634; *Woodward v. Jewell*, 140 U. S. 247, 249, 35 L. Ed. 478; *Clark v. Reyburn*, 8 Wall. 318, 322, 19 L. Ed. 354.

"The mortgagor has a right to lease, sell and in every respect to deal with the mortgaged premises as owner so long as he is permitted to remain in possession, and so long as it is understood and held that every person taking under him, takes subject to all the rights of the mortgagee, unimpaired and unaffected." *Teal v. Walker*, 111 U. S. 242, 250, 28 L. Ed. 415.

A deed in fee, executed by the mortgagor, subsequent to the mortgage deed, but prior to the foreclosure, passes the legal title. *Russell v. Ely*, 2 Black 575, 17 L. Ed. 258.

84. *Woodward v. Jewell*, 140 U. S. 247, 249, 35 L. Ed. 478.

85. *Waterman v. MacKenzie*, 138 U. S. 252, 259, 34 L. Ed. 923.

86. *Hutchins v. King*, 1 Wall. 53, 58, 17 L. Ed. 544. See ante, "Title Acquired," VII, C, 1.

88. **Operation and extent of power.**—Where at the time a mortgage is executed a contract is entered into between the mortgagee and the mortgagor by which the mortgagee agrees to hold the security for a certain time and further agrees that the mortgagor shall have the right to sell the property named in the conveyance and

make title thereto, the proceeds of the sale to go to the credit of the mortgagee, this agreement confers authority on the mortgagor to sell and transfer title, discharged of the lien of the mortgage, but an exchange is outside of his authority. *Woodward v. Jewell*, 140 U. S. 247, 249, 35 L. Ed. 478.

89. Where at the time a mortgage is executed a contract is entered into between the mortgagee and mortgagor by which the mortgagee agrees to hold the security for a certain time and the mortgagee further agrees that the mortgagor shall have the right to sell the property named in the conveyance and make title thereto, the proceeds of the sale to go to the credit of the mortgagee, the contract is not to be taken as a power of attorney to the mortgagor to sell the land the title of which was in the mortgagor but simply as a consent of lienholders to the release of their liens upon a sale made by the mortgagor of the real estate described in the mortgage, and was not invalid under the laws of Georgia because not executed before two witnesses. *Woodward v. Jewell*, 140 U. S. 247, 252, 35 L. Ed. 478.

90. **Effect on mortgage debt.**—*McLearn v. Wallace*, 10 Pet. 625, 643, 9 L. Ed. 559. See the title **VENDOR AND PURCHASER**.

As to a sale as constituting a withdrawal of the security, see ante, "Withdrawal of Security," V, A, 9.



purchasers, with notice, who have relative rights to contribution among themselves.<sup>91</sup>

**D. Where Mortgage Contains the Pact De Non Alienando.**—The effect of the stipulation in a mortgage called the pact de non alienando, by which the mortgagor agrees not to alienate or encumber the mortgaged premises to the prejudice of the mortgage, is well settled in Louisiana. Where a mortgage contains the pact de non alienando, the mortgagee may enforce his mortgage by proceeding against the mortgagor alone, notwithstanding the alienation of the property, and all those claiming under the mortgagor, whether directly or remotely, will be bound, although not made parties.<sup>92</sup>

**E. Ineffective Quitclaim Deed from Mortgagor to Mortgagee.**—A void or voidable quitclaim deed of a mortgagor to the mortgagee does not have the effect of merging or uniting the mortgage and the equity of redemption leaves the mortgaged estate exactly where it found it.<sup>93</sup>

**F. Purchasers' Rights.**—A bona fide purchaser for value of property, subject to an equitable mortgage, without notice of such mortgage, takes the property free of the equitable mortgage.<sup>94</sup> A bona fide purchaser under the mortgagor, with actual notice of the mortgage, or constructive notice by means of a registry, can only protect himself, by the lapse of time, or other equity, under the same circumstances which would afford a protection to the mortgagor. Such a purchaser is not entitled to have the value of the improvements made by him, deducted from the proceeds of the sale of the mortgaged premises.<sup>95</sup> But a purchaser of property from a mortgagor, with either constructive or actual notice of the mortgage, can be in no better situation than the mortgagor from whom he derives his title, and is bound by the same equity which would affect his rights.<sup>96</sup> If either of the purchasers should pay more than his proportion of the debt, according to the relative value of the property they possess, that is a matter to be settled among themselves.<sup>97</sup>

**91. As affecting rights of mortgagee to foreclosure.**—*Hughes v. Edwards*, 9 Wheat. 489, 501, 6 L. Ed. 142.

**92. Where mortgage contains the pact de non alienando.**—*Avegno v. Schmidt*, 113 U. S. 293, 299, 28 L. Ed. 1009.

Under the doctrine in Louisiana that a mortgagee may enforce a mortgage containing the pact de non alienando by proceeding against the mortgagor alone, notwithstanding the alienation of the property, there is such a privity between a person whose life estate has been condemned under condemnation proceedings for confiscation, and his heirs, that the latter are bound by a suit and decree to enforce a mortgage executed by their ancestor containing a pact de non alienando, to which the ancestor alone had been made a party defendant. *Avegno v. Schmidt*, 113 U. S. 293, 300, 28 L. Ed. 1009; *Shields v. Schiff*, 124 U. S. 351, 356, 31 L. Ed. 445.

The heirs of a person in Louisiana whose property was sold under confiscation proceedings succeeded by inheritance from him, and not by donation from the generosity of the government; and, hence, being in privity with their ancestor, they were bound, equally with him, by the proceedings on the mortgage, which contained the pact de non alienando. *Shields v. Schiff*, 124 U. S. 351, 356, 31 L. Ed. 445; *Avegno v. Schmidt*, 113 U. S. 293, 300, 28 L. Ed. 1009.

A mortgagee under an act containing the pact de non alienando, can proceed

against the mortgagor, after the latter's expropriation through confiscation proceedings, as though the latter had never been divested of his title. *Shields v. Schiff*, 124 U. S. 351, 356, 31 L. Ed. 445; *Bigelow v. Forrest*, 9 Wall. 339, 19 L. Ed. 696; *Day v. Micou*, 18 Wall. 156, 160, 21 L. Ed. 860; *Waples v. Hays*, 108 U. S. 6, 27 L. Ed. 632; *Avegno v. Schmidt*, 113 U. S. 293, 28 L. Ed. 1009.

**93. Ineffective quitclaim deed from mortgagor to mortgagee.**—*United States v. Stowell*, 133 U. S. 1, 19, 33 L. Ed. 555.

**94. Purchasers' rights.**—*Lynch v. Murphy*, 161 U. S. 247, 255, 40 L. Ed. 688.

**95.** *Hughes v. Edwards*, 9 Wheat. 489, 6 L. Ed. 142.

**96.** *Hughes v. Edwards*, 9 Wheat. 489, 499, 6 L. Ed. 142.

The mortgagor, after forfeiture, has no title at law, and none in equity, but to redeem upon the terms of paying the debt and interest. His conveyance to a purchaser with notice passes nothing but an equity of redemption, and the latter can, no more than the mortgagor, assert that equity against the mortgagee, without paying the debt, or showing that it has been paid or released, or that there are circumstances in the case sufficient to warrant the presumption of those facts, or one of them. *Hughes v. Edwards*, 9 Wheat. 489, 498, 6 L. Ed. 142.

**97.** *Hughes v. Edwards*, 9 Wheat. 489, 501, 6 L. Ed. 142.

**G. Where Tract Is Sold in Separate Parcels.**—As to a treatment of the questions arising where real estate, bound by a mortgage, has been alienated in separate parcels, see the title *MARSHALING ASSETS AND SECURITIES*.

**H. Disposition of Proceeds.**—Where at the time a mortgage is executed a contract is entered into between the mortgagee and the mortgagor by which the mortgagee agrees to hold the security for a certain time and further agrees that the mortgagor shall have the right to sell the property named in the conveyance and make title thereto, the proceeds of the sale to go to the credit of the mortgagee, no duty is cast upon the purchasers of seeing that the mortgagor appropriated the proceeds in accordance with the stipulation.<sup>98</sup>

## XI. Discharge of Mortgages or Deeds of Trust.

**A. By Whom Made.**—Any creditor may pay the mortgage debt, and proceed against the property.<sup>99</sup> A mortgage is not under any obligation to accept an offer made by a stranger to pay the debt, on condition that mortgagee will execute an assignment to a third party.<sup>1</sup> One of two joint mortgagees, or the survivor of them, may release the joint debt.<sup>2</sup> As to executors and administrators executing releases of mortgages made in favor of the deceased, see the title *EXECUTORS AND ADMINISTRATORS*, vol. 6, p. 141. As to the rights of strangers paying off the mortgage, see the title *SUBROGATION*.

**B. To Whom Made.**—A mortgagor who pays certain installments to the adjudged heir ab intestato under a decree rendered according to the Porto Rico Code, is not subject to the risk that subsequent established rights of a joint heir can be maintained against him, because the decree expressly reserves the rights of third parties.<sup>3</sup>

**C. What Constitutes**—1. **PAYMENT OR SURRENDER OF OBLIGATION SECURED.**—The mortgage can have no separate existence. When the debt is paid, the mortgage expires. It cannot survive for a moment the debt which the obligation represents,<sup>4</sup> notwithstanding any agreement to the contrary.<sup>5</sup> Where one under an agreement with the maker of a note, secured by a deed of trust, that he will pay the note at maturity and hold it for a certain time, when if not paid

**98. Disposition of proceeds.**—Woodward v. Jewell, 140 U. S. 247, 249, 35 L. Ed. 478.

**99. Who may pay or release mortgage.**—Downs v. Kissam, 10 How. 102, 108, 13 L. Ed. 346.

1. Where the offer to the mortgagee to pay the mortgage debt, is not made by the party obliged to pay the debt or entitled to do so, for the purpose of removing the encumbrance of the mortgage upon the property, nor in payment of the mortgage debt, and in satisfaction of the mortgage and the judgment rendered thereon, but is an offer made by a stranger to pay the amount due on account thereof, accompanied with a demand to execute an assignment to a named third party of the debt and securities, compliance with which was a condition of the offer of payment, the effect of which would be to transfer the debt of mortgage and judgment rendered thereon to an assignee, and not to extinguish it, the mortgagee is not under any obligation to accept the offer. Gibson v. Lyon, 115 U. S. 439, 445, 29 L. Ed. 440.

2. Wall v. Bissell, 125 U. S. 382, 391, 31 L. Ed. 772.

3. To whom payment made.—Sixto v. Sarria, 196 U. S. 175, 183, 49 L. Ed. 436.

Where the order of a lower court was affirmed by the higher court requiring certain installments which had matured on a mortgage to be paid into court, pending a suit to decide the rights of a person who asserted that he was an heir of the mortgagee, it was held that a mortgagor who acted in the face of knowledge of the decision of the higher court instead of appearing in that court and having the rights of the assignee of the mortgage, and the contesting heir, who was not a party to the suit, determined, is not relieved from liability, although he obtained an order from the lower court granting him the release of the deposited installments in order to pay them to the said assignee of the mortgage. Sixto v. Sarria, 196 U. S. 175, 191, 49 L. Ed. 436.

4. **Payment or surrender of obligation secured.**—Carpenter v. Longan, 16 Wall. 271, 275, 21 L. Ed. 313; Sheldon v. Sill, 8 How. 441, 450, 12 L. Ed. 1147.

5. Where in Louisiana one is indebted to another and the latter is also indebted to the former, and the respective debts are reciprocally extinguished by agreement, but it is provided that one of the debts, secured by a mortgage, shall be kept alive for the benefit of the wife of the mortgage debtor, upon the considera-



by the former he may enforce the trust, pays the note and the note is surrendered to him endorsed in blank and uncanceled, this constitutes a transfer or sale of the note and not a payment.<sup>6</sup> Where a mortgagee or trustee of a trust deed at the time of taking a deed, has information that a prior mortgagee or trustee of a prior deed has released the property from the mortgage or trust, without payment of the notes or their surrender, or express authority from the holder of them, he will take the property subject to any equitable right of the holder of the notes, to secure the payment of which the mortgage or trust deed was executed.<sup>7</sup>

2. **BOND IN PAYMENT.**—A bond, which is no satisfaction for another bond, cannot be deemed a satisfaction of a mortgage, which is a security of a higher nature. To render it a satisfaction, it ought to better the mortgagee, in point of safety, and expedite the time of payment; for the bond with sureties will not be a satisfaction of one without, unless the time of payment is thereby shortened.<sup>8</sup>

3. **PAYMENT IN SPECIFIC ARTICLES.**—In equity, where a creditor agrees to receive specific articles in satisfaction of a debt, even though it be a debt upon bond, secured by mortgage, he will be held to the performance of his agreement. But, in order to bring a case within this principle, there must be: An agreement not inequitable in its terms and effect; a valuable consideration for such agreement; a readiness to perform, and the absence of laches, on the part of the debtor.<sup>9</sup>

4. **BOOK ENTRIES AS DISCHARGE.**—Where a mortgage is given to the endorser of a note of the debtor to indemnify them from loss by their endorsement, and on the debtor's default in payment, the endorser pays the note entering the amount paid by them upon their books in their general account against the debtor and afterwards assign the mortgage together with the note or obligation therein also mentioned, the entry, in the regular course of their bookkeeping, of the amount so paid in general account against the debtor, does not merge or extinguish the mortgage or the personal liability of the debtor to them.<sup>10</sup>

**D. Presumption of Discharge.**—The general rule is, that where the mortgagor has been permitted to retain possession, the mortgage will, after a length of time, be presumed to have been discharged, by payment of the money, or a release, unless circumstances can be shown sufficiently strong to repel the presumption, as, payment of interest, a promise to pay, an acknowledgment by the mortgagor that the mortgage is still existing, and the like.<sup>11</sup> But no presumption of payment of a mortgage can arise from lapse of time against a mortgagee or his assigns in possession, when the mortgagor became insolvent and died before the debt fell due, and when his vendee of the equity of redemption also became insolvent before the maturity of the debt, removed from the state, and never afterwards returned.<sup>12</sup>

**E. Duty to Enter Satisfaction.**—The mortgagee cannot refuse to enter satisfaction where he has waived the conditions upon which such entry was to be made.<sup>13</sup>

tion on her part of the release of her paraphernal claims against her husband, one of the parties to the agreement, is without force and effect, for when the principal obligation is discharged, the mortgage falls with it. *Nalle v. Young*, 160 U. S. 624, 641, 40 L. Ed. 560.

6. *Carter v. Burr*, 113 U. S. 737, 741, 28 L. Ed. 1147.

7. *Insurance Co. v. Eldredge*, 102 U. S. 545, 547, 26 L. Ed. 245.

8. **Bond in payment.**—*Hamilton v. Calender*, 1 Dall. 420, 423, 1 L. Ed. 204.

9. **Payment in specific articles.**—*Very v. Levy*, 13 How. 345, 14 L. Ed. 173.

10. **Book entries as discharge.**—*Bendey*

*v. Townsend*, 109 U. S. 665, 668, 27 L. Ed. 1065.

11. **Presumption of discharge.**—*Hughes v. Edwards*, 9 Wheat. 489, 497, 6 L. Ed. 142; *Willison v. Watkins*, 3 Pet. 43, 52, 7 L. Ed. 596.

12. *Brobst v. Brock*, 10 Wall. 519, 19 L. Ed. 1002.

13. **Duty to enter satisfaction.**—Where a vendor sells lands and takes a mortgage thereon as security and the vendee also gives mortgage on other land owned by him, the vendor agreeing that upon the erection of a mill 50 feet wide by 150 feet long on the land sold he will accept policies of insurance on it for the amount



**F. Rescission of Settlement.**—Where the owner of the full, unencumbered, though only equitable title, of property resides thereon in full, exclusive, and open possession, the rescission of a settlement as to a mortgage against the property made by a mere holder of the legal title is not binding upon the owner of an equitable title when made without his knowledge or consent and his full equitable title is, therefore, not disturbed or incumbered by this alleged voluntary rescission.<sup>14</sup>

**G. Effect of Payment, Release or Erasure.**—Generally full payment<sup>15</sup> of the debt will discharge the mortgage.<sup>16</sup> But receipt of the mortgage debt by the mortgagee, technically, does not release legal title to the mortgaged property.<sup>17</sup> It is undoubtedly well settled, as a general principle, that a court of law will not permit an outstanding satisfied mortgage to be set up against the mortgagor. It would be contrary to the plainest principles of equity and justice, to permit a stranger, who had no interest in the mortgage, to set it up, when it had been satisfied by the mortgagor himself, to defeat his title. But if this stranger had himself paid it off, if this mortgage had been bought in by him, he would be considered as an assignee, and might certainly use it for his protection.<sup>18</sup> The legal estate which vests in the trustee under a deed of trust is defeated on the performance of the conditions in the deed.<sup>19</sup> But where property is conveyed by a deed of trust, to secure payment of a note which is duly assigned for a valuable consideration and subsequent to the assignment of the note the trustee acquires the property and executes a release of the mortgage to his grantor and conveys it, the holder of the note is not deprived of his lien given by the deed of trust.<sup>20</sup> If the creditor has released the debtor, the mortgage will thereby be satisfied, and the charge on the land destroyed.<sup>21</sup> As to the liability of a trustee for wrongfully executing a release, see ante, "Of Trustees," VII, D. The erasure and cancellation of mortgages may be made in Louisiana, by consent or by order of the court, and when the erasure is made by the judgment of a court of competent jurisdiction, it has the effect of a *res judicata*.<sup>22</sup>

**H. Setting Aside Release.**—Under a bill to set aside the release of a mortgage, the mortgagor is an indispensable party.<sup>23</sup>

of the mortgage collateral to the one given on the property sold, and accepts such policies, he cannot decline to enter satisfaction on such other mortgage because the mill is 78 feet wide by 100 feet long, and not of the dimensions contracted for. He waives by such acceptance of the policies all right to object to the variations in the construction. *Swain v. Seamens*, 9 Wall. 254, 19 L. Ed. 554.

**14. Rescission of settlement.**—*McLean v. Clapp*, 141 U. S. 429, 436, 35 L. Ed. 804. See, generally, the title RESCISSION, CANCELLATION AND REFORMATION.

**15. Payment as discharge.**—A mortgage executed for an unascertained balance of accounts, which the sum named in the mortgage was supposed to be sufficient to cover, and not proving to be insufficient, the creditor obtaining a judgment for the residue, the payment of the sum named in the mortgage is no reason for an injunction to stay proceedings upon the judgment. *Gear v. Parish*, 5 How. 168, 12 L. Ed. 100.

**16.** A mortgage of timbered land imports the growing timber thereon, and when severed from the freehold without the consent of the mortgagee his right to

hold it as a portion of a security is not impaired, but when the amount due according to the stipulation of the mortgage is paid, the lien of the mortgage upon the timber thus severed is discharged, and the property reverts to the mortgagor, or any vendee of the mortgagor. Any sale of the timber by the mortgagee, or assignee of the mortgage, after such payment, is a conversion for which an action will lie by the mortgagor or his vendee. *Hutchins v. King*, 1 Wall. 53, 17 L. Ed. 544.

**17.** *Peltz v. Clarke*, 5 Pet. 481, 483, 8 L. Ed. 199. See ante, "By Whom Made," XI, A.

**18.** *Peltz v. Clarke*, 5 Pet. 481, 483, 8 L. Ed. 199. See the title SUBROGATION.

**19.** *Bank v. Guttschlick*, 14 Pet. 19, 28, 10 L. Ed. 335.

**20.** *Swift v. Smith*, 102 U. S. 442, 449, 26 L. Ed. 193.

**21. Release.**—*Bush v. Person*, 18 How. 82, 84, 15 L. Ed. 273.

**22. Erasure or cancellation in Louisiana.**—*Adams v. Preston*, 22 How. 473, 490, 16 L. Ed. 273.

**23. Setting aside release.**—The executors of an estate, under authority of the will, sold lands on a mortgage. The first grantee then sold it to a mercantile firm,

## XII. Foreclosure.

**A. Election of Remedies.**—Where there is no prohibition by statute, it is competent for the mortgagee to pursue three remedies at the same time. He may sue on the note or obligation, he may bring an action of ejectment, and he may file a bill for foreclosure and sale.<sup>24</sup>

**B. Under Power of Sale**—1. **STATUS OF POWER OF SALE MORTGAGES.**—The delay and expense incident to a foreclosure and sale in equity have brought power of sale mortgages and trust deeds into general favor, as a power of sale, whether vested in the creditor himself or in a trustee, affords a prompt and effectual security.<sup>25</sup> The insertion of such power does not affect the mortgagor's right to redeem so long as the power remains unexecuted and the mortgage is not, as it may be, foreclosed in the ordinary manner, but when a sale is made of the interest of the mortgagor, his right is wholly divested, embracing his equity or redemption.<sup>26</sup>

2. **INTERPRETATION AND CONSTRUCTION OF POWERS OF SALE.**—The power of sale contained in a mortgage is part of the contract, and should be construed on principles applicable to contracts and not as a hostile process.<sup>27</sup>

3. **ACCRUAL OF RIGHT TO SALE.**—It is competent for the parties to agree to a foreclosure by sale for nonpayment of installments,<sup>28</sup> or for nonpayments of

taking Confederate money in payment which he paid to one of the executors and obtained a release of the mortgage. On reaching their majority the legatees of the will transferred their rights to their mother, who filed a bill charging fraud in the execution of the release of the mortgage, and sought to charge the property with the amount of the debt it secured. It was held that the original grantee was an indispensable party as was one of the members of the mercantile firm to whom the property was conveyed, and who was vested with the legal title to the property, and that another partner of the firm, to whom the property was mortgaged to secure the payment of his interest on retiring from the firm, should also be made a party, if it was intended to conclude him (in case he did not get his money from his partners) from proceeding on the mortgage given to him to secure its payment and raising anew the question of the validity of the sale of the real estate to the first grantee, and of that made to the firm. *Robertson v. Carson*, 19 Wall. 94, 105, 106, 22 L. Ed. 178.

24. **Election of remedies.**—*Gilman v. Illinois, etc., Tel. Co.*, 91 U. S. 603, 616, 23 L. Ed. 405.

25. **Status of power of sale mortgages.**—*Bell Silver, etc., Min. Co. v. First Nat. Bank*, 156 U. S. 470, 478, 39 L. Ed. 497.

"The power of sale in the indenture, whether we call it a deed of trust or a mortgage, does not change its character as an instrument for the security of the indebtedness designated, but it is an additional authority to the grantee or mortgagee, and if he does not choose to foreclose the mortgage by any of the ordinary methods provided by law, he can proceed under the power added for the sale of the property, to obtain payment of the indebtedness." *Bell Silver, etc., Min. Co.*

*v. First Nat. Bank*, 156 U. S. 470, 477, 39 L. Ed. 497.

"There is nothing in the law of mortgages, nor in the law that covers what are sometimes designated as trust deeds in the nature of mortgages, which prevents the conferring by the grantor or mortgagor in such instrument of the power to sell the premises described therein upon default in payment of the debt secured by it, and if the sale is conducted in accordance with the terms of the power, the title to the premises granted by way of security passes to the purchaser upon its consummation by a conveyance." And this is true where a statute forbids a conveyance "so as to enable the owner of the mortgage to recover possession of the property without a foreclosure and sale." *Bell Silver, etc., Min. Co. v. First Nat. Bank*, 156 U. S. 470, 477, 39 L. Ed. 497.

26. **Effect of power of sale on equity of redemption.**—See post, "Redemption," XIII.

27. **Interpretation and construction of powers of sale.**—*Bacon v. Northwestern Mut. Life Ins. Co.*, 131 U. S. 258, 265, 33 L. Ed. 128.

28. **Power to foreclose for nonpayment of installments.**—*Olcott v. Bynum*, 17 Wall. 44, 62, 21 L. Ed. 570.

Where a mortgage given to secure a debt, payable in installments, contained a condition that if, at the expiration of the time limited for the payment of the installments and the interest thereon, the mortgagee had not foreclosed for the accrued installments, and there should still remain due on the mortgage a sum not greater than a certain designated sum, one less than the sum secured, the mortgagor might have the privilege of paying the amount due by giving his note therefor, secured by mortgage on other real estate, that privilege did not prevent the install-



interest;<sup>29</sup> but if the power of sale contains conditions, the performance of such conditions constitute a necessary element in the foreclosure proceedings,<sup>30</sup> unless such condition is merely cumulative to the general right to foreclose.<sup>31</sup> Where, by the term of a mortgage, a debt has become due, the defense cannot be made that the judgment obtained was collusive.<sup>32</sup> Limitations upon the power of the trustee to take legal proceedings to enforce payment of the amount secured, should be strictly construed, and those attempting to provide against a remedy in the ordinary course of judicial proceedings ousting the jurisdiction of the courts are without effect.<sup>33</sup>

4. NOTICE OF SALE.—The instruments generally give specific directions regarding the notice to be given. In some states, the statute prescribes the manner of giving this notice, and in such case it must be complied with. In either case, the validity of the sale being wholly dependent on the power conferred by the in-

ments from falling due at the times stipulated, nor prevent a sale of the property, under the other terms of the mortgage, to satisfy them when they fell due. *Bacon v. Northwestern Mut. Life Ins. Co.*, 131 U. S. 258, 263, 33 L. Ed. 128.

29. Power to foreclose for nonpayment of interest.—*Richards v. Holmes*, 18 How. 143, 145, 15 L. Ed. 304.

Where there was a deed of trust to secure the payment of a note which had two years to run, and the trustee was empowered to sell in case any default should be made in payment of any part of the debt and interest, the trustee could sell the property if the interest for the first year was not paid when due, and it was not necessary that the trust deed should describe the interest as being annual. *Richards v. Holmes*, 18 How. 143, 15 L. Ed. 304.

30. Conditions as to sale.—Where a mortgage provides that, after the principal of the bonds secured has been declared by the trustees to have become due, by reason of provisions therein contained, the trustees, "upon the written request of the holders of a majority of the said bonds then outstanding, shall proceed to collect both principal and interest of all such bonds outstanding, by foreclosure and sale of said property, or otherwise, as herein provided," the written request of the holder of the majority of the outstanding bonds is necessary element in foreclosure proceedings. *Chicago, etc., R. Co. v. Fosdick*, 106 U. S. 47, 78, 27 L. Ed. 47.

31. Where it was provided in a mortgage given to secure certain bonds, that on default in payment of principal or interest, the same continuing for sixty days, the trustee on request of seventy-five per cent of the bondholders, after advertisement should sell the property at public auction to the highest bidder for cash, the remedy was cumulative and did not prevent the trustee from exercising the right of foreclosure, especially that it was provided in the mortgage that nothing therein should be held or construed to prevent or interfere with a foreclosure of the instrument. *Morgan's, etc., Steamship Co. v. Texas Cent. R. Co.*, 137 U. S. 171, 191, 34 L. Ed. 625, cited in *Guaranty Trust, etc.,*

*Co. v. Green Cove Springs, etc., R. Co.*, 139 U. S. 137, 142, 35 L. Ed. 116.

32. A mortgage given to secure certain bonds contained a provision that it should become enforceable, if the trustees should declare the principal and interest upon the bonds immediately due, and upon the default of said bondholders to pay the same after the issue of execution. A bondholder brought suit upon six coupons, and the defendant consented to an immediate trial before a justice of the peace which resulted in a verdict against the defendant, and the issue of execution. Later on the same day, the trustees gave notice that by reason of such execution having been unpaid, they declared the principal and interest upon the bonds to be immediately due and payable, and took possession of the property the same night. It was held that although this judgment was collusive and obtained by the consent of the parties for the express purpose to give authority to foreclose the mortgage, it is not collusive in the sense of the law, because the bonds were due. *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 189, 44 L. Ed. 423.

33. Limitations upon power of trustee.—*Guaranty Trust, etc., Co. v. Green Cove Springs, etc., R. Co.*, 139 U. S. 137, 142, 35 L. Ed. 116.

A provision in a deed of trust to the effect that neither the whole nor any part of the premises mortgaged should be sold, under proceedings either at law or equity, for the recovery of the principal or interest of the debt secured, it being the intention and agreement of the parties that the mode of sale provided by the mortgage should be exclusive of all others, if it were not objectionable as attempting to provide against a remedy in an ordinary course of judicial proceedings and oust the jurisdiction of the courts, it is still evident that this was a condition for the benefit of the grantor and its assigns, and that intervening lienholders, and those who have purchased the property under decrees in their favor, do not stand in a position to take advantage of this covenant. *Guaranty Trust, etc., Co. v. Green Cove Springs, etc., R. Co.*, 139 U. S. 137, 142, 35 L. Ed. 116.



strument, a strict compliance with its terms is essential.<sup>34</sup> The notice is not for the benefit of the grantor in the sense of notice to him. It is only for his benefit by giving notoriety and publicity of the time, the terms, and the place of sale, and of the property to be sold, that bidders may be invited, competition encouraged, and a fair price obtained for the property. As to the grantor, he is presumed to know that he is in default and his property liable to sale at any time; and no notice to him is required.<sup>35</sup> No particular form of notice of sale of real property under a deed of trust is prescribed by law; it is sufficient if the description of the land be reasonably certain, so as to inform the public of the property to be sold.<sup>36</sup> Mere minor errors or defects in the notice will not defeat the title acquired at the sale.<sup>37</sup> Where a trustee is empowered to sell property at public auction or at private sale, after having given public notice to such sale, by advertisement, at least thirty days previous thereto, his power extends to a private sale made at any time after thirty days' notice; but this notice should be such as to call for purchasers at private sale.<sup>38</sup> A sale regularly adjourned, so as to give notice to all persons present of the time and place to which it is adjourned, is, when made, in effect the sale of which previous public notice was given.<sup>39</sup>

**5. TIME OF SALE.**—A power to a trustee to sell at public auction, after a certain public notice of the time and place of sale, includes the power regularly to adjourn the sale to a different time and place, when, in his discretion fairly exercised, it shall seem to him necessary to do so in order to obtain the fair auction price for the property.<sup>40</sup> As to the effect of war on the time as to when a sale under power of sale mortgage may be made, see the title WAR.

**34. Requirements as to manner of notice must be strictly complied with.**—*Shillaber v. Robinson*, 97 U. S. 68, 78, 24 L. Ed. 967.

Thus, where the terms of a mortgage or deed of trust require that before any foreclosure or sale under it is made, sixty days' notice shall be given in certain newspapers, a sale without the notice conveys no title. *Bigler v. Waller*, 14 Wall. 297, 20 L. Ed. 891.

Where it is provided in a mortgage that the mortgagee, on default of the mortgagor, may cause the premises and property to be sold at public auction, on first giving thirty days' notice of the time, place and terms of sale by publishing the same once a week for three weeks successively in certain newspapers, and it was contended that unless the last notice in each of the papers preceded the sale by thirty days it was insufficient, it was held that it was sufficient that the notice of sale was published in each of the papers for three weeks, and that the notice preceded the sale thirty days. The first publication was notice, as much as the second or last. *Bell Silver, etc., Min. Co. v. First Nat. Bank*, 156 U. S. 470, 474, 39 L. Ed. 497.

**35. To whom notice must be given.**—*University v. Finch*, 18 Wall. 106, 109, 21 L. Ed. 818.

**36. Form of notice.**—*Newman v. Jackson*, 12 Wheat. 570, 6 L. Ed. 732.

Where it is provided in a mortgage that the mortgagee on default of the mortgagor may cause the premises and property to be sold at public auction, on first giving thirty days' notice of the time, place and terms of sale by publishing the same once

a week for three weeks successively in certain newspapers, it was held sufficient that the description in the notice of sale was a transcript of that contained in the mortgage and if it was defective in any respect in the description of the personalty it was sufficient that it was complete in the description of the real property, for the recovery of which the action was brought. *Bell Silver, etc., Min. Co. v. First Nat. Bank*, 156 U. S. 470, 474, 39 L. Ed. 497.

**37. Errors in notice.**—Where a required advertisement of the foreclosure of a mortgage on property in Michigan containing a power of sale, designates the mortgagee as Dixon instead of Dickson, and contains other minor errors nonprejudicial, palpable, and not misleading, and a correct reference is made to the record of the mortgage which furnishes full and accurate information, there are no defects in the notice sufficient to defeat the title acquired at that sale. *Bacon v. Northwestern Mut. Life Ins. Co.*, 131 U. S. 258, 266, 33 L. Ed. 128.

**38. Notice where power permits either private or public sale.**—*Richards v. Holmes*, 18 How. 143, 146, 15 L. Ed. 304.

**39. Notice of adjourned sale.**—*Richards v. Holmes*, 18 How. 143, 147, 15 L. Ed. 304.

**40. Adjournment.**—*Richards v. Holmes*, 18 How. 143, 147, 15 L. Ed. 304.

In *Richards v. Holmes*, 18 How. 143, 147, 15 L. Ed. 304, the court said: "The courts of several states have gone further in this direction than we find necessary, though we do not intend to intimate any doubt of the correctness of their decisions. They

6. **PLACE OF SALE.**—A sale of a large and valuable property under a deed of trust in the nature of a mortgage, made on the premises themselves which were situated in a remote locality, was held not to be improper where the testimony showed that the property would not have brought more if offered elsewhere.<sup>41</sup>

7. **BY WHOM MADE.**—A sale made by a trustee appointed under an inoperative decree is without effect.<sup>42</sup> Where a trustee is dead the trust being still alive and unexecuted, a court of equity will carry it out through any other appropriate person in whom the control of the property may be; or if necessary, through its own officers and agents without the intervention of a new trustee.<sup>43</sup> Where a deed of trust is given on property to trustees to secure the payment of a promissory note, and on default in payment of same, they are authorized to sell the property at public auction after previous advertisement, and on default in payment a sale is made at public auction after previous advertisement signed by both of them and the purchaser's deed is executed by both, the absence of one of the trustees at the sale will not vitiate it when the sale is fairly and properly made and the proceedings under the deed of trust are otherwise regular.<sup>44</sup> In a sale under a deed of trust where private persons appoint other private persons, their heirs and assigns, to make the sale, then if the notice of sale is given, and the deed is executed, by the sole trustee or the two trustees, and the sale is fairly conducted, and no ground otherwise appears for setting it aside, the mere fact that the sale is not attended by the sole trustee, or that it is made in the absence of one or even both of two trustees, is not alone a sufficient ground for holding the sale invalid.<sup>45</sup> Whenever the trustee has been guilty of a breach of the trust, and has transferred the property, by sale or otherwise, to any third person, the cestui que trust has a full right to follow such property into the hands of such third person, unless he stands in the predicament of a bona fide purchaser, for a valuable consideration, without notice.<sup>46</sup>

8. **AMOUNT TO BE SOLD.**—Where a mortgage is given to secure a debt, payable in installments, and express authority is given to sell all the property upon the failure to pay either of the installments at maturity, on default, if enough of the property to satisfy the amount due could be segregated and sold without injury to the residue, it would be the duty of the mortgagee so to sell,<sup>47</sup> but the property should be sold as a whole where separation would injure the residue.<sup>48</sup>

9. **SALE AS A WHOLE OR IN PARCELS.**—Trustees should not sell the entirety of two tracts of land when each tract is subject to an individual deed of trust, except when the interests of the mortgagors and incumbrancers require it.<sup>49</sup>

have held that a public officer, upon whom a power of sale is conferred by law, may adjourn an advertised public sale to a different time and place, for the purpose of obtaining a better price for the property."

41. **Place of sale.**—*Olcott v. Bynum*, 17 Wall. 44, 62, 21 L. Ed. 570.

42. **By whom made.**—Where a certain lot of land conveyed by two deeds of trust to secure the payment of certain loans, and on default in payment the creditor institutes a suit alleging the refusal of one of the trustees to sell the property embraced in the trust and a decree is entered appointing a new trustee in the place of the alleged delinquent one, "in the deed of trust," but without reference to which deed, and the new trustee and the remaining trustee claiming and purporting to act under the first deed of trust sold the property at public auction to the creditor, it was held that the decree rendered was inoperative and void, and that the conveyance of the property to the creditor was without effect, and the said creditor is not estopped from asserting his lien on

the property by a resale. *Shepherd v. Pepper*, 133 U. S. 626, 648, 33 L. Ed. 706.

43. *Batesville Institute v. Kauffman*, 18 Wall. 151, 21 L. Ed. 775.

44. *Smith v. Black*, 115 U. S. 308, 318, 29 L. Ed. 398.

45. *Smith v. Black*, 115 U. S. 308, 319, 29 L. Ed. 398.

46. **Wrongful sale by trustee.**—*Balloch v. Hooper*, 146 U. S. 363, 369, 36 L. Ed. 1008; *Oliver v. Piatt*, 3 How. 333, 401, 11 L. Ed. 622.

47. **Amount to be sold.**—*Olcott v. Bynum*, 17 Wall. 44, 62, 21 L. Ed. 570.

48. In a sale of property under foreclosure proceedings it was held proper to sell the realty and the fixed machinery and water power connected therewith constituting paper mill as a unit where they could not be disintegrated and the parts sold separately without large depreciation and a diminished amount in the aggregate of yield. *Hill v. National Bank*, 97 U. S. 450, 453, 24 L. Ed. 1051.

49. *Warner v. Grayson*, 200 U. S. 257, 272, 50 L. Ed. 470.



10. **STRICT CONFORMITY TO TERMS OF INSTRUMENT.**—A power of sale will have no validity unless made in strict conformity to the prescribed directions.<sup>50</sup>

11. **WHO MAY PURCHASE.**—Although equity will enforce in the most rigid manner good faith on the part of the trustee, and vigilantly watch any acquisition by him in his individual character, of property which has ever been the subject of his trust, under the mere fact that a trustee has afterwards bought such property,<sup>51</sup> or has been an officer in a corporation which purchased the property at the sale,<sup>52</sup> does not vitiate the sale in the absence of fraud. If the proceedings are fairly and properly made, there is no reason why a creditor should be disqualified from becoming a purchaser of the property,<sup>53</sup> and if the consideration of the conveyance from the trustee is credited by the creditor, as a credit of cash upon the obligation of the debtor, in fact and in law it is a payment of money to the use and benefit of the debtor, and is not open to the objection that it is a sale only in form and not in fact because no money passes.<sup>54</sup> But where real estate is conveyed by a debtor directly to a creditor as security for the payment of an obligation, with a power to sell in case of default, the creditor is also a trustee to sell, and cannot purchase the property at his own

**50. Strict conformity to terms of instrument.**—*Shillaber v. Robinson*, 97 U. S. 68, 77, 24 L. Ed. 967, citing *Bigler v. Waller*, 14 Wall. 297, 302, 20 L. Ed. 891.

**51. Subsequent acquisition of the property by trustee.**—*Stephen v. Beall*, 22 Wall. 329, 22 L. Ed. 786.

Where the trustee has sold the trust property to another, that sale having been judicially confirmed after opposition by the *cestui que trust*, the fact that thirteen years afterwards he bought the property from the person to whom he once sold it does not, of necessity, vitiate his purchase. The question in such a case becomes one of actual fraud. And where on a bill charging fraud, the answer denies it in the fullest manner, alleging a purchase bona fide and for full value paid, and that when he, the trustee, made the sale to the person from whom he has since bought it, the purchase by himself, now called in question, was not thought of either by himself or his vendee—the court will not decree the purchase fraudulent, the case being heard on the pleadings, and without any proofs taken. *Stephen v. Beall*, 22 Wall. 329, 22 L. Ed. 786.

The complainants in this case, who alleged fraud and relied on the trustee's possession of the trust property after an alleged sale of it, as evidence of it, not stating when the trustee came into possession—that is to say, how soon after his former sale—the court assumed the time to be thirteen years; this term having elapsed between the date of the sale by the trustee and the filing of the bill (or cross bill, rather) to set it aside; the court acting on the presumption that the complainant stated the case as favorably as he could for himself, and would have mentioned the fact that the trustee had been in possession long before the bill was filed, if he had really been so. *Stephen v. Beall*, 22 Wall. 329, 22 L. Ed. 786.

**52. Trustee officer of corporation purchasing at sale.**—If duly advertised, and fairly and properly conducted, a trustee's public sale of lands to a corporation which was the payee of the note secured by the deed of trust will not be set aside merely upon the ground that the trustee then and at the date of the deed was the actuary of the corporation, if the deed was made to him as an individual, and he, as such, and not in his official capacity, accepted and executed the trust thereby conferred. *Clark v. Trust Co.*, 100 U. S. 149, 152, 25 L. Ed. 573.

**53. Creditor as purchaser.**—*Smith v. Black*, 115 U. S. 308, 315, 29 L. Ed. 398; *Richards v. Holmes*, 18 How. 143, 15 L. Ed. 304; *Easton v. German-American Bank*, 127 U. S. 532, 539, 32 L. Ed. 210.

It would be improper for the auctioneer to buy in behalf of the creditor at anything short of the best price. But there is no impropriety in his being employed to bid a particular sum for the creditor, to prevent a sacrifice of the property. *Richards v. Holmes*, 18 How. 143, 149, 15 L. Ed. 304.

In *Richards v. Holmes*, 18 How. 143, 148, 15 L. Ed. 304, the court said: "No decision lays down a positive rule that such sales, though affected by such bidding, are, *per se*, and as between all persons, void. They may be avoided by parties whose just interests have been injuriously affected by such misconduct, provided the rights of innocent third persons are not thereby disturbed."

Even improper practices to enhance the price, if any such had been resorted to, could not be complained of by junior incumbrancers. It is only some practice to prevent bidding, or procure a sale for less than the property would have otherwise brought, which can be relied on by them to avoid the sale. *Richards v. Holmes*, 18 How. 143, 148, 15 L. Ed. 304.

**54.** *Easton v. German-American Bank*, 127 U. S. 532, 539, 32 L. Ed. 210.



sale for his own use.<sup>55</sup>

12. **ADEQUACY OF PRICE.**—Where a sale is made under a deed of trust and the price which the property brings is grossly inadequate, this fact alone will not constitute a sufficient reason to impeach the genuineness or validity of the sale.<sup>56</sup>

13. **TERMS OF SALE.**—Where the mortgagees are expressly authorized to sell for cash or on credit, they may do either, or combine them in the sale; nor is a sale for part in cash and part on credit under a power requiring it to be made for cash invalid, if the departure from the terms of the power is beneficial to the mortgagor. It is immaterial whether such arrangement for payment is made before or after the sale.<sup>57</sup> Where a deed of trust is given on property to trustees to secure the payment of a promissory note, and on default in payment of the same, the property is sold by them under the trust deed, a settlement made by the purchaser in cash, notwithstanding the terms of the sale provided for credit violates no duty to the grantor.<sup>58</sup>

14. **WHERE PROPERTY SUBJECT TO CONFLICTING LIENS.**—Although a deed of trust to secure a debt usually authorizes the trustee to sell on default of payment, yet where a trustee attempts to sell property subject to conflicting liens some of which it is at least questionable whether his deed covers, it is the right of the other parties interested to bring the matter before a court of equity for the purpose of deciding the mutual rights of the parties, and administering the fund accordingly.<sup>59</sup>

15. **WAIVER OR ESTOPPEL IN REGARD TO DEFECTS.**—Where mortgaged property is sold under a power, the absence of objection on the part of the mortgagor to the sale as made cures any defect which exists therein, and gives it validity.<sup>60</sup> Where a deed of trust provided that, if default was made in the payment of the note or interest, the trustees should sell the property thereby conveyed at public sale, on the following terms: "The amount of indebtedness secured by said deed of trust unpaid, with the expenses of sale, in cash, and the balance at twelve and eighteen months, and on sale of the property the amount realized was not sufficient to cover the amount of the note, the holder is not estopped to deny that the note was not paid in full by the proceeds realized by the sale, because the deed of conveyance made to him by the proceeds recites that the property was sold to him in accordance with the terms of the deed of trust, and the deed of trust declared that the terms of sale should be the amount due on the note, and the expenses of sale in cash, and the balance on a credit of twelve and eighteen months."<sup>61</sup>

16. **THE DEED AND TITLE CONVEYED.**—Where a trustee's sale is valid, the title passing thereunder should be conveyed to the purchaser by a deed properly made and acknowledged.<sup>62</sup> But if a sale under a power given in the mortgage

55. *Easton v. German-American Bank*, 127 U. S. 532, 537, 32 L. Ed. 210.

56. **Adequacy of price.**—*Clark v. Trust Co.*, 100 U. S. 149, 152, 25 L. Ed. 573.

Where a deed of trust is given on property to two trustees to secure the payment of a promissory note and on default in payment of same they are authorized to sell the property at public auction after previous advertisement, a sale made on default in payment of said note after previous advertisement the proceedings of which are fair and regular is not objectionable on ground of inadequacy of price realized, where there has been a revulsion and depression of prices continuing until after the sale is made and the evidence shows that the trustee made bona fide efforts to secure more for the property and that the purchaser immediately offered the property at his bid to

several persons but that no one would take it. *Smith v. Black*, 115 U. S. 308, 317, 29 L. Ed. 398.

57. **Terms of sale.**—*Markey v. Langley*, 92 U. S. 142, 23 L. Ed. 701.

58. *Smith v. Black*, 115 U. S. 308, 320, 29 L. Ed. 398.

59. **Where property subject to conflicting liens.**—*Draper v. Davis*, 104 U. S. 347, 349, 26 L. Ed. 783.

60. **Waiver of defects.**—*Markey v. Langley*, 92 U. S. 142, 23 L. Ed. 701; *Bacon v. Northwestern Mut. Life Ins. Co.*, 131 U. S. 258, 264, 33 L. Ed. 128; *Olcott v. Bynum*, 17 Wall. 44, 61, 21 L. Ed. 570.

61. **Estoppel to deny payment.**—*Shepherd v. May*, 115 U. S. 505, 506, 29 L. Ed. 456.

62. **The deed.**—*Clark v. Trust Co.*, 100 U. S. 149, 25 L. Ed. 573.

is valid, it is conclusive without a deed; if it is invalid, a deed cannot help it.<sup>63</sup> And where a sale is made by a trustee under a deed of trust, the fact that it is not consummated by a conveyance executed and acknowledged in proper form, does not invalidate the sale.<sup>64</sup> Neither error in the mere recital, nor silence as to the precise hour of the day when the sale occurred, renders the deed of a trustee void upon its face, or ineffectual as a conveyance of the legal title by a trustee invested with power to sell upon notice, and to convey the title to the purchasers.<sup>65</sup> Although the deed is given at period somewhat later than the sale of the property under a mortgage, it is operative by relation from the time of the sale.<sup>66</sup> A trustee under a decree of foreclosure having the legal title can convey all the property which it covers, and is not restricted to the decree, which only determines the foreclosure and establishes the right of the trustee to convey without a breach of trust.<sup>67</sup> A mortgagor, who on a bill attempting to charge his mortgagee with reception of profits of the estate because of a foreclosure which, though void for requisite notice of the intended sale in foreclosure, was gone through with in form, has had his bill dismissed, with a decree that he is himself still owner and liable for a balance of unpaid mortgage money, cannot object, on error, that the decree did not order the heirs of the formal purchaser, the purchaser himself being dead, to convey, if the bill have not made such heirs parties, or if they have not been called in. However, the execution of the decree for the payment of the mortgage money may be stayed in such case till an outstanding title made by the proceedings purporting to have been in foreclosure shall have been brought back to the mortgagor.<sup>68</sup>

17. RIGHTS IN PROCEEDS.—Where property is sold under the terms of a mortgage, the lien of the mortgage continues upon the fund as it subsisted upon the premises before they were sold.<sup>69</sup> Where property, subject to mortgage and other liens, is sold by the first mortgagee, he becomes the trustee for the benefit of all concerned. If he regards the interest of others as well as his own, seeks to promote the common welfare, and keeps within the scope of his authority, a court of equity will in no wise hold him responsible for mere errors of judgment

63. *Olcott v. Bynum*, 17 Wall. 44, 61, 21 L. Ed. 570.

64. *Clark v. Trust Co.*, 100 U. S. 149, 153, 25 L. Ed. 573.

65. *Mansfield v. Excelsior Ref. Co.*, 135 U. S. 326, 332, 34 L. Ed. 162.

66. *Olcott v. Bynum*, 17 Wall. 44, 61, 21 L. Ed. 570.

67. *Chesapeake Beach R. Co. v. Washington, etc., R. Co.*, 199 U. S. 247, 251, 50 L. Ed. 175, in which case the court said: (p. 250) "The trustee had the legal title and purported to convey all the property which it held. The source of its title was a conveyance to it by the owner. The decree of the court only determined a foreclosure and established the right of the trustee to convey without a breach of trust. Even if it is not to be inferred that the decree was as broad as it is recited to have been (see *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207), the deed of the Union Trust Company conveyed whatever title it had. *Williams v. Jackson*, 107 U. S. 478, 27 L. Ed. 529. The suggestion that the instrument must be read as limiting itself by pure implication to rights conferred by the decree, and as excluding the only source of the grantor's title, does not merit extended discussion, but it may be mentioned that there is a covenant for future assurances, in general terms, not

limited to any particular source. It is observed in one of the cases cited for the defendant that 'the recital in the deed cannot enlarge or control the words of the grant.' *Titcomb v. Currier*, 4 Cush. 591, 592. Still less can such a recital as this be taken to eliminate the only title which the grantor held. See further *Brobst v. Brock*, 10 Wall. 519, 19 L. Ed. 1002; *Bryan v. Brasius*, 162 U. S. 415, 40 L. Ed. 1022."

Where a trust company begins its suit for the foreclosure of its mortgage, and sells under the decree in that suit all the interests, legal and equitable, which is held in the land as trustee for the bondholders, and distributes the proceeds, the bondholder receiving his share without complaint and without objection, all the rights which the trust company, as trustee, had in the lands at the time of the mortgage passes to the purchaser at the sale; and the sale binds the trust company as trustee and therefore it binds the bondholder. *Richter v. Jerome*, 123 U. S. 233, 247, 31 L. Ed. 132.

68. *Bigler v. Waller*, 14 Wall. 297, 20 L. Ed. 891.

69. Rights in proceeds.—*Olcott v. Bynum*, 17 Wall. 44, 63, 21 L. Ed. 570. And see, also, *Markey v. Langley*, 92 U. S. 142, 23 L. Ed. 701.



or results, however unfortunate, which he could not reasonably have anticipated.<sup>70</sup> Upon the sale of such property the liens attach to the proceeds thereof in the same manner, order, and effect as they bound the premises before the sale, the new securities standing in substitution for the old.<sup>71</sup> Where on foreclosure of a mortgage given to secure a debt, payable in installments, the property is incapable of division without injury, and all is properly sold together, yielding a fund sufficient to pay the whole debt, as well the installments underdue as the one overdue, it is proper at once to pay the former as well as the latter, stop the interest, and extinguish the entire liability.<sup>72</sup> Where a deed of trust is given to secure certain debts due the grantee, it is claimed that the debt of another party was included in the deed; and in order to show this, the plaintiff in his suit is compelled to resort to parol evidence that the parties to the deed intended to provide for the payment of that debt out of the proceeds of the sale of the trust property and to that end included it in the aggregate sum secured; if that evidence is competent, it is the right of the grantee to show by parol evidence that the intention of the parties was to apply the proceeds of sale to his reimbursement, for all advances and payments made and expenses incurred by him before anything was paid on the claim of the plaintiff.<sup>73</sup>

18. **RESALE.**—Under a resale the parties are deemed to have abandoned their rights under the first sale.<sup>74</sup>

**C. By Suit or Action**—1. **CHARACTER OF PROCEEDING.**—A proceeding which is in its essential nature a foreclosure of a mortgage as a mortgage is foreclosed in a court of chancery, is a suit in equity, by whatever name it may be called,<sup>75</sup> and it has no analogy to an action of trover, detinue, or trespass,<sup>76</sup> and is not a proceeding in rem.<sup>77</sup> Where a mortgagee holds a certificate of purchase under a decree of sale, and is lawfully entitled to possession of certain mortgaged

70. *Markey v. Langley*, 92 U. S. 142, 23 L. Ed. 701.

71. *Markey v. Langley*, 92 U. S. 142, 155, 23 L. Ed. 701.

72. *Olcott v. Bynum*, 17 Wall. 44, 63, 21 L. Ed. 570.

A deed of trust with power of sale, provided that money should be paid in three equal installments, and that in default of payment of any one "that may grow due thereon," all the mortgaged premises might be sold and a deed of the premises made to the purchaser, and that it should be lawful for the trustee "out of the money arising from such sale to retain the principal and interest which shall then be due," rendering the overplus to the mortgagor. Held, that when one installment fell due, the trustee had a right to sell, and though there was a surplus above what was necessary to pay the installment due, yet that the trustee might reserve the whole and apply it to the residue of the mortgage debt. *Olcott v. Bynum*, 17 Wall. 44, 21 L. Ed. 570.

73. *Newhall v. Le Breton*, 119 U. S. 259, 264, 30 L. Ed. 381.

74. On the sale of property under a deed of trust given by two cotenants to secure a debt, one of the cotenants becoming the purchaser, and the sum realized was sufficient to leave a surplus for the benefit of the other cotenant, as her share, but the sale was not carried out according to its terms; the original creditor advanced more money to the purchaser and received a deed of trust as security

which was recorded so as to become the first lien on the property; and on the same day a deed of trust was given to secure notes executed for the amount of the surplus due the other cotenant, but the notes were never received nor was the deed recorded. Later litigation arose in which all three of the parties above mentioned were involved, and the property was ordered sold, the creditor purchasing it at a price insufficient to pay the amount of the debt with interest and accrued taxes. It was held that all the parties had abandoned the original sale and that all claim of the cotenant, entitled to a surplus from the original sale, was gone; that the creditor was entitled to priority of payment out of the net proceeds of the sale of the property, and that the sale was to be regarded as a resale to enforce the creditor's rights under the original deed of trust. *Mellen v. Wallach*, 112 U. S. 41, 28 L. Ed. 633.

75. **Character of proceeding.**—*Walker v. Dreville*, 12 Wall. 440, 20 L. Ed. 429.

76. *Union Bank v. Stafford*, 12 How. 327, 341, 13 L. Ed. 1008.

77. *Pardee v. Aldridge*, 189 U. S. 429, 433, 47 L. Ed. 883.

Where a mortgagee, instead of seeking to obtain possession of the land, prays to have his debt paid, and the property pledged for its security sold, for the purpose of raising the money, the demand is, in reality, a personal one, the debt being considered as the principal, and the land



premises after condition broken; a foreclosure and sale is in aid of the original title and not inconsistent with it.<sup>78</sup>

2. **STRICT FORECLOSURE.**—At common law,<sup>79</sup> and under the present procedure in some jurisdictions,<sup>80</sup> upon the failure of the mortgagor to comply with the conditions contained in the mortgage, the mortgagee had the right to sue for and recover the land itself. Where mortgaged property has been conveyed by the mortgagor and the mortgagee under strict foreclosure proceedings in Connecticut seeks to charge the mortgage debtor with liability of any balance of the mortgage debt that may remain after the security is exhausted, which is done by appraisal proceedings, the mortgagor is also a necessary party, even though it may prevent the grantee from removing the suit to the federal court because his citizenship is the same as that of the mortgagee and the grantee's is not.<sup>81</sup> A decree of strict foreclosure, which does not find the amount due, which allows no time for the payment of the debt and the redemption of the estate, and which is final and conclusive in the first instance, cannot, in the absence of some special law authorizing it, be sustained.<sup>82</sup> In this country the proceeding in most of the states, and perhaps in all of them, is regulated by statute.<sup>83</sup>

3. **PURPOSE.**—The remedy obtained on a mortgage in a court of equity is not the recovery of the land, but the satisfaction of the debt. It is the pursuit by action of one debt on two instruments or securities, the one general, the other special.<sup>84</sup> "The debt or obligation, to secure which it is given, is stated in the instrument itself, and the only proceeding with reference to its amount is one of calculation as to the interest thereon, or as to what remains due after credit of payments; and it is only to ascertain this that a reference is made to an accountant, usually a master in chancery, and not to try the validity of the debt or obligation secured. The equitable suit is to enforce the application of the property to the purposes intended by the contract of the parties."<sup>85</sup>

4. **ACCRUAL OF RIGHT TO FORECLOSE.**—The right to bring foreclosure proceedings accrues upon the nonperformance of the terms or conditions of the mortgage,<sup>86</sup> but no sale of the mortgaged property can be made until after the

merely as an incident. *Hughes v. Edwards*, 9 Wheat. 489, 497, 6 L. Ed. 142.

78. *Bradley v. Lightcap*, 195 U. S. 1, 22, 49 L. Ed. 65.

79. **Strict foreclosure.**—*Bronson v. Kinzie*, 1 How. 311, 317, 11 L. Ed. 143.

80. *Flagg v. Walker*, 113 U. S. 659, 675, 28 L. Ed. 1072.

81. *Coney v. Winchell*, 116 U. S. 227, 230, 29 L. Ed. 610.

Under the Connecticut practice any party to the suit can call for an appraisal by simply making a motion to that effect. The appraisal is one of the incidents of a suit for foreclosure when the person liable for the payment of the debt is a party. *Coney v. Winchell*, 116 U. S. 227, 230, 29 L. Ed. 610.

82. *Clark v. Reyburn*, 8 Wall. 318, 19 L. Ed. 354.

83. *Clark v. Reyburn*, 8 Wall. 318, 322, 19 L. Ed. 354.

84. **Purpose.**—*Sheldon v. Sill*, 8 How. 441, 450, 12 L. Ed. 1147.

85. *Scott v. Neely*, 140 U. S. 106, 113, 35 L. Ed. 358.

86. **Accrual of right to foreclose.**—In *Bronson v. Kinzie*, 1 How. 311, 318, 11 L. Ed. 143, the court said: "But, as courts of equity follow the law, they acknowledge the legal title of the mortgagee, and never deprive him of his right at law until his debt is paid; and he is entitled to the

aid of the court to extinguish the equitable title of the mortgagor, in order that he may obtain the benefit of his security. For this purpose, it is his absolute and undoubted right, under an ordinary mortgage deed, if the money is not paid at the appointed day, to go into the court of chancery, and obtain its order for the sale of the whole mortgaged property (if the whole is necessary), free and discharged from the equitable interest of the mortgagor. This is his right, by the law of the contract; and it is the duty of the court to maintain and enforce it, without any unreasonable delay."

Where the provision of a mortgage given on the purchase of certain property in litigation required that certain money be paid into court for certain designated purposes, when, by the terms of the mortgage, the time had arrived for the payment of the money, it was the duty of the mortgagor to have signified his readiness to pay and to unite with the mortgagee in procuring the necessary order of the court, and not having so done, a right to enforce the mortgage at once arose. *Crescent Min. Co. v. Wasatch Min. Co.*, 151 U. S. 317, 322, 38 L. Ed. 177.

Where it is provided in a mortgage to secure certain bonds that if the mortgagor should fail to pay the principal or the interest on the said bonds when the same

condition is broken.<sup>87</sup> Where a corporation is insolvent, and has no funds at the place where its bonds are payable, demand of payment at such place need not be made before suit brought to foreclose its mortgages executed to secure the bonds.<sup>88</sup> An objection that leave was not given to file the bill of foreclosure—the mortgaged premises being at the time in the possession of a receiver appointed in a former suit in the same court—if, under any circumstances, available, will not be sustained, if made a year and a half after the bill was filed, and when the party objecting had in the mean time appeared, answered it, and cross-examined the witnesses of the complainant.<sup>89</sup>

5. LIMITATIONS AND LACHES<sup>90</sup>—a. *By Whom Pleaded.*—A mortgagee in possession, if satisfied with the mortgage security, need have no anxiety about the statute of limitations. That is the concern of the mortgagor.<sup>91</sup> The possession of the mortgagor not being adverse, it has been held in some jurisdictions that the statute of limitations did not apply to mortgages.<sup>92</sup> The cases in Georgia hold that a purchaser of the legal title, or possibly a mortgagee in possession,

might become due and payable, and if default continue sixty days after having been demanded, the principal of all the bonds secured to become immediately due and payable, it is not requisite that there be a request for a declaration by the trustee that the principal was due, or such a declaration and notification to the defaulting company to make the principal mature, in order to proceed by suit in equity to collect the aggregate amount of principal and interest; that is a consequence of a default continuing sixty days after demand. *Morgan's, etc., Steamship Co. v. Texas Cent. R. Co.*, 137 U. S. 171, 194, 34 L. Ed. 625.

Where bonds contained a provision to the effect that if default should be made in the payment of any one of the installments of interest as they fell due, and the default should continue for ten days, the principal of the bonds should become due, at the election of the holders, without notice, and default was made, the election by the bondholders to consider the principal sum due was sufficiently proven by the bringing of the suit by the trustee and the production of the bonds at the hearing. *Rice v. Edwards*, 131 U. S., appx. clxxv, 25 L. Ed. 976.

Where under a mortgage given to secure the interest as well as the principal debt, suit is instituted to foreclose the mortgage for default in payment of interest, and not for principal due or any default in payment, if the proceeding results finally in a sale of the mortgaged premises, the sale is made free from the equity of redemption of the mortgagor, and all holders of junior incumbrances, if made parties to the suit. *Chicago, etc., R. Co. v. Fosdick*, 106 U. S. 47, 68, 27 L. Ed. 47.

Where a conveyance is declared to be for the purpose of securing the payment of the interest as well as the principal of the bonds, and it is provided that the mortgagor's right of possession terminates upon a default in the payment of the interest as well as principal, on any of

the bonds, the trustees, or on their failure to do so, any bondholder, on nonpayment of any installment of interest on any bond, may file a bill for the enforcement of the security, by the foreclosure of the mortgage and the sale of the mortgaged property, independently of other provisions in the conveyance that the foreclosure may be had for the principal under certain conditions on default in payment of interest. *Chicago, etc., R. Co. v. Fosdick*, 106 U. S. 47, 68, 27 L. Ed. 47.

<sup>87.</sup> *Wood v. Weimar*, 104 U. S. 786, 794, 26 L. Ed. 779.

Where each of two cosureties executes a mortgage to the other to protect him against liability on account of the principal beyond the amount or proportion respectively assumed, unless one of them has been compelled to pay, and has in fact paid, an excess beyond his agreed share of the debt, there has been no breach of the conditions of the mortgage, and consequently no right to a foreclosure and sale of the mortgaged premises. *Hampton v. Phipps*, 108 U. S. 260, 266, 27 L. Ed. 719.

Where a mortgage provides that on default of payment of interest the mortgage shall be foreclosed, on such default the mortgagee is entitled to a decree nisi which will ascertain the sum so due, and give the mortgagor a reasonable time to pay it. If this sum is not paid, the court must then order a sale of the mortgaged property, even though the debt secured is not to mature until thirty years. *Howell v. Western R. Co.*, 94 U. S. 463, 466, 24 L. Ed. 254.

<sup>88.</sup> *Shaw v. Bill*, 95 U. S. 10, 24 L. Ed. 333.

<sup>89.</sup> *Jerome v. McCarter*, 94 U. S. 734, 24 L. Ed. 136.

<sup>90.</sup> *Limitations and laches.*—See, generally, the titles LACHES, vol. 7, p. 790; LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 900.

<sup>91.</sup> *By whom pleaded.*—*Clay v. Freeman*, 118 U. S. 97, 106, 30 L. Ed. 104.

<sup>92.</sup> *Higginson v. Mein*, 4 Cranch 415, 2



may, when sued, plead the statute of limitations as a defense to a prior debt, or mortgage or incumbrance, made by the holder of the legal title, but not a mortgagee out of possession.<sup>93</sup> There are some authorities which go to show that a purchaser with the legal title, whose right accrued subsequent to the debt which may be barred by the statute, can also avail himself of the statute when he is sued to foreclose the equity of redemption. While this proposition is not undisputed, the cases in which this privilege has been sustained by the courts of Georgia are those in which the party setting it up has become the owner of the title or the entire equity of redemption, or has been found in possession of the mortgaged property.<sup>94</sup> And though the subsequent purchaser might set up the plea of the statute, the plea must show that the action is barred as between the parties to the debt, because as the owner of the equity of redemption it is that debt he has to pay.<sup>95</sup>

b. *When Statute Begins to Run.*—Where a mortgagor's interest in land was sold under the bankrupt act of the United States, the statute of limitations began to run from the time when the petitioner was declared a bankrupt, and not from the time when the purchaser took a deed from the assignee in bankruptcy.<sup>96</sup>

c. *Period of Limitation and Laches.*—Under the statute of limitations in Wisconsin the suit for foreclosure falls within the time provided for equitable actions.<sup>97</sup> Laches in asserting rights under a mortgage will bar a recovery thereunder.<sup>98</sup> If the right of redemption is not foreclosed within twenty years, the statute may be pleaded.<sup>99</sup> So long as the demands secured are not barred by the statute of limitations, there can be no laches in prosecuting a suit upon

L. Ed. 664. See ante, "Character of Possession," VII, B, 2.

93. *Sanger v. Nightingale*, 122 U. S. 176, 185, 30 L. Ed. 1105.

94. *Sanger v. Nightingale*, 122 U. S. 176, 184, 30 L. Ed. 1105.

95. *Sanger v. Nightingale*, 122 U. S. 176, 184, 30 L. Ed. 1105; *Ewell v. Daggs*, 108 U. S. 143, 27 L. Ed. 682.

96. *When statute begins to run.*—*Cleveland Ins. Co. v. Reed*, 24 How. 284, 16 L. Ed. 686.

97. *Period of limitations and laches.*—The revised statutes of Wisconsin of 1839 provided in the 37th section, that where there are concurrent remedies at law and in equity, the remedy in equity is barred in the same time that the remedy at law is barred; and the 40th section provided, that bills for relief in case of the existence of a trust not cognizable by the courts of common law, and in all other cases not therein provided for, shall be filed within ten years after the cause thereof shall accrue, and not after that time. It was held that where a bill was filed for a foreclosure or sale of mortgaged property, and the defendant had been in possession for more than ten years prior to the filing of the bill, there was no corresponding remedy at law, and the case fell within the 40th section of the act. *Cleveland Ins. Co. v. Reed*, 24 How. 284, 16 L. Ed. 686.

98. Where a bill in equity was filed for the foreclosure of a mortgage upon a certain newspaper, a newspaper plant, and a membership in the Western Associated Press, the contention being that the newspaper, plant and membership were subject to the lien of the mortgage as one

homogeneous property, and that any property of like kind substituted for any portion lost or destroyed became subject to this lien; and to hold liable for the mortgage debt a corporation which had acquired the plant and good will and membership, as alleged, to the value of the property so acquired; it was held that, in any view, the membership of the successor company was held adversely to the complainant. At the time the bill was filed, it had been so held for nearly eight years in the name of the successor company, which had paid all the assessments upon it and enjoyed all its privileges as the owner. If it obtained that membership under the by-laws without reference to the old certificate of membership, then of course the bill as framed would fail, and if it had been allowed to avail itself of the old membership, still its liability, if any, would be for a conversion, and the defenses of laches and limitations would apply. Viewed as an action for conversion, recovery was clearly barred as to the plant and the good will, and also as to this certificate, which was issued independently of the mortgage and not embraced within it. And so far as the bill proceeds upon the theory that the plant, the good will and the membership ought on equitable principles to be held subject to the lien of the mortgage, the court properly declined to assist a complainant that had slept upon its alleged rights for nearly eight years, and shown no excuse for its laches in asserting them. *Metropolitan Bank v. St. Louis Dispatch Co.*, 149 U. S. 436, 444, 450, 37 L. Ed. 799.

99. *Willison v. Watkins*, 3 Pet. 43, 52, 7 L. Ed. 596.



the mortgages to enforce these demands.<sup>1</sup>

d. *Bar of Obligation Secured*.—Unless the debt secured be barred, suits for foreclosure of mortgages securing such debts will not be barred.<sup>2</sup>

e. *Judgment Barred without Affecting Debt*.—Where a deed of trust was executed to secure the payment of certain notes, and a judgment obtained on the notes, the judgment did not operate as an extinguishment of the right of the holders of the note, to call for the execution of the trust; although the act of limitations might apply to the judgment.<sup>3</sup>

f. *Effect of Payment of Interest*.—Where one is the sole maker of a note and his wife executes a mortgage on her separate estate to secure its payment, becoming a surety to her husband, payment of interest on the note after her death prevents the statutes of limitation of the state from operating as a bar to the enforcement of the lien upon the property mortgaged by her.<sup>4</sup>

g. *Where Mortgage Payable in Installments*.—Where the mortgage is payable by installments, some of which were not due at the filing of the bill, the statute of limitations, will not apply. The possession of the mortgagor was not adverse to the mortgagee.<sup>5</sup>

h. *Statute Must Be Pleaded*.—Where in a suit to enforce a deed of trust to secure certain notes and interest thereon, if the statute of limitations is not pleaded, it is unavailable as a defense.<sup>6</sup>

i. *Effect of War*.—As to the effect of war upon the running of the statute of limitations, see the title WAR.

6. JURISDICTION.—Upon the application of the mortgagee, a court of equity will order a sale of the property to discharge the debt.<sup>7</sup> Courts of law have no power to foreclose the equity of redemption, or to impose terms upon a mortgagor applying to redeem.<sup>8</sup> An election to sue at law upon a note secured by mortgage does not make it necessary for the holder to exhaust his remedies in that forum before he can go into equity to enforce his mortgage. He may proceed at law and in equity at the same time, and until actual satisfaction of the debt has been obtained.<sup>9</sup> The act of the general assembly of Kentucky, approved December 19, 1795, to establish district courts in that commonwealth, conferred jurisdiction on the district courts to entertain suits for foreclosure of mortgages.<sup>10</sup> As to jurisdiction of the federal courts, see the following section and references there given.

7. IN THE FEDERAL COURTS.—As to jurisdiction of federal courts in foreclosure proceedings between citizens of different states, see the title COURTS, vol. 4, pp. 959, 966, 970. In an equity foreclosure in a circuit court of the United States, the requirements of the state law should be complied with and the forms of proceedings thereby prescribed pursued as nearly as practicable.<sup>11</sup>

1. *Cross v. Allen*, 141 U. S. 528, 537, 35 L. Ed. 843.

2. *Bar of obligation secured*.—Under the statute of limitations as enforced in Texas, unless the debt secured be barred, suits for foreclosure of mortgages securing such debts will not be barred, and this rule is applied where the statute is sought to be set up by one who held the equitable title to the land before and also acquired the legal title after the mortgage was given by the then holder of the legal title. *Ewell v. Daggs*, 108 U. S. 143, 147, 27 L. Ed. 682.

"The rule in California, from which state Utah took its statutes, is that when action on the debt is barred, action on the mortgage given to secure the debt is also barred." *Gisborn v. Charter Oak Life Ins. Co.*, 142 U. S. 326, 337, 35 L. Ed. 1029.

3. *Judgment barred without affecting debt*.—*Bank v. Guttschlick*, 14 Pet. 19, 10

L. Ed. 335.

4. *Effect of payment of interest*.—*Cross v. Allen*, 141 U. S. 528, 536, 35 L. Ed. 843.

5. *Where mortgage payable in installments*.—*Union Bank v. Stafford*, 12 How. 327, 13 L. Ed. 1008, affirmed in *New Orleans Canal, etc., Co. v. Stafford*, 12 How. 343, 13 L. Ed. 1015.

6. *Statute must be pleaded*.—*Shepherd v. Pepper*, 133 U. S. 626, 651, 33 L. Ed. 706.

7. *Jurisdiction*.—*Bronson v. Kinzie*, 1 How. 311, 318, 11 L. Ed. 143.

8. *Dorow v. Kelly*, 1 Dall. 143, 145, 1 L. Ed. 73.

9. *Concurrent remedies at law and in equity*.—*Ober v. Gallagher*, 93 U. S. 199, 208, 23 L. Ed. 829.

10. *District courts of Kentucky*.—*Applegate v. Lexington, etc., Min. Co.*, 117 U. S. 255, 267, 29 L. Ed. 892.

11. *Woodworth v. Northwestern, etc.*

While recognizing the weight which should be given to decisions of the supreme court of a state in construing its own laws, yet it is not binding upon the federal court when dealing with the rights and title of a purchaser under a decree of a foreclosure sale conferred by authority of a federal court rendered before said decisions.<sup>12</sup> Where property is sold under a decree at a foreclosure sale in a federal court which retains jurisdiction for the purpose of itself settling and determining all liens and demands on the premises, and the purchaser of the property is vested with the right of possession under the decree of sale. It was held that a supplemental bill may be filed in the original suit with a view to protecting the prior jurisdiction of the federal court and to render effectual its decree, and to protect the said purchaser from judgments rendered in the state courts to sell the property described in the decree of foreclosure when the aforesaid purchaser was not a party to the suit.<sup>13</sup>

8. **PARTIES.**—As to a treatment of the general rules applicable to parties, see the titles *PARTIES*; *RES ADJUDICATA*.

a. *Parties Plaintiff.*—A bill of foreclosure is properly filed in the name of the two executors under the will of the mortgagee, to whom letters testamentary have issued;<sup>14</sup> the trustee, to whom the legal title was conveyed in trust;<sup>15</sup> or, where a trustee declines to execute his trust, the cestui que trust;<sup>16</sup> and by bona fide holders of the mortgage.<sup>17</sup> Where a deed of trust is given to secure the payment of bonds and interest, on default in paying interest and the refusal of the trustee to foreclose the deed, a suit may be instituted by a part of the bondholders against the mortgagor, impleading as respondents, the trustee and the other bondholders who refuse to join.<sup>18</sup> But where a deed of trust is given to secure payment of certain bonds issued by a company, in the absence of statutory authority or some provision in the instrument which establishes the trust, nothing can be done by the majority of the bondholders however large, which will bind the minority without their consent.<sup>19</sup> Simple contract creditors in a foreclosure suit are not only unnecessary but improper parties.<sup>20</sup> As to the rights of aliens to foreclose, see the title *ALIENS*, vol. 1, p. 238.

*Ins. Co.*, 185 U. S. 354, 357, 46 L. Ed. 945; *Nalle v. Young*, 160 U. S. 624, 637, 40 L. Ed. 560.

12. *Julian v. Central Trust Co.*, 193 U. S. 93, 114, 48 L. Ed. 629.

13. *Julian v. Central Trust Co.*, 193 U. S. 93, 112, 48 L. Ed. 629.

14. **Executors as parties.**—*Anderson v. Watt*, 138 U. S. 694, 703, 34 L. Ed. 1078.

15. **Trustees as parties.**—*Dodge v. Tuleys*, 144 U. S. 451, 455, 36 L. Ed. 501.

16. **Cestui que trust as party.**—*Grant v. Phoenix Life Ins. Co.*, 121 U. S. 105, 112, 30 L. Ed. 905.

17. **Bona fide holders as parties.**—A farmer and his wife on the line of a proposed country railroad, subscribed to stock in the road and mortgaged their farm, upon representations made to them by agents of the road and others, in a time of excitement roused at public meetings, that the road would prove a most lucrative investment of money, a very profitable thing to the neighborhood, and would enable farmers to sell the products of their farm at a large advance over existing prices. The making of the road was begun, and after a good deal of money had been laid out in grading, and for other purposes, the further making of it was absolutely stopped for want of funds, and it remained unmade. The mortgage thus

obtained was assigned to a director of the road who was a large creditor of the road (then much embarrassed for money), when the mortgage was given. Held, on a bill by him to foreclose, that he was to be taken as an innocent holder for value; and that on the distinction recognized by the law between a representation of existing facts, and a representation of facts yet to come into existence—the distinction between “promissory statements” based upon general knowledge, information, and judgment, and those representations which, from knowledge peculiarly his own, a party may certainly know will prove to be true or false—he was entitled to a decree. *Sawyer v. Prickett*, 19 Wall. 146, 22 L. Ed. 105.

The assignee of a bond and mortgage who, by the terms of the assignment, holds it as collateral security for the payment of another debt, may, under the 111th and 113th sections of the New York Code of Procedure, sue without making his assignor a party to the suit. *Chew v. Brumagen*, 13 Wall. 497, 20 L. Ed. 663.

18. **Bondholders as parties.**—*Hotel Co. v. Wade*, 97 U. S. 13, 15, 19, 24 L. Ed. 917.

19. *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 529, 535, 27 L. Ed. 1020.

20. *Hollins v. Brierfield Coal, etc., Co.*,



b. *Parties Defendant*—(1) *Owner of Interest in the Property*.—The owner of property mortgaged at the time suit is brought for the foreclosure of the mortgage, or the sale of the mortgaged premises, whether he be the original mortgagor,<sup>21</sup> or his successor in interest,<sup>22</sup> is an indispensable party to the suit. A decree without his being made a party will not bind him, or parties claiming under him, although the latter may have acquired their interests after suit commenced; and a purchaser of the property at a sale under the decree is not entitled to a writ of assistance to obtain possession of the premises as against him or them.<sup>23</sup> A judgment obtained in the foreclosure of a mortgage, known to have been made by a mere trustee, will not conclude the rights of known beneficiaries who are not made parties to the suit.<sup>24</sup> The mortgagor represents in a foreclosure suit not merely himself, but all parties who have acquired any interest in the property since the commencement of that suit.<sup>25</sup> Under the practice of courts of equity at an early date, if the equity of redemption was transferred to another, such other party stood in the shoes of the holder of such equity of redemption and was equally entitled to be heard before his right could be cut off. It was certainly possible for him to show that the mortgage was satisfied, or his liability released, or that in some other way the suit could not be maintained. The holder of the equity of redemption was, therefore, an indispensable party to a valid foreclosure.<sup>26</sup> The rule in Louisiana, and in most states, is that a person having an interest in mortgaged premises sold under a foreclosure, and not made a party to the proceedings, merely retains his equity of redemption, that is, a right to redeem the property by paying the amount due on the mortgage; he cannot dispossess the purchaser without redeeming, or offering to redeem, the property by paying the mortgage debt. His remedy, if one he has, is a bill in equity to redeem the property, and not an action at law.<sup>27</sup>

(2) *Holders of Mere Nominal Interest*.—Where in foreclosure proceedings other parties had a nominal interest as defendants, and resided beyond the jurisdiction of the court, it was error in the circuit court to dismiss the bill because they were not made parties. Under the act of congress of 1839, the court should have gone on to decree against the actual defendants.<sup>28</sup>

(3) *Where Property Has Been Alienated*.—The general rule is that a mortgagor who has parted with his interest in the mortgaged premises need not be a party in a suit for foreclosure, unless he has warranted the title to his assignee.<sup>29</sup> But where a bill charges fraud in the execution of a release of

150 U. S. 371, 386, 37 L. Ed. 1113; *Stout v. Lye*, 103 U. S. 66, 26 L. Ed. 428.

Simple contract creditors whose claims have not been reduced to judgment, who possess no express lien by mortgage, trust deed, or otherwise cannot come into a court of equity to obtain the seizure of the property of their debtor, and its application to the satisfaction of their claims; and this, notwithstanding a statute of the state may authorize such a proceeding in the courts of the state. Nor is this rule changed by the fact that the suit is brought in a court in which at the time is pending another suit for the foreclosure of a mortgage or trust deed upon the property of the debtor. *Hollins v. Brierfield Coal, etc., Co.*, 150 U. S. 371, 378, 37 L. Ed. 1113.

21. *Owner of interest in the property*.—*Terrell v. Allison*, 21 Wall. 289, 22 L. Ed. 634; *Evster v. Gaff*, 91 U. S. 521, 523, 23 L. Ed. 403; *Robertson v. Carson*, 19 Wall. 94, 105, 22 L. Ed. 178; *Howard v. Railway Co.*, 101 U. S. 837, 849, 25 L. Ed. 1081.

22. See post, "Where Property Has Been Alienated," XII, C, 8, b, (3).

23. *Terrell v. Allison*, 21 Wall. 289, 22 L. Ed. 634.

24. *Oliver v. Piatt*, 3 How. 333, 407, 11 L. Ed. 622.

25. *Hollins v. Brierfield Coal, etc., Co.*, 150 U. S. 371, 386, 37 L. Ed. 1113.

26. *Terrell v. Allison*, 21 Wall. 289, 292, 22 L. Ed. 634.

27. *Evans v. Pike*, 118 U. S. 241, 248, 30 L. Ed. 234.

28. *Holders of mere nominal interest*.—*Union Bank v. Stafford*, 12 How. 327, 13 L. Ed. 1008, affirmed in *New Orleans Canal, etc., Co. v. Stafford*, 12 How. 313, 13 L. Ed. 1015.

29. *Mortgagor as necessary party*.—*Robertson v. Carson*, 19 Wall. 94, 105, 22 L. Ed. 178.

In *Ayres v. Wiswall*, 112 U. S. 187, 28 L. Ed. 693, it was decided that in a suit for the foreclosure of a mortgage by sale, in which it was sought to charge the mortgage debtor with the payment of any balance of the mortgage debt that might re-



a mortgage by executors who were the mortgagors, and that the mortgagee was a party to it, and the mortgage is sought to be enforced, the mortgagee is a necessary party to the proceedings, even though he has sold the property.<sup>30</sup> One who has purchased the premises mortgaged before the institution of the suit for the sale of the property and was placed in their possession, is an indispensable party to that suit, and is not bound by the decree rendered in his absence,<sup>31</sup> but a plaintiff's failure to file an amended bill in foreclosure proceedings when he knew the premises had been secretly purchased does not prevent him from maintaining a second foreclosure suit when said failure does not prejudice any of the defendants, nor can it be said that plaintiff has lost his rights, except as to the costs of the first suit.<sup>32</sup> In Louisiana, the pact de non alienando in mortgages, dispenses with the necessity of making subsequent grantees or mortgagees parties in a proceeding to enforce payment of the mortgage.<sup>33</sup> The fact that the court is unable to join all parties and to sell all the land, due to a conveyance by the mortgagor directly or indirectly to a territory which refuses to waive its exemption from suit, does not deprive the court of the jurisdiction and power to order a decree of foreclosure sale and a mortgage, and direct a judgment for the sum remaining due in case the proceeds of the sale are insufficient to pay the mortgage debt.<sup>34</sup>

(4) *Where Property Has Been Conveyed in Trust*.—Where, after a mortgage of it, real property has been conveyed in trust for the benefit of children, both those in being, and those to be born; all children in esse at the time of filing the bill of foreclosure should be made parties. Otherwise, the decree of foreclosure does not take away their right to redeem. A decree in such a case against the trustee alone, does not bind the cestui que trusts.<sup>35</sup>

(5) *Trustees*.—In foreclosure of a deed of trust, the trustee is a necessary party, notwithstanding his failure to give the required statutory bond.<sup>36</sup>

(6) *Prior Incumbrancers*.—As a general rule, a prior mortgagee is not a nec-

main due after the security was exhausted, the debtor was a necessary party. *Coney v. Winchell*, 116 U. S. 227, 228, 29 L. Ed. 610.

**30. Mortgagee as necessary party.**—*Robertson v. Carson*, 19 Wall. 94, 105, 22 L. Ed. 178.

**31. Purchaser as necessary party.**—*Terrell v. Allison*, 21 Wall. 289, 293, 22 L. Ed. 634; *Hefner v. Northwestern Life Ins. Co.*, 123 U. S. 747, 755, 31 L. Ed. 309; *Terrell v. Allison*, 21 Wall. 289, 22 L. Ed. 634.

A., the owner in fee of certain lands, having mortgaged them to B., to secure a debt, contracted in writing to sell and convey them to C., who thereupon, pursuant to the contract, entered on them, and thereafter remained in the open and visible possession of them. The assignee of B. subsequently brought suit to foreclose the mortgage, but failed to make C. a party. A decree by default was rendered, under which the lands were sold to D., who conveyed them to B., after C. had paid to A. all that was due upon the contract, and received from him a deed, which was in due time recorded. B. brought ejectment, and C. filed his bill to redeem. Held, that C., not having been served with process, was not bound by the foreclosure proceedings, and that the title which passed by the sale under them was subject to his right of redemption. *Noyes v. Hall*, 97 U. S. 34, 24 L. Ed. 909.

**32.** *Johns v. Wilson*, 180 U. S. 440, 451, 45 L. Ed. 613.

**33.** *Dupasseur v. Rochereau*, 21 Wall. 130, 136, 22 L. Ed. 588; *Watson v. Bondurant*, 21 Wall. 123, 23 L. Ed. 509; *Avegno v. Schmidt*, 113 U. S. 293, 299, 28 L. Ed. 1009.

**34.** *Kawananakoa v. Polyblank*, 205 U. S. 349, 354, 51 L. Ed. 834. See the title TERRITORIES.

**35. Where property has been conveyed in trust.**—*Clark v. Reyburn*, 8 Wall. 318, 19 L. Ed. 354.

**36. Trustees.**—When A., of one state, mortgages by way of trust deed to B., of another, lands in that other in trust for C., of this same other state, authorizing B. upon default in the payment of the mortgage debt to take possession of the mortgaged premises and sell them upon certain specified conditions, B. is a necessary party in any proceedings in the nature of foreclosure; though by statute of the state, B. may have been required to give bond such as above mentioned, and may not have given it. And if C., the creditor, have filed a bill for foreclosure against A. and B., A. cannot transfer the case from the state court to the circuit court under the act of July 27th, 1866. The suit is not one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of B., to whom the trust deed was made. *Gardner v. Brown*, 21 Wall. 36, 22 L. Ed. 527.

essary party to a bill to foreclose a junior mortgage, where the decree sought is only for a foreclosure of the equity of redemption from the prior mortgage, and not of the entire property or estate.<sup>37</sup> To a bill in equity to foreclose a second mortgage, although the first mortgagee is not a usual or necessary party when the decree sought and rendered is subject to his mortgage, yet, at least when he holds the legal title, and his debt is due and payable, he may, and, when the property is ordered to be sold free of all incumbrances, must be made a party; and if he is, and the bill contains sufficient allegations, he is barred by the decree, the bill in such case being in effect both a bill to foreclose the second mortgage and a bill to redeem from the first mortgage.<sup>38</sup> The second mortgagee, in filing his bill of foreclosure and praying for appointment of a receiver, may properly make the first mortgagee a party, though admitting the priority of the lien of the first mortgage and not asking any direct relief against him.<sup>39</sup> Prior mortgagees, and those having elder titles not made parties to the suit, cannot be affected by the judgment.<sup>40</sup>

(7) *Subsequent Incumbrancers*.—Subsequent incumbrancers are not necessary parties in a proceeding in equity to foreclose the mortgage.<sup>41</sup>

(8) *Adverse Claimants*.—In a suit to enforce the lien of a mortgage it is competent to unite in the same suit both the mortgagor and the party claiming the property adversely to the lien of the mortgage, by virtue of proceedings had subsequently to its execution. If the plaintiff is entitled to have the property sold in satisfaction of the debt secured by the mortgage, it was his right to have it sold free from any apparent claim thereon wrongly asserted by the holder of a tax title. Such relief could not be had without making the latter a party to the suit.<sup>42</sup> But it is well settled that in a foreclosure proceeding the complainant cannot make a person who claims adversely to both the mortgagor and mortgagee a party, and litigate and settle his rights in that case.<sup>43</sup>

**37. Prior incumbrancers.**—Woodworth v. Blair, 112 U. S. 8, 11, 28 L. Ed. 615; Jerome v. McCarter, 94 U. S. 734, 24 L. Ed. 136; Nalle v. Young, 160 U. S. 624, 642, 40 L. Ed. 560; Hagan v. Walker, 14 How. 29, 37, 14 L. Ed. 312, distinguishing and explaining the holding in Finley v. United States Bank, 11 Wheat. 304, 6 L. Ed. 480, to the effect that although, in general, all incumbrancers must be made parties to a bill of foreclosure, yet where a decree of foreclosure and sale was made and executed, at the suit of a subsequent mortgagee, and with the consent of the mortgagor, it not appearing to the court that there were any prior incumbrancers, the proceedings will not be set aside, upon the application of the mortgagor, in order to let in a prior mortgagee, who ought regularly to have been made a party, unless it be necessary to prevent irreparable mischief. See, also, New Orleans, etc., Ass'n v. Le Breton, 120 U. S. 765, 768, 30 L. Ed. 821.

**38.** Hefner v. Northwestern Life Ins. Co., 123 U. S. 747, 754, 31 L. Ed. 309.

**39.** Miltenberger v. Logansport R. Co., 106 U. S. 286, 306, 27 L. Ed. 117.

**40.** Lacassagne v. Chapuis, 144 U. S. 119, 125, 36 L. Ed. 368; Finley v. United States Bank, 11 Wheat. 304, 6 L. Ed. 480; Dupasseur v. Rochereau, 21 Wall. 130, 137, 22 L. Ed. 588. See, generally, the title RES ADJUDICATA.

In foreclosure proceedings in Louisiana if there be a subsequent mortgage, the prior mortgage containing the pact de non

alienando, the mortgagee therein need not be made a party, but must take notice of the proceedings to enforce the prior mortgage at his peril. Nalle v. Young, 160 U. S. 624, 642, 40 L. Ed. 560.

**41. Subsequent incumbrancers.**—Brewster v. Wakefield, 22 How. 118, 129, 16 L. Ed. 301.

"Subsequent incumbrancers, when not made parties to a bill for foreclosure or sale, are not bound by the decree; nor is that rule violated in the least degree when it is held that the title of the defendants is paramount, as that consequence flows from the fact that the lien of the judgment under which the defendants claim is prior to that under which the plaintiff claims his title. Whatever rights the plaintiff had prior to the sale in equity which gives the defendants the paramount title, he still has, wholly unimpeached by that sale or by any other cause, unless they are barred by lapse of time or laches." Howard v. Railway Co., 101 U. S. 837, 848, 25 L. Ed. 1081.

Under the Louisiana code the seizure and sale, by virtue of executory process under a mortgage, are not affected by the existence of subsequent mortgages, the owners of which are not made parties to the proceeding. Carite v. Trotot, 105 U. S. 751, 755, 26 L. Ed. 1223.

**42.** Mendenhall v. Hall, 134 U. S. 559, 568, 33 L. Ed. 1012.

**43.** Dial v. Reynolds, 96 U. S. 340, 341, 24 L. Ed. 644.



(9) *Joint Tenants*.—Where one of four joint tenants makes a deed of trust of land conveyed to the four, the deed of trust purporting to convey the whole estate, it is not necessary, on a bill filed, to have the land sold under the deed of trust to make the three who do not convey parties defendant to the bill.<sup>44</sup>

(10) *Husband and Wife*.—As to whether the husband is a necessary party in an action to foreclose a mortgage on wife's realty, see the title HUSBAND AND WIFE, vol. 6, p. 734.

(11) *Bondholders*.—In the foreclosure of a mortgage given to secure certain bondholders it is not necessary that they be made parties to the suit; they are protected by their trust deed and are bound by the decree so long as it stands unreversed, and is not set aside or vacated.<sup>45</sup> Bondholders who refuse to unite with the other complainants in the prosecution of a suit to compel the trustee to foreclose the mortgage, may be made parties defendant.<sup>46</sup>

(12) *Tenants*.—Persons who are primarily liable for a mortgage debt are not relieved by the omission to make a tenant a party to a foreclosure bill when they are not prejudiced by said omission.<sup>47</sup>

c. *Intervention*.—The simple contract creditor can intervene, and if he has any equities in respect to the property, whether prior or subsequent to those of the plaintiff, can secure their determination and protection.<sup>48</sup> General creditors of the mortgagor having no specific lien are not suffered to intervene in an appellate tribunal on a charge that the parties to a foreclosure proceeding have made agreements in fraud of the law, or rights of a third person.<sup>49</sup>

9. SERVICE OF PROCESS.—As to the laws applicable to service of process, see the title SUMMONS AND PROCESS. As to whether the service of process in a territory should be served by a marshal of the United States or whether by a marshal of the territory, see the title SUMMONS AND PROCESS.

10. DEFENSES—*a. No Other Defenses than Allowable on Obligation Secured*.—Where a note secured by a mortgage is transferred to a bona fide holder for value before maturity, and a bill is filed to foreclose the mortgage, no other or further defenses are allowed against the mortgage than would be allowed were the action brought in a court of law upon the note.<sup>50</sup>

*b. Want of Title*.—It is a good defense to foreclosure proceedings that the plaintiff has no good title to the obligations secured.<sup>51</sup>

*c. Insufficient Description of Mortgaged Property*.—A defense set up in the answer in a foreclosure suit that the deed executed by the mortgagee, the subject of the mortgage, did not contain all the parcels of land to which the mortgagor was entitled, was not sufficient, where the answer itself disclosed that the mortgagor had availed itself of its remedy by direct proceedings against the mortgagee to reform the deed, the result of which was a decree in favor of the

44. *Joint tenants*.—Stephen v. Beall, 22 Wall. 329, 22 L. Ed. 786. See the title JOINT TENANTS AND TENANTS IN COMMON, vol. 7, p. 533.

45. *Bondholders*.—Richter v. Jerome, 123 U. S. 233, 247, 31 L. Ed. 132.

46. *Bondholders refusing to unite in foreclosure proceedings*.—Hotel Co. v. Wade, 97 U. S. 13, 24 L. Ed. 917.

47. *Tenants*.—Johns v. Wilson, 180 U. S. 440, 449, 45 L. Ed. 613.

48. *Intervention*.—Hollins v. Brierfield Coal, etc., Co., 150 U. S. 371, 378, 37 L. Ed. 1113. See, generally, the title PARTIES.

49. *Bronson v. Railroad Co.*, 2 Black 524, 528, 17 L. Ed. 359. See, generally, the title APPEAL AND ERROR, vol. 2, pp. 71, 313.

50. *No other defenses than allowable on obligation secured*.—Kenicott v. Super-

visors, 16 Wall. 452, 469, 21 L. Ed. 319; Carpenter v. Longan, 16 Wall. 271, 274, 21 L. Ed. 313; Chicago R. Equip. Co. v. Merchants' Bank, 136 U. S. 268, 283, 34 L. Ed. 349; Sawyer v. Prickett, 19 Wall. 146, 166, 22 L. Ed. 105. See, also, Swift v. Smith, 102 U. S. 442, 444, 26 L. Ed. 193.

51. *Want of title in plaintiff*.—In a suit to foreclose a mortgage executed as security for certain notes, where it is shown that the plaintiff never acquired any title to the notes as owner, or as holder of them as security for any indebtedness from the maker to him, and that he received them from the defendant, as agent, to raise or advance money on, for, or to the defendant, and failed to do so and retained them tortiously, this constitutes a good defense to the suit. Weaver v. Field, 114 U. S. 244, 247, 29 L. Ed. 143.



mortgagor compelling a reformation of the deed, so as to include all of the lands purchased.<sup>52</sup>

d. *Illegal Use of Premises.*—It is not a good defense that the property covered was used for an illegal purpose unknown to the mortgagee, as, for instance, gambling, and therefore that the mortgage was invalid.<sup>53</sup>

e. *Illegality or Fraud.*—Where a mortgage is given to secure a note for a stock subscription to a railroad, and a misrepresentation of an existing fact by an agent of the company is set up as a defense to a suit to foreclose, it must appear that the misrepresentation was actually made, that the alleged agent was in fact an agent of the company by whose acts they would be bound, and that the statement was relied upon and through it he was induced to subscribe.<sup>54</sup> A corporation organized under an unlawful scheme to form a trust and to illegally obtain the property of the stockholders which had been given to the corporation, does not constitute a defense to the right of the trustee to foreclose a mortgage given to secure certain bonds, if the bondholders had no knowledge of the illegality or fraud.<sup>55</sup> It is no defense to a suit to foreclose a mortgage that the debt arose from the receipt of the bills of a bank that was chartered illegally and for fraudulent purposes, and that the bills were void in law, and finally proved worthless in fact; the bills themselves having been actually current at the time the defendant received them, and they not having proved worthless in his hands, nor he being bound to take them back from persons to whom he had paid them away.<sup>56</sup>

f. *Conditional Surrender of Paper Secured.*—Where an agreement is made by the holders of notes of a corporation, secured by a mortgage, that they will convert them into stock upon certain conditions, which are never complied with, a conditional surrender of the notes secured by the mortgage does not cut off the right to foreclose for their satisfaction.<sup>57</sup>

g. *Where Mortgage Given to Receiver.*—Where a receiver has taken a mortgage and applied the same in settlement of the receivership, the mortgagor will not be allowed to defend on the ground that the receiver had no authority to transfer the mortgage.<sup>58</sup>

**52. Insufficient description of mortgaged property.**—*Crescent Min. Co. v. Wasatch Min. Co.*, 151 U. S. 317, 322, 38 L. Ed. 177.

**53. Illegal use of premises.**—*Dickerman v. Northern Trust Co.*, 176 U. S. 181, 196, 44 L. Ed. 423.

**54. Illegality or fraud.**—*Sawyer v. Prickett*, 19 Wall. 146, 165, 22 L. Ed. 105.

**55.** *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 200, 44 L. Ed. 423.

**56.** *Orchard v. Hughes*, 1 Wall. 73, 17 L. Ed. 560.

**57. Conditional surrender of paper secured.**—*Pugh v. Fairmount Gold, etc., Min. Co.*, 112 U. S. 238, 243, 28 L. Ed. 684.

**58. Where mortgage given to receiver.**—A debtor of a bank made notes in its favor, and they were secured by a mortgage on certain real property. Subsequently, a firm filed a creditor's bill against the bank and obtained the appointment of a receiver with authority to proceed and collect the debts due the bank, though they had not obtained a judgment at law, but did so soon after the bill was filed. The wife of the debtor, having become the owner of the equity of redemption of the property, made an arrangement with the receiver by which the latter transferred to her the mort-

gage, and took her notes secured by mortgage on the same property. These notes he passed to the firm in part satisfaction of their judgment against the bank. After these proceedings had gone on for twelve years, the creditor's bill filed by the firm was dismissed for want of jurisdiction, because no judgment had been obtained before the bill was filed; and the receiver was ordered to bring into court the assets of the bank which he had received, and the proceeds of such as he had parted with. Failing to do this, because he had surrendered the assets to the debtors, and turned over the proceeds to the creditor of the bank, the bank on his report of these facts obtained a decree for the value of the assets which had come into his possession, including the mortgage surrendered to the wife of the debtor. Suit being brought on her notes and to foreclose the mortgage given by her in the settlement with the receiver, she set up in defense that the notes were without consideration, because the receiver had no authority to transfer to her the mortgage debt, in settlement of which they were given, and thus the debt was still a charge upon her land; that if the notes given by her were valid, they belonged to the bank, and not

h. *Alteration of Instrument*.—As to the alteration of negotiable papers or a mortgage securing the same, as constituting a defense to an action on the mortgage, see the title *ALTERATION OF INSTRUMENTS*, vol. 1, p. 263.

i. *Agreements between Parties*.—An agreement between the original parties to the mortgage cannot be set up in defense against a bona fide holder where such holders are excluded from the provision.<sup>59</sup>

j. *Where Mortgage Is of Pre-Emption Right*.—The mortgagor of the pre-emption right acquired by a deed in fee simple, with a covenant of general warranty, cannot make out a sufficient defense unless by proving payment of the money, want of consideration, or fraud which will avoid the contract.<sup>60</sup>

k. *Waiver*.—Where the mortgagor fails to set up matter in defense, he is deemed to have waived it.<sup>61</sup>

11. *PLEADING*.—a. *Misjoinder or Multifariousness*.—A bill of foreclosure is bad for misjoinder of parties and for multifariousness, where persons are made defendants thereto who claim title adversely to the mortgagor and the complainant, and the latter seeks in that suit to litigate and settle his rights.<sup>62</sup> Where on the refusal of the trustee to act, the cestui que trust institutes suit of foreclosure and the bill joins trustees, creditors of the mortgagor, and holders of liens on the property, it is not open to the objection that it is multifarious.<sup>63</sup>

b. *Description of Parties*.—A description of the parties is indispensable to the exercise of jurisdiction in a suit in the federal court to foreclose an equity of redemption.<sup>64</sup>

c. *Description of Interests*.—Great precision is not necessary in stating the interests in the mortgaged premises.<sup>65</sup>

to a member of the firm because the receiver had no authority to transfer them to the firm. Held, that the bank, by electing to charge the receiver with the value of the securities surrendered by him in settlement with her, and the firm, had affirmed the transaction, and relinquishment of claim against her or her land, and that consequently defense set up by her was not sustained. *Brown v. Bass*, 4 Wall. 262, 18 L. Ed. 330.

59. *Agreements between parties*.—In a suit to foreclose, brought by a bona fide holder of a mortgage given to secure a note for stock in a railroad company, it is no defense that the mortgagor holds an agreement which provides that the company will not demand the interest but pay the same out of the dividend of the stock, and will save him harmless from the interest if the mortgage or note is transferred; but provides that the provision shall be no defense to the payment of interest if the note or mortgage shall be in the hands of a third party, either as security or otherwise. *Sawyer v. Prickett*, 19 Wall. 146, 166, 22 L. Ed. 105.

60. *Where mortgage is of pre-emption right*.—*Bush v. Marshall*, 6 How. 284, 288, 12 L. Ed. 440.

61. *Waiver*.—Where in a suit in Louisiana to foreclose a mortgage containing the pact de non alienando, the mortgagor fails to set up prescription as a defense, he is deemed to have waived it, and under such circumstances, those who take from them, their heirs or assigns, are as equally estopped from pressing it as effectually as the debtor himself. *Shields v. Schiff*, 124 U. S. 351, 357, 31 L. Ed. 445.

62. *Misjoinder or multifariousness*.—*Dial v. Reynolds*, 96 U. S. 340, 24 L. Ed. 644. See, generally, the titles *MULTIFARIOUSNESS; PARTIES*.

"As a general rule, a court of equity, in a suit to foreclose a mortgage, will not undertake to determine the validity of a title prior to the mortgage and adverse to both mortgagor and mortgagee; because such a controversy is independent of the controversy between the mortgagor and the mortgagee as to the foreclosure or redemption of the mortgage, and to join the two controversies in one bill would make it multifarious." *Hefner v. Northwestern Life Ins. Co.*, 123 U. S. 747, 751, 31 L. Ed. 309.

63. *Grant v. Phoenix Life Ins. Co.*, 121 U. S. 105, 112, 30 L. Ed. 905.

64. *Description of parties*.—*Mossman v. Higginson*, 4 Dall. 12, 14, 1 L. Ed. 720.

65. *Description of interests*.—In the absence of any statute or rule of court, restricting the natural meaning of the words, the allegation in the bill to foreclose, that a third party "claims some interest in and to a portion of the mortgaged premises, the exact nature of which your orator is unable to set out," is sufficient to include the interest, of a claimant under a tax deed, whether it was a mere lien for the amount of the taxes, as it would have been if the right of redemption from the sale for taxes had not expired, or if the treasurer's deed was void for any reason, or was a perfect title in fee, as it would be if that right had expired and there was no defect in the tax deed. *Hefner v. Northwestern*



d. *Allegation as to Default*.—Where under the terms of a mortgage default occurs upon failure to pay interest, unless failure is caused by mortgagee, the allegation is sufficient where it shows default in interest.<sup>66</sup>

12. EVIDENCE—*a. Presumptions and Burden of Proof*.—The mortgagee to enforce his mortgage must prove his debt.<sup>67</sup>

*b. Production of Paper Secured*.—It is not necessary to produce bonds in evidence, the issue of which has been averred in the bill and admitted in the answer.<sup>68</sup> Where a deed of trust is made to secure the payment of certain promissory notes, in an action upon the deed, the notes may be read in evidence, to prove the amount of the debt intended to be secured by the deed, without the notes having been assigned by the payees to the plaintiffs, the trustees in the deed.<sup>69</sup>

13. THE DECREE—*a. Necessity for Decree*.—The general rule is that the interest of the mortgagor, such as it is, is so far protected by a court of equity, that the mortgagee cannot foreclose, without a decree in equity.<sup>70</sup>

*b. Time for Decree*.—It is proper for the court to refuse to delay a decree in favor of the complainant in foreclosure proceedings of a mortgage, in the form of a deed of trust, for the purpose of allowing the right to the equity of redemption under the trust deed to be ascertained and settled by the court as between the applicant and another subsequent purchaser where he does not pay, or offer to bring into court, for the use of the mortgagee, the money due on the mortgage, and who has no interest in the controversy.<sup>71</sup>

*c. Form and Requisites*.—The decree should contain a finding of the fact and amount of the alleged indebtedness and provide for redemption.<sup>72</sup> Uncertainty in the terms of the decree will render it inoperative and void.<sup>73</sup> It is in-

Life Ins. Co., 123 U. S. 747, 756, 31 L. Ed. 309.

66. *Allegation as to default*.—Where a company having a contract to construct waterworks for the use of the city mortgaged its property and works to secure bonds issued and the semi-annual interest coupons thereon which stipulated that on default in payment of such coupons for ninety days the lien of the mortgage might be enforced for the whole debt unless failure in payment was caused by the city under the said contract, on default in payment of the coupons for the period mentioned, it was held that the bill to foreclose need not allege that the failure to pay was not caused by the city, that if there was such fault in the city it was a matter of defense to be made out by the defendant. *Waterworks Co. v. Barret*, 103 U. S. 516, 518, 26 L. Ed. 523.

67. *Presumptions and burden of proof*.—*Wood v. Weimar*, 104 U. S. 786, 793, 26 L. Ed. 779.

68. *Production of paper secured*.—*Dickerman v. Northern Trust Co.*, 176 U. S. 181, 194, 44 L. Ed. 423.

69. *Wilcox v. Hunt*, 13 Pet. 378, 10 L. Ed. 209.

70. *Necessity for decree*.—*Bank v. Guttschlick*, 14 Pet. 19, 29, 10 L. Ed. 335.

71. *Time for decree*.—*Brine v. Insurance Co.*, 96 U. S. 627, 631, 24 L. Ed. 858.

72. *Form and requisites of decree*.—In *Clark v. Reyburn*, 8 Wall. 318, 19 L. Ed. 354, a decree of strict foreclosure, which contained no finding, either of the fact or amount of the alleged indebtedness, and gave no time within which to pay or

redeem, was reversed on these grounds, although the bill was taken pro confesso as to the parties having the entire beneficial interest, and contained an averment of the precise amount of the mortgage debt then due. The same consequences undoubtedly would have followed, if it had been a decree of foreclosure and sale, instead of a strict foreclosure; and the error is as vital where a larger amount than is actually due is ordered to be paid, as where there is a failure to find what amount is due. *Chicago, etc., R. Co. v. Fosdick*, 106 U. S. 47, 71, 27 L. Ed. 47.

It is obvious that the finding of the amount due, for nonpayment of which, according to the terms of the decree, the mortgaged property is ordered to be sold, is the foundation of the right of the mortgagee further to proceed, and a substantial error in that finding must, on appeal, vitiate all subsequent proceedings. Unlike a calculable error in the amount of a personal judgment which may be cured by a remittitur, it is otherwise incurable; for, as it is an illegal exaction, made as a condition for preserving the rights of the mortgagor in his estate, and, if executed, depriving him wrongfully of them, it propagates itself through all subsequent stages of the cause. *Chicago, etc., R. Co. v. Fosdick*, 106 U. S. 47, 71, 27 L. Ed. 47.

As to matters of redemption, see post, "Redemption," XIII.

73. Where a certain lot of land conveyed by two deeds of trust to secure the payment of certain loans, and on default in payment the creditor institutes



dispensable in a decree of foreclosure of a mortgage, for default in payment of interest that there should be declared the fact, nature, and extent of the default which constituted the breach of the condition of the mortgage, and which justified the complainant in filing his bill to foreclose it, and the amount due on account thereof, which, with any further sums subsequently accruing and having become due, according to the terms of the security, the mortgagor is required to pay, within a reasonable time to be fixed by the court, and which, if not paid, a sale of the mortgaged premises is directed.<sup>74</sup>

d. *Order Barring Junior Mortgagee's Right*.—Where a junior mortgagee is a party defendant to a foreclosure bill in which there is a prayer that he be decreed to redeem, and where the priority of the plaintiff's mortgage is found or conceded, and a sale is ordered in default of payment, declaring the right of the debtor to redeem to be forever barred, a similar order as to right of redemption by the junior mortgagee is not substantially or even formally necessary.<sup>75</sup>

e. *Consent Decree*.—In a suit to foreclose a mortgage given to secure bonds it is within the power of the parties to the suit to agree that a decree may be entered for a sale of the mortgaged property without any specific finding of the amount due on account of the mortgage debt, or without giving a day of payment; also, that if the property is bought at a sale by or for the bondholders, payment of the purchase money may be made by a surrender of the bonds.<sup>76</sup>

f. *Scope of Decree*.—(1) *In General*.—In equity the decree is that the mortgaged premises be sold to pay the debt, and if insufficient for that purpose, that the plaintiff have further remedy by execution for the balance.<sup>77</sup>

(2) *Conformity to Pleadings*.—In foreclosure proceedings, though the specific relief sought is a strict foreclosure, a decree for a sale of the property and for the enforcement of the agreement contained in the deed of trust is, under the prayer for general relief, appropriate.<sup>78</sup> A mortgagee whose bill seeks a foreclosure, on the sole ground that the mortgage is a legal one, cannot be decreed an equitable mortgagee, unless he files a new bill in which his equitable rights are set forth.<sup>79</sup>

(3) *Preservation of Property*.—Where a court of equity has mortgaged property in its charge it is its duty to preserve it, not only for the benefit of lien creditors, but also for the benefit of the mortgagor company whose possession has been displaced.<sup>80</sup>

(4) *Personal Decree for Deficiency*.—In some cases a personal decree may be entered up against the mortgagor for the residue of the debt, after the proceeds arising from the sale of the land have been applied,<sup>81</sup> but this is not gen-

eral, a suit alleging the refusal of one of the trustees to sell the property embraced in the trust and a decree is entered appointing a new trustee in the place of the alleged delinquent one, "in the deed of trust," but without reference to which deed. The decree rendered is inoperative and void for uncertainty. *Shepherd v. Pepper*, 133 U. S. 626, 648, 33 L. Ed. 706.

74. *Chicago, etc., R. Co. v. Fosdick*, 106 U. S. 47, 70, 27 L. Ed. 47; *Parker v. Dacres*, 130 U. S. 43, 48, 32 L. Ed. 848.

75. *Order barring junior mortgagee's right*.—*Simmons v. Burlington, etc., R. Co.*, 159 U. S. 278, 288, 40 L. Ed. 150.

76. *Consent decree*.—*Pacific Railroad v. Ketchum*, 101 U. S. 289, 297, 25 L. Ed. 932. See, generally, the title JUDGMENTS AND DECREES, vol. 7, p. 544.

77. *Scope of decree*.—*Sheldon v. Sill*, 8 How. 441, 450, 12 L. Ed. 1147. See post, "Personal Decree for Deficiency," XII, C, 13, f, (4).

78. *Conformity to pleadings*.—*Sage v. Central R. Co.*, 99 U. S. 334, 25 L. Ed. 394.

79. *Koehler v. Black River Falls Iron Co.*, 2 Black 715, 17 L. Ed. 339.

80. *Jerome v. McCarter*, 94 U. S. 734, 738, 24 L. Ed. 136. See, generally, the title RECEIVERS.

81. *Personal decree for deficiency*.—The ninety-second rule of equity practice prescribed by the supreme court authorizes a personal judgment against the defendant in foreclosure cases. *Walker v. Dreville*, 12 Wall. 440, 442, 20 L. Ed. 429.

"The rule of court by which a personal decree may, in some cases, be entered up against the mortgagor for the residue of the debt, after the proceeds arising from the sale of the land have been applied, is a recent rule intended to obviate the necessity of a separate action. It has not changed the essential nature of the decree for foreclosure and sale." *Kountze v. Omaha Hotel Co.*, 107 U. S. 378, 393.

erally done without the authority of a rule of a court.<sup>82</sup>

g. *Amount of Decree*—(1) *Where Debt Payable in Installments*.—Where a mortgage has been given to secure a debt payable in installments, the decree may require payment of all installments, then due, though maturing since the

27 L. Ed. 609, in which case the court said: "It often happens that the debt is not fully ascertained when a decree for sale and foreclosure is made; as where there are many outstanding bonds which have to be called in and verified. The sale in such cases is frequently made in advance, and the proceeds brought into court for distribution amongst those who may appear to be entitled thereto; all which shows that a decree of foreclosure is a very different thing from a personal decree or judgment for the debt."

A personal decree for a deficiency is a necessary incident of a foreclosure suit in equity, under § 808 of the Revised Statutes relating to the District of Columbia. *Shepherd v. Pepper*, 133 U. S. 626, 651, 33 L. Ed. 706.

The provision in § 808 of the Revised Statutes relating to the District of Columbia, as to decrees in the enforcement of liens was interpreted in the case of *Dodge v. Freedman's Sav., etc., Co.*, 106 U. S. 445, 27 L. Ed. 206, where it was held that it authorized a decree in personam against the debtor for the balance remaining due after the proceeds of the sale of lands covered by a mortgage or a deed of trust in the nature thereof had been applied to the satisfaction of the debt. *Shepherd v. Pepper*, 133 U. S. 626, 652, 33 L. Ed. 706.

Where the holder of certain notes, secured by a deed of trust in the nature of a mortgage upon land in the District of Columbia filed a bill of foreclosure it was held that § 808 of the Revised Statutes relating to the District of Columbia applies to suits for the foreclosure of deeds of trust in the nature of mortgages to secure the payment of money, and authorize a decree in favor of the mortgagee against the debtor for the payment of the balance of the debt that might remain due after the application thereto of the proceeds of the sale of the trust property, and an order for execution thereof as at law. *Dodge v. Freedman's Sav., etc., Co.*, 106 U. S. 445, 446, 27 L. Ed. 206.

Where a mortgage is given to the endorers of a note of the debtor to indemnify them from loss by their endorsement, and on the debtor's default in payment, the endorers pay the note entering the amount paid by them upon their books in their general account against the debtor and afterwards assign the mortgage together with the note or obligation therein also mentioned, the assignee is entitled to a decree for the foreclosure of the mortgage and also to a decree against the debtor himself for

so much of the money paid by the endorers, with interest, as the money obtained by the sale of the land under the foreclosure should be insufficient to satisfy. *Bendey v. Townsend*, 109 U. S. 665, 668, 27 L. Ed. 1065.

82. Without the authority of a rule of the supreme court, a district court of the United States has no authority to direct a mortgagor to pay the balance of debt, which may remain unsatisfied after the sale of the mortgaged premises. *Noonan v. Lee*, 2 Black 499, 500, 17 L. Ed. 278; *Noonan v. Bradley*, 12 Wall. 121, 125, 20 L. Ed. 279.

In *Orchard v. Hughes*, 1 Wall. 73, 17 L. Ed. 560, it was held that independently of a rule of court, execution cannot issue in a decree for foreclosure of a mortgage in chancery for the balance left due after a sale of the mortgaged premises (*Noonan v. Lee*, 2 Black 499, 17 L. Ed. 278, recognized); and this (by opinion, however, of but a majority of the court), applies to the territorial court of Nebraska, as much as to the courts of states organized under the judiciary act of 1789.

In *Hershfield v. Griffith*, 18 Wall. 657, 658, 21 L. Ed. 968, and in *Hornbuckle v. Toombs*, 18 Wall. 648, 652, 21 L. Ed. 966, the court said: "In the case of *Orchard v. Hughes*, 1 Wall. 73, 17 L. Ed. 560, a majority of this court was of opinion that the territorial courts were subject to the same general regulations in equity cases which govern the practice in the circuit and district courts. That was the case of a foreclosure of a mortgage in the territorial court of Nebraska, and the court, under a territorial law, not only decreed a foreclosure and sale of the mortgaged premises, but gave a personal decree against the defendant for the deficiency. We had decided in *Noonan v. Lee*, 2 Black 499, 17 L. Ed. 278, that under the equity rules prescribed for the circuit and district courts, such a decree could not be made. The majority of the court now applied the same rule in the case of *Orchard v. Hughes*, although it was decided by a territorial court. Following out the principle involved in that decision, we subsequently, in the case of *Dunphy v. Kleinsmith*, reversed a judgment of the supreme court of Montana, on the ground that the case (being in nature of a creditor's bill, filed to reach property which the debtor had fraudulently conveyed) was a clear case of equity, whilst the proceedings therein exhibited no resemblance to equity proceedings, there being a trial by jury, a verdict for damages, and a judgment on the verdict. On a careful review of the



institution of the suit.<sup>83</sup> And where a party designing to foreclose a mortgage, notified the mortgagor before filing the bill, that he elected to consider the entire amount of the mortgage debt as due, he was entitled to a decree for the full amount although, according to the terms of the bond, one of the installments was not due when the bill was filed.<sup>84</sup>

(2) *Stipulations That Principal Due upon Default of Interest.*—A stipulation in a mortgage that on default in payment of interest on the debt secured, the principal shall become due, is in the nature of a penalty, and may be regarded as stricti juris, to be construed fairly and reasonably, according to the meaning of the parties, but leaning, if need be, in any case of ambiguity, in favor of the debtor.<sup>85</sup>

(3) *Where Trustee Has Power to Declare Default.*—Where by the terms of a mortgage the principal debt does not become absolutely due on default in payment of the interest for a certain period, but only at the election of the trustee, as declared by him and notified to the mortgagor, a decree finding the whole amount due in the absence of such notice is erroneous, and redemption may be exercised by paying the interest then due and in arrears.<sup>86</sup>

(4) *Interest.*—As to interest, see the title INTEREST, vol. 7, p. 217.

(5) *Expenditures in Extinguishing Tax Titles.*—The mortgagor may be decreed such sums as he may have expended in extinguishing tax titles.<sup>87</sup>

(6) *Where Mortgage Assigned before Maturity.*—Upon a bill filed by an assignee to foreclose a mortgage given to secure a negotiable note, assigned to him before maturity bona fide for value and without notice, the amount due is the face of the note and interest which could be recovered in an action at law, and a decree that the amount due shall be paid within a specified time, or that the mortgaged premises shall be sold follows necessarily.<sup>88</sup>

(7) *Premiums Paid for Insurance.*—Where a deed of trust required the grantor to keep the property insured for the benefit of the grantee, which the grantor failed to do, under foreclosure proceedings it was held that the sum paid by the grantee for such insurance was a proper charge and a lien under the deed of trust.<sup>89</sup>

(8) *Tacking.*—An act of Pennsylvania confined the remedy of a mortgagee to the recovery of the principal and interest due on the mortgage; therefore, a

whole subject we are not satisfied that those decisions are founded on a correct view of the law."

If, in Louisiana, seizure and sale of mortgaged property do not result in full satisfaction of the debt, suit has to be brought on the primary security in order to recover the balance. *Gordon v. Gilfoil*, 99 U. S. 168, 175, 25 L. Ed. 383.

83. *Where debt payable in installments.*—*Chicago, etc., R. Co. v. Fosdick*, 106 U. S. 47, 74, 27 L. Ed. 47.

84. *Noonan v. Lee*, 2 Black 499, 17 L. Ed. 278; *Noonan v. Bradley*, 12 Wall. 121, 125, 20 L. Ed. 279.

85. *Stipulations that principal due upon default of interest.*—*Chicago, etc., R. Co. v. Fosdick*, 106 U. S. 47, 77, 27 L. Ed. 47.

86. *Where trustee has power to declare default.*—*Chicago, etc., R. Co. v. Fosdick*, 106 U. S. 47, 74, 27 L. Ed. 47.

87. *Expenditures in extinguishing tax titles.*—Where a suit is brought to foreclose a deed of trust, in the nature of a mortgage of land, made to secure the payment of a note, with interest, containing covenants that the mortgagor would pay all taxes and assessments on

the premises, and there is given power to sell on any breach of condition, and out of the proceeds, after paying all expenses, including all moneys advanced for taxes, insurance or other liens and assessments, and the land is sold and conveyed for nonpayment of taxes, and it is insisted by the defendant that the tax deeds were void, for want of previous notice to certain persons, but it is at least doubtful upon the evidence whether the notice was not given, and there is no evidence whatever of any invalidity in the taxes, the sales or the deeds, in any other respect—in this state of things, the mortgagee was not bound to take the risk of contesting the tax title, and the sums paid to extinguish those titles were reasonable expenses chargeable to the mortgagor by the terms of the mortgage. *Windett v. Union Mut. Life Ins. Co.*, 144 U. S. 581, 584, 36 L. Ed. 551.

88. *Where mortgage assigned before maturity.*—*Carpenter v. Longan*, 16 Wall. 271, 273, 21 L. Ed. 313.

89. *Premiums paid for insurance.*—*Brine v. Insurance Co.*, 96 U. S. 627, 631, 24 L. Ed. 858. See the title INSURANCE, vol. 7, p. 66.



simple contract debt could not be tacked to a mortgage.<sup>90</sup>

(9) *Costs and Fees.*—A court of equity, where a mortgage authorizes the payment of the expenses of the mortgagee, may pay, out of funds in his hands, the taxed costs, and also such counsel fees in behalf of the complainants as, in the discretion of the court, it may seem right to allow.<sup>91</sup> But the provision in a trust deed authorizing commissions on sale as trustee will not warrant a decree for such fees on foreclosure.<sup>92</sup>

(10) *Set-Off and Credits.*—In a decree of foreclosure of a mortgage given to secure payment of certain notes, it is proper to allow the amount of a judgment rendered against the mortgagee in another state, and acquired by the mortgagor, to be set off as against the notes.<sup>93</sup> Credits established by agreement may be set off but not credits to be ascertained by testimony as to the value of the property at the time of the agreement.<sup>94</sup> Also a mortgage given by the purchaser of mortgaged premises may be deducted where he seeks to collect the amount due on the original mortgage.<sup>95</sup>

(11) *Ascertainment of Amount.*—Upon a bill of foreclosure filed by the assignee, an account must be taken to ascertain the amount due upon the instru-

90. *Dorow v. Kelly*, 1 Dall. 143, 145, 1 L. Ed. 73.

91. *Cost and fees.*—*Bronson v. La Crosse, etc.*, R. Co., 2 Wall. 283, 17 L. Ed. 725. See ante, "Stipulation for Payment of Costs and Fees," V, B, 3.

92. Where a deed of trust provided that in case of default in paying the principal or interest as each matured, or of failure to keep and perform the covenants of the deed of any of them, the trustee was authorized to sell, at public auction, after advertisement, to the highest bidder for cash, and with or without previous entry upon the premises, the right and equity of redemption of the grantors, and out of the proceeds of sale to pay the costs, charges and expenses of the advertisement, sale and conveyance, "including commissions such as are, at the time of such sale, allowed by the laws of Illinois to sheriffs on sale of real estate on execution," it was held that this provision did not impose upon the borrower the burden of paying to the lender a solicitor's fee where a suit was brought for foreclosure; and that the commissions referred to in the deed were allowed only where the property was sold, upon advertisement, by the trustee, without suit. *Fowler v. Equitable Trust Co.*, 141 U. S. 384, 407, 35 L. Ed. 786.

93. *Set-off.*—*Mendenhall v. Hall*, 134 U. S. 559, 571, 33 L. Ed. 1012. See, generally, the title SET-OFF, RECOUPMENT AND COUNTERCLAIM.

94. A written agreement between two parties recites that one is indebted to the other in a large sum of money; that the latter assumed payment of certain other debts of the former, that the former conveys to the latter a farm and certain personalty with power in the latter to convert the personalty as he should deem best into cash to apply on the indebtedness, and if the former within six months pay the indebtedness, the latter to reconvey the farm, but in default in payment

the latter might foreclose the mortgage contained in the conveyance of the said farm and agreement. The conveyance was made and a third party subsequently acquired the farm as well as the right to the indebtedness as he filed a suit against the debtor for an account of the amount due on the security of the farm and for foreclosure of the equity of redemption. It was held, that the debtor was entitled to be credited only with the proceeds realized by sale of the property mentioned in the agreement as having been sold and conveyed to the party of the second part and not to credits to be ascertained by testimony as to the value of the property at the time of the agreement. *Goodwin v. Fox*, 129 U. S. 601, 637, 32 L. Ed. 805.

95. A written agreement between two parties recites that one is indebted to the other in a large sum of money; that the latter assumed payment of certain other debts of the former; that the former conveys to the latter a farm and certain personalty with power in the latter to convert the personalty as he should deem best into cash to apply on the indebtedness, and if the former within six months pay the indebtedness the latter to reconvey the farm, but in default in payment the latter might foreclose the mortgage contained in the conveyance of the said farm and agreement. The conveyance was made and a third party subsequently acquired the farm as well as the right to the indebtedness and he filed a suit against the debtor for an account of the amount due on the security of the farm and for foreclosure of the equity of redemption. It was held that the principal of a mortgage made by the plaintiff, with interest due upon it, must be deducted from the balance found due to the party of the second part, the farm to be charged with, and to pay, the amount due on such mortgage. *Goodwin v. Fox*, 129 U. S. 601, 641, 32 L. Ed. 805.

ment secured by the mortgage.<sup>96</sup> The mortgagee can recover only to the extent of what he proves.<sup>97</sup>

h. *Conclusiveness*.—As to the conclusiveness of a former judgment upon subsequent foreclosure proceedings, see the title RES ADJUDICATA. If the initiation of foreclosure proceedings operated to acknowledge an outstanding right of redemption at that time, their culmination and the deed of the sheriff must be recognized as evidence of the assertion of an extinguishment of such equity.<sup>98</sup> A mortgage, under the law of Louisiana, is indivisible, and the foreclosure of it has the effect to extinguish it, even if all the parties to the mortgage have not been made parties to the foreclosure proceedings.<sup>99</sup> A purchaser of property at a foreclosure sale will not be heard to object to the terms and decree of sale.<sup>1</sup> Nor can either the mortgagor or his assignee in bankruptcy object to the order in which the priority of valid and subsisting liens on the mortgaged premises is fixed by the decree of foreclosure.<sup>2</sup> A decree of foreclosure does not determine the rights of a party holding a prior mortgage, when the decree itself declares that neither it, nor any sale under it, should in any way prejudice or affect the rights of such other parties.<sup>3</sup>

i. *Review*.—As to all matters relating to appeals in foreclosure proceedings, see the title APPEAL AND ERROR, vol. 1, p. 333.

j. *Effect of Death of Defendant after Decree*.—As to the necessity for revival after the death of the defendant to a decree of foreclosure, see the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 26.

14. THE SALE—*a. Prerequisites*.—Under the laws of various states certain prerequisites, such as appraisement,<sup>4</sup> actual seizure of the land,<sup>5</sup> and order of sale,<sup>6</sup> etc., are required.

b. *Notice of Sale*.—**To Whom Given**.—Where a holder of a first mortgage,

96. *Ascertainment of amount*.—Carpenter v. Longan, 16 Wall. 271, 273, 21 L. Ed. 313.

97. Wood v. Weimar, 104 U. S. 786, 793, 26 L. Ed. 779.

98. Harter v. Twohig, 158 U. S. 448, 454, 39 L. Ed. 1049.

99. Lovell v. Cragin, 136 U. S. 130, 143, 34 L. Ed. 372.

1. Thus where in a decree of sale it is provided that if certain conditions were found to exist, payment of a certain amount should be made by the purchaser of the property, in default of which resale might be ordered, a purchaser could not be heard to object to the terms and decree of sale. Any inconvenience that would be occasioned by a resale of a portion of the property could be avoided by complying with the decree and making payment accordingly. Compton v. Jesup, 167 U. S. 1, 35, 42 L. Ed. 55.

2. Jerome v. McCarter, 94 U. S. 734, 24 L. Ed. 136.

3. Humphreys v. McKissock, 140 U. S. 304, 315, 35 L. Ed. 473.

4. *Appraisement*.—Where a mortgage in Louisiana contained a clause authorizing a sale "for cash, without appraisement" and on default in payment, and in the petition praying for the order of seizure and sale, no reference was made to this clause, and the right to sell without appraisement was not claimed, and the order upon the petition was, "let executory process issue herein as prayed for and according to law," a sale without

appraisement is imported. Stockmeyer v. Tobin, 139 U. S. 176, 193, 35 L. Ed. 123.

5. *Necessity for actual seizure of land*.—By the law of Louisiana, as held by her courts, it is indispensably necessary, in order to make a valid sale of land under a foreclosure of a mortgage, that in all parishes, except Jefferson and Orleans, there should be an actual seizure of the land; not perhaps an actual turning out of the party in possession, but some taking possession of it by the sheriff more than a taking possession constructively. Watson v. Bondurant, 21 Wall. 123, 22 L. Ed. 509; Pike v. Evans, 94 U. S. 6, 10, 24 L. Ed. 40.

Where a return in a record, purporting to be a sheriff's return to a fieri facias, alleges that under a proceeding to foreclose a mortgage the sheriff seized the mortgaged premises, but does not purport to be signed by the sheriff, the return is traversable, and if the law requires an actual seizure, it may be shown that none was made. Watson v. Bondurant, 21 Wall. 123, 22 L. Ed. 509.

6. *Order of sale*.—Under the civil code of Indiana, the "order of sale" in proceedings for the foreclosure of a mortgage comes within the function and supplies the purpose of an execution. The code requiring executions to be sealed with the seal of the court, such order of sale, if not so sealed, is void. Insurance Co. v. Hallock, 6 Wall. 556, 18 L. Ed. 948.

Under the civil code of Indiana, the "order of sale" in proceedings for the



on property in Louisiana, duly executed before a notary, with pact de non alienando, proceeds by executory process to have the property seized and sold to satisfy his claim, he is not bound to give notice to other mortgagees, or any person but the debtor in possession.<sup>7</sup>

**Substantial Compliance with Decree.**—A substantial compliance with the decree of foreclosure requiring notice of the sale of the property to be advertised is sufficient.<sup>8</sup>

**Posting Advertisement.**—A requirement that advertisement of a sale be posted at public places is a duty of the sheriff and merely directory, and the failure to do so does not affect the title of a bona fide purchaser at the sale unless there has been actual injury.<sup>9</sup>

c. *Authority to Sell.*—In courts which pursue the chancery practice in foreclosing mortgages, unaffected by statutory provisions, no process or order under seal of the court issues to the commissioner. He may, if he thinks proper, procure a copy of the decree and order appointing him commissioner, or if the party who wishes the decree executed thinks proper in this mode to demand of him to proceed, he may furnish him such copy. But it is believed that the decree itself is the authority on which the commissioner acts, and if he proceeds in conformity to the decree, the sale will be valid although no copy has been placed in the hands of the commissioner.<sup>10</sup>

d. *By Whom Made.*—In courts which pursue the chancery practice in foreclosing mortgages, unaffected by statutory provisions, the sale is made by a commissioner appointed by the court. This is usually one of the standing master commissioners of the court, or, for reasons shown, some special commissioner for that purpose.<sup>11</sup> Sales of mortgaged premises under a decree of foreclosure and sale are usually made in the federal courts by the marshal of the district where the decree was entered, or by the master appointed by the court, as directed in the decree. Such sales must be made by the person designated in the decree, or under his immediate direction and supervision, but he may employ an auctioneer to conduct the sale if it be made in his presence.<sup>12</sup> As to whether

foreclosure of a mortgage comes within the function and supplies the purpose of an execution, and the sheriff could not sell without such order. *Insurance Co. v. Hallock*, 6 Wall. 556, 18 L. Ed. 948.

Where a decree of foreclosure and sale for default in payment of an amount due, contained a clause authorizing the complainants on petition to have an order of sale in case of default as to any future installment, successive orders of sale upon such summary proceeding by petition are regular and sufficient. *Fleming v. Soutter*, 6 Wall. 747, 18 L. Ed. 847.

7. *New Orleans, etc., Ass'n v. Le Breton*, 120 U. S. 765, 768, 30 L. Ed. 821.

8. **Substantial compliance with decree.**—Where the decree of foreclosure required notice of the sale of the property to be advertised in a certain newspaper, and it appearing that, before such advertisement was made, it had been merged into another, or that its name had been changed to another, it was held, that the identity of the paper remaining, the advertisement was a substantial compliance with the order. *Sage v. Central R. Co.*, 99 U. S. 334, 25 L. Ed. 394.

Although the marshal may not have given the notice required by law to an executor against whom the petition was filed, yet, if the executor was served with

process on the spot where the property was situated and where the advertisements were posted up, was present at the sale and named one of the appraisers, and requested that the land and negroes should be sold together, he cannot afterwards impeach the sale because formal steps were not strictly complied with. Nor can the curator who subsequently represented the same estate. *Erwin v. Lowry*, 7 How. 172, 12 L. Ed. 655.

9. **Posting advertisement.**—Where lands were mortgaged to the trustee of the general loan office of the province of Pennsylvania, whose powers and duties were afterwards transferred to the state treasurer; and the lands were sold by the sheriff under a precept from the treasurer, a requirement that advertisement of sale be posted at public places was held to be a duty of the sheriff and merely directory, that in the absence of actual injury an omission to do so did not affect the title of the bona fide purchaser at the sale. *Weitzell v. Fry*, 4 Dall. 218, 220, 1 L. Ed. 807.

10. *Insurance Co. v. Hallock*, 6 Wall. 556, 559, 18 L. Ed. 948.

11. **By whom made.**—*Insurance Co. v. Hallock*, 6 Wall. 556, 559, 18 L. Ed. 948.

12. *Blossom v. Railroad Co.*, 3 Wall. 196, 205, 18 L. Ed. 43.



judicial sales in a territory should be made by a marshal of the United States or of the territory, see the title *SHERIFFS', CONSTABLES' AND MARSHALS' SALES*.

e. *Time of Sale*.—The marshal, or other officer, who makes a sale of real property under a decree of foreclosure, possesses the power, for good cause shown, in the exercise of a sound discretion, and in subordination to the superior control of the court over the whole matter of the sale, to adjourn the sale from time to time.<sup>13</sup> The mere delay of the sale for the purposes of an appeal does not operate to the legal injury of the mortgagee. It does not suspend execution for the debt; he has no right to such an execution by the decree of foreclosure and sale. It is not a decree against the person, and cannot be enforced by an execution against goods and lands generally. It is simply a decree for the sale of the land mortgaged, in order that the proceeds may be applied to the debt.<sup>14</sup>

f. *Place of Sale*.—Where a plantation in Louisiana and its fixtures are to be sold under a mortgage, the sale must be made at the seat of justice, unless the debtor require it to be made on the plantation, by notice given the proper officer within a certain time after seizure.<sup>15</sup>

g. *Amount to Be Sold*.—When the law gives the mortgage creditor the right to seize the whole thing mortgaged, it gives him the right to sell the whole thing, if it be indivisible by nature or only so by the agreement and contract of the parties.<sup>16</sup>

h. *Confirmation*.—Where property is sold in Pennsylvania under foreclosure proceedings, the sheriff makes return of the sale to the court from whence the

**13. Time of sale.**—*Blossom v. Railroad Co.*, 3 Wall. 196, 18 L. Ed. 43.

In a case where the decree was that the sale should be made unless the mortgagors should previously pay the mortgage debt, a few short adjournments for the purpose of enabling the mortgagors to make an arrangement to pay it, are adjournments for sufficient cause, although such adjournments have been made by direction of the complainant's solicitor. And, if prior to the day to which the sale stands adjourned, the mortgagors come in and pay the complainants the amount of the decree, etc., the sale may properly be discontinued altogether. *Blossom v. Railroad Co.*, 3 Wall. 196, 18 L. Ed. 43.

**14.** *Kountze v. Omaha Hotel Co.*, 107 U. S. 378, 393, 27 L. Ed. 609.

**15. Place of sale.**—*Stockmeyer v. Tobin*, 139 U. S. 176, 194, 35 L. Ed. 123.

**16. Amount to be sold.**—*Stockmeyer v. Tobin*, 139 U. S. 176, 196, 35 L. Ed. 123.

Where the purpose of a bill is to obtain a decree for the sale of encumbered premises and the application of the proceeds of sale to discharge the encumbrances according to priority, and the debts to senior and junior encumbrancers are overdue, under such circumstances a court of equity, on the application of a junior encumbrancer, will provide for the sale of the entire encumbered property, if the circumstances of the case show that the interests of the mortgagor and of the encumbrancers require the sale. *Shepherd v. Pepper*, 133 U. S. 626, 650, 33 L. Ed. 706, citing *Finley v. United States Bank*, 11 Wheat. 304, 306, 6 L. Ed. 480; *Hagan v. Walker*, 14 How. 29,

37, 38, 14 L. Ed. 312; *Jerome v. McCarter*, 94 U. S. 734, 735, 736, 740, 24 L. Ed. 136; *Hill v. National Bank*, 97 U. S. 450, 454, 24 L. Ed. 1051; *Woodworth v. Blair*, 112 U. S. 8, 28 L. Ed. 615; *Hefner v. Northwestern Life Ins. Co.*, 123 U. S. 747, 754, 31 L. Ed. 309. See, also, *Bronson v. Kinzie*, 1 How. 311, 11 L. Ed. 143.

This authority is properly exercised in the case of deeds of trust, where all the encumbrances are due and where the plaintiff has a first lien on some of the property sought to be sold, and where all the encumbrancers are parties to the suit. So where one has a first lien on the bulk of the property sought to be sold, and a second lien, on the small remaining portion; and his debts secured were all overdue when the bill was filed, as well as the debt due to a junior encumbrancer. Under such circumstances, the mere non-assent of the latter ought not to prevent the court from doing what is equitable in regard to the claims of the former, as well as those of himself. *Shepherd v. Pepper*, 133 U. S. 626, 651, 33 L. Ed. 706.

Where a plantation in Louisiana and the personal property thereon was mortgaged as an entirety, the personality on foreclosure may be sold along with the plantation in a lump sum. *Stockmeyer v. Tobin*, 139 U. S. 176, 196, 35 L. Ed. 123.

A mortgage given to secure the interest as well as the principal debt; suit is instituted to foreclose the mortgage for default in payment of interest, and not for principal due or in default of payment; if the proceeding results finally in a sale of the mortgaged premises, the sale is of the whole premises, when necessary to the payment of the amount due, or when

order issued, and before executing the purchaser's deed he must formally acknowledge his sale in open court after notice to all parties in interest. To this proceeding the judgment debtor is a party, and at the hearing, may make any objection to the confirmation of the sale; and the action of the court has all the effect of a judicial decree. Therefore, it is binding upon him. The acknowledgment of the sheriff's deed in consummation and confirmation of the sale cures all defects, except want of power to sell in the officer, or fraud in making it, and an objection that more property is sold than necessary to satisfy the demands entitled to the proceeds is a question peculiarly for the court to determine, and the hearing is an appropriate time for its determination and should then be made or be regarded as waived, and subsequent objections to the title acquired by the sale of the property cannot be maintained.<sup>17</sup> The court may defer the order confirming the sale until the time for redemption has expired, and then confirm the report of the sale and the deed of the master in one order, there being no occasion to confirm the sale if the land is redeemed; and if it is not, the court can confirm the sale and approve the deed by the same final order.<sup>18</sup>

i. *Second Foreclosure or Resale*.—Upon proper circumstances being shown, a second foreclosure or resale may be ordered.<sup>19</sup>

j. *Rights and Liabilities of Purchaser*—(1) *Purchaser as a Party to the Proceedings*.—A party bidding at a foreclosure sale makes himself thereby a party

the property is not properly divisible. Chicago, etc., R. Co. v. Fosdick, 106 U. S. 47, 68, 27 L. Ed. 47.

17. *Confirmation*.—Gibson v. Lyon, 115 U. S. 439, 450, 29 L. Ed. 440.

18. *Allis v. Insurance Co.*, 97 U. S. 144, 146, 24 L. Ed. 1008.

19. In *Johns v. Wilson*, 180 U. S. 440, 450, 45 L. Ed. 613, the court said: "Where the mortgagee has no knowledge and no means of knowing that the mortgaged property has been sold by the person in whose name it stands of record, especially where such sale is brought about by a fraudulent conspiracy between the vendor and vendee, and the conveyance is withheld from record for the purpose of misleading the mortgagee, we know of no objection to a second foreclosure for the purpose of terminating the rights of the vendee. As stated in *Jones on Mortgages*, § 1679: 'If the owner of the equity has, through mistake, not been made a party, the mortgagee who has purchased at the sale may maintain a second action to foreclose the equity of such owner, and for a new sale, but he cannot recover the cost of the previous sale.'"

If the decree or the sale under foreclosure of a mortgage to secure certain bondholders was in fraud of the rights of the bondholders, their remedy is by a direct proceeding to set aside the sale or the decree, and to proceed anew with another foreclosure of the mortgage, and not to undertake to reforeclose what had been fully foreclosed before under a decree which remains in force. *Richter v. Jerome*, 123 U. S. 233, 247, 31 L. Ed. 132.

Where in the foreclosure of a mortgage the property is sold by decree of court, the purchaser is credited with the amount paid by him and the lien reserved on the

property to secure its payment in full, on default in payment by the purchaser, where no rights of innocent strangers have intervened, the court may render a decree for a resale on an order to show cause. *Stuart v. Gay*, 127 U. S. 518, 526, 32 L. Ed. 191.

In *Johns v. Wilson*, 180 U. S. 440, 450, 45 L. Ed. 613, the court said: "While it is possible that the mortgagee might have been able to obtain relief by an amended bill in the original suit, a new action is a proper remedy where he has been mistaken in his facts, especially if such mistake has been brought about by the contrivance of the legal owners."

Where in foreclosure of certain mortgages the provisions of the decree were that the entry of the decree of sale should not foreclose a certain lienor's claim, but that the issues concerning it should be inquired into and determined; that if upon the determination of such issues it should be adjudged by the court that the decree rendered by another court, in the suit brought by said lienor, referred to in the pleadings therein, and the lien thereby declared and adjudicated in his favor, continues in full force and effect, then the purchasers at any sale had thereunder of that portion of the property sold, covered or affected by said lien, should pay to said lienor a certain sum and in default of such payment the court should resume possession of the property covered and affected by the said lien and enforce such decree as it may render herein in his favor by a resale of such property or otherwise as the federal supreme court may direct, it was held, that the decree of sale conferred upon the claimant in event that his claim shall not be paid by the purchaser, the right to a decree of



to the proceedings, and subject to the jurisdiction of the court for all orders necessary to compel the perfecting of his purchase; and with a right to be heard on all questions thereafter arising, affecting his bid, which are not foreclosed by the terms of the decree of sale, or are expressly reserved to him by such decree.<sup>20</sup>

(2) *Title Acquired*—(a) *Entire Estate*.—A decree for the foreclosure of the mortgage and a sale under such a decree would carry to the purchaser the entire estate in the mortgaged premises, provided the necessary parties were made to the proceeding to foreclose;<sup>21</sup> although the judicial sale, made at the instance of a mortgagee may be irregular or void, it passes to the purchaser all the rights the mortgagee, as such, had.<sup>22</sup>

(b) *Relation of Title*.—The title relates back to the date of the mortgage.<sup>23</sup>

(c) *Prior Incumbrances and Claims*.—The general rule is that the purchaser at foreclosure sales takes subject to all prior incumbrances or legal claims.<sup>24</sup>

resale of the property covered and affected by his lien. *Compton v. Jesup*, 167 U. S. 1, 37, 42 L. Ed. 55.

20. *Kneeland v. American Loan, etc., Co.*, 136 U. S. 89, 94, 34 L. Ed. 379, in which case it was said that: "The right of purchasers at a foreclosure sale to be heard on the question of compensation to trustees and others, both in the trial and appellate courts, was affirmed in *Williams v. Morgan*, 111 U. S. 684, 28 L. Ed. 559, when, as in that case, by the terms of the decree, the amount of such compensation placed an additional burden upon the purchasers. The case of *Swann v. Wright*, 110 U. S. 590, 28 L. Ed. 252, was referred to in the opinion, and distinguished on the ground of the express provisions in the decree as to the terms of sale. See, also, *Stuart v. Gay*, 127 U. S. 518, 32 L. Ed. 191; *Central Trust Co. v. Grant Locomotive Works*, 134 U. S. 207, 34 L. Ed. 107."

21. *Avegno v. Schmidt*, 113 U. S. 293, 297, 28 L. Ed. 1009; *Eyster v. Gaff*, 91 U. S. 521, 523, 23 L. Ed. 403.

A judicial sale of the estate under the decree of the court, if the court has power to make the decree, whether it be in the form of a decree of sale preceded by a formal decree of foreclosure, or in the form of a decree of sale without a formal decree of foreclosure, effectually bars the right of the mortgagor to redeem; and the purchaser will hold it under the title he acquires to it by virtue of the sale and conveyance he receives from the master, free and discharged from the equity of redemption. *Simmons v. Burlington, etc., R. Co.*, 159 U. S. 278, 288, 40 L. Ed. 150.

Equities forming a part and parcel of the security which is enforced, not being excepted from the sale, pass by it. *Richter v. Jerome*, 123 U. S. 233, 248, 31 L. Ed. 132.

A purchaser at the judicial sale on foreclosure of a mortgage takes only the title which the mortgagor possessed; the doctrine of caveat emptor applies to all judicial sales of this character. *Brant v.*

*Virginia Coal, etc., Co.*, 93 U. S. 326, 335, 23 L. Ed. 927.

And where under a mortgage given to secure the interest as well as the principal debt, suit is instituted to foreclose the mortgage for default in payment of interest, and not for principal due or in default in payment, if the proceedings result finally in a sale of the mortgaged premises, the sale is made free from the equity of redemption of the mortgagor, and all holders of junior encumbrances, if made parties to the suit. *Chicago, etc., R. Co. v. Fosdick*, 106 U. S. 47, 68, 27 L. Ed. 47.

22. *Brobst v. Brock*, 10 Wall. 519, 534, 19 L. Ed. 1002.

23. *Relation of title*.—*Eyster v. Gaff*, 91 U. S. 521, 523, 23 L. Ed. 403; *Osterberg v. Union Trust Co.*, 93 U. S. 424, 428, 23 L. Ed. 964.

And even if under the laws of a state a mortgage is primarily security for a debt and creates a lien only, it is a lien which may become the title. The decree of the court conveying the title is, of course, the act of the law, but it is the act of the law consummating the act of the mortgagor. And the sale and deed relate to the date of the mortgage, conveying the title which was then possessed by the mortgagor. *United States v. Commonwealth, etc., Trust Co.*, 193 U. S. 651, 655, 48 L. Ed. 830.

24. *Prior incumbrances and claims*.—As the rule of caveat emptor applies to a purchaser at a judicial sale, under a decree foreclosing a mortgage, he cannot retain from his bid a sum sufficient to pay a part of the taxes on the property which were a substituting lien at the date of the decree of foreclosure. *Osterberg v. Union Trust Co.*, 93 U. S. 424, 23 L. Ed. 964.

Property chargeable with a claim that is sold at a decree of foreclosure and sale is not discharged of the lien, where the purchaser of the property has agreed to pay the claim out of certain proceeds to arise from an anticipatory sale of the same, which fails to transpire; and the



(d) *Subsequent Liens or Incumbrances.*—The title of a purchaser at a judicial sale under a decree of foreclosure takes effect by relation to the date of the mortgage, and defeats any subsequent lien or incumbrance. A lien for taxes does not, however, stand upon the footing of an ordinary incumbrance, and is not displaced by a sale under a pre-existing judgment or decree, unless otherwise directed by statute. It attaches to the res without regard to individual ownership, and when it is enforced by sale pursuant to the statute, prescribing the mode of assessing and collecting them, the purchaser takes a valid and unimpeachable title.<sup>25</sup> But the purchaser is not deprived of the right of possession nor is the judgment to be annulled, because another person claims under the mortgagor by a deed subsequent to the mortgage which has not been paid; but the claimant is given the right to appear, plead and make such defense as under the facts of the case and the principles of equity he is entitled to.<sup>26</sup>

(e) *Purchasers Pendente Lite.*—As to the title acquired by purchasers pendente lite, see the titles *LIS PENDENS*, vol. 7, p. 1051; *RES ADJUDICATA*.

(3) *Right to Possession.*—After the decree and sale, the premises may not be withheld from the purchaser,<sup>27</sup> and the possession may be acquired by a writ of assistance.

(4) *Right to Rents, Issues and Profits.*—A purchaser of land at a foreclosure sale is entitled to the rents, issues and profits which accrued and were collected by the mortgagor after the entry of the order of confirmation of the sale, because the purchaser has as against the mortgagor, by relation, both the legal and equitable title to the land purchased, at least, as of the date of the order of the

charge is not incorporated into the decree by virtue of a reliance upon the conditional promise. *Meddaugh v. Wilson*, 151 U. S. 333, 359, 38 L. Ed. 183.

Where a decree of foreclosure and sale provides that the purchaser shall pay all claims incurred by the receiver and they shall be presented within six months after the confirmation of the sale, a purchaser is liable for claims presented after six months after the confirmation when the decree of confirmation provides that the deed of the purchaser shall recite that he shall take the property subject to all the claims incurred by the receiver, and does not prescribe any certain time for presentation. *Olcott v. Headrick*, 141 U. S. 543, 547, 35 L. Ed. 851.

Where a decree of foreclosure and sale is made and executed, at the suit of a subsequent mortgagee, and with the consent of the mortgagor, it not appearing to the court that there were any prior incumbrancers, the prior incumbrancers were not bound by the decree in a suit to which they are not made parties; and the purchasers under the sale take subject to the prior liens. *Finley v. United States Bank*, 11 Wheat. 304, 6 L. Ed. 480.

In the foreclosure of a subsequent mortgage in Louisiana purchasers take subject to the prior lien. *Nalle v. Young*, 160 U. S. 624, 642, 40 L. Ed. 560.

**25. Subsequent liens or incumbrances.**—*Osterberg v. Union Trust Co.*, 93 U. S. 424, 428, 23 L. Ed. 964.

Charges for taxes and redemption of tax certificates by the lien creditor after the sale of the property under the trust deed, may be properly taken out of the proceeds of the sale of the property, in

Illinois. *Gormley v. Bunyan*, 138 U. S. 623, 633, 34 L. Ed. 1086.

The grantee of a purchaser who obtained property at a foreclosure sale is not allowed to say that he was misled in any way as to his liability for delinquent taxes, when by the terms of the decree of sale the property was made subject to any indebtedness that might subsequently be charged against the property prior in lien to that of the mortgage foreclosed, and upon the confirmation of the sale and before he took title from the purchaser at such sale, the order of decree specifically included within the obligations which must be assumed any taxes which might "finally be adjudged to be a lien upon the property." *United States Trust Co. v. New Mexico*, 183 U. S. 535, 46 L. Ed. 315.

**26.** *Romig v. Gillett*, 187 U. S. 111, 116, 47 L. Ed. 97.

**27. Right to possession.**—"If it was to be understood," says Chancellor Kent, "that after a decree and sale of mortgaged premises the mortgagor or other party to the suit, or perhaps those who have been let into the possession by the mortgagor pendente lite, could withhold the possession in defiance of the authority of this court and compel the purchaser to resort to a court of law, I apprehend that the delay and expense and inconvenience of such a course of proceedings would greatly impair the value and diminish the results of sales under a decree." *Terrell v. Allison*, 21 Wall. 289, 291, 22 L. Ed. 634.

**Writ of assistance.**—See the title *ASSISTANCE, WRIT OF*, vol. 2, p. 632.

confirmation of the sale.<sup>28</sup> Where a purchaser at a judicial sale, under a decree foreclosing a mortgage, having failed to punctually comply with the terms of sale, is granted an extension of time by the court, the property in the meantime to remain in the possession of a receiver, he is not entitled to any of the earnings of the property while it so remains in the possession of the latter, nor is he in a position to question the orders of the court as to their application.<sup>29</sup>

(5) *Right to Proceeds Where Property Sold.*—The purchaser is not entitled to proceeds in the hands of a receiver arising from the sale of land not ordered to be sold in the decree.<sup>30</sup>

(6) *Collusive Agreements to Purchase.*—Collusive agreements as to purchasing the property at foreclosure sale will not be upheld.<sup>31</sup>

(7) *Time for Making Deed.*—Statutes have been passed regulating the time within which a deed must be made under mortgage sales.<sup>32</sup>

(8) *Liability Where Sale Is Set Aside.*—Where a sale of mortgaged property to the mortgagee under foreclosure proceedings is set aside on the ground of fraud and the mortgagor seeks to charge the mortgagee with the value of the use and occupation of the property and for waste while in possession as purchaser, the mortgagor cannot have personal judgment, except for any balance that may be found due for rents, profits and damages after the mortgage debt has been satisfied.<sup>33</sup> A mortgagee who has purchased the mortgaged property under an invalid sale will not be held liable for waste committed without his consent or knowledge.<sup>34</sup>

**28. Right to rents, issues and profits.**—*Woodworth v. Northwestern, etc., Ins. Co.*, 185 U. S. 354, 361, 46 L. Ed. 945.

**29.** *Osterberg v. Union Trust Co.*, 93 U. S. 424, 23 L. Ed. 964.

**30. Right to proceeds where property sold.**—Before the commencement of a suit to foreclose a mortgage, some of the lands covered by it had been transferred to a trustee, by way of indemnity against a bond upon which he was surety for the mortgagor, and sold by the trustee, with the consent of the mortgagee. The proceeds thereof were subsequently paid over to the receiver appointed in the foreclosure suit. The decree did not order the sale of the lands from which such proceeds arose, nor did the master attempt to sell them. Held, that the purchaser at the foreclosure sale acquired no right to such proceeds. *Osterberg v. Union Trust Co.*, 93 U. S. 424, 23 L. Ed. 964.

**31. Collusive agreements to purchase.**—Where on the sale of property under foreclosure proceedings the purchaser of the property entered into an agreement with the parties thereto, that did not thereby impair, affect, or novate their existing claims and that the original mortgage and privileges remain in full force and were recognized as operating on the said property, it was held that the purchaser by his agreement undertook to keep alive and in full force a mortgage made by another party after it had been foreclosed, the mortgaged property sold, and the mortgage and the decree rendered thereon extinguished, which he could not do. *New Orleans, etc., Ass'n v. Adams*, 109 U. S. 211, 215, 27 L. Ed. 910.

The owner of mortgaged land made "a

friendly arrangement" with the mortgagee to buy it in, ostensibly for his own use, but with the understanding that he was to hold it for the use of the mortgagor, as if no sale had been made. This was done to defeat the claim of a third party; and with that view the mortgagor confirmed the sale. The mortgagee and purchaser afterwards claimed the land as his own. Held, that the mortgagor cannot sustain a bill in equity to restrain the mortgagee from selling the land, and to enforce the understanding made before the sale. *Randall v. Howard*, 2 Black 585, 17 L. Ed. 269.

**32.** Before the passage of the act of 1872 of Illinois, which required a deed to be made within a certain time, a purchaser bought property at a foreclosure sale for about one-third of the mortgaged debt, and the mortgagor did not redeem within the statutory period. It was held that the mortgagee's failure to make a deed to the said premises is not affected by the passage of the prior statute so far as the mortgagor is concerned, but it may revive the mortgagor's equity of redemption. *Bradley v. Lightcap*, 195 U. S. 1, 22, 49 L. Ed. 65.

**33. Liability where sale is set aside.**—*Fort v. Roush*, 104 U. S. 142, 145, 26 L. Ed. 664.

**34.** *Bigler v. Waller*, 14 Wall. 297, 305, 20 L. Ed. 891.

Thus, where premises had been irregularly sold under a deed of trust, the purchaser was held not to be responsible for waste committed upon the land and the destruction of improvements, the property having been injured during the existence of the Civil War; the evidence failing to show that the injury was caused



(9) *Liability under Contract between Mortgagor and Third Persons.*—A liability resting wholly on a contract with the owners of property does not run with the property into the hands of those who acquired it by foreclosure proceedings.<sup>35</sup>

(10) *Conclusiveness of Sale*—(a) *General Statement.*—The valid and regular sale and conveyance under an existing order or decree is conclusive.<sup>36</sup>

(b) *Collateral Attack.*—A purchaser's title under foreclosure sale cannot be collaterally attacked.<sup>37</sup>

(c) *Setting Aside*—aa. *Right to Set Aside.*—The foreclosure sale may be set aside by the proper party<sup>38</sup> for disregarding the legal formalities,<sup>39</sup> inadequacy of price,<sup>40</sup> or prevention in making a defense by reason of the unfaithful conduct of a solicitor and the directors of a mortgage company.<sup>41</sup>

by any act of the defendant, but showing that it was done by the Confederate military forces in the defendant's absence, and, so far as it appears, without his knowledge. *Bigler v. Waller*, 14 Wall. 297, 305, 20 L. Ed. 891.

**35. Liability under contract between mortgagor and third persons.**—*Sullivan v. Portland, etc., R. Co.*, 94 U. S. 806, 810, 24 L. Ed. 324.

**36.** Where under proceedings in the orphans' court of Philadelphia conveyance of property is made, containing a recital that is made under and subject to the payment of an existing mortgage, the sanction of the court to the fact and form of the conveyance is a judicial act, necessary to perfect the proceedings, for, without the deed, the sale would not have been consummated, and no title would have been divested and passed; the grantee is therefore estopped by the recitals in the conveyance to deny the existence of the mortgage. *Gibson v. Lyon*, 115 U. S. 439, 446, 29 L. Ed. 440.

Where under foreclosure proceedings in Pennsylvania the judgment rendered is erroneous and might be reversed upon a writ of error, this will not destroy a sheriff's sale made under the judgment while standing in full force and unreversed. *Gibson v. Lyon*, 115 U. S. 439, 453, 29 L. Ed. 440.

Where, under foreclosure proceedings in Pennsylvania, a sheriff is ordered to sell certain lots of land to satisfy a judgment and enough is realized on the sale of one lot to cover that amount, but he proceeds to sell another and the sale is duly acknowledged before the court, and deeds are executed to the purchasers, an objection to the proceedings made afterward is too late in point of time, and the action and judgment of the court directing the acknowledgment and title of the deed is conclusive. *Gibson v. Lyon*, 115 U. S. 439, 449, 29 L. Ed. 440.

Nor does a decree of foreclosure, rendered upon a publication of notice based upon a defective affidavit, which was intended to comply with the statute, affect the rights of a grantee of a purchaser at the foreclosure sale. *Romig v. Gillett*, 187 U. S. 111, 116, 117, 47 L. Ed. 97. See ante, "Title Acquired," XII, C, 14, j, (2).

**37. Collateral attack.**—A purchaser's title to certain property obtained through a judgment at a foreclosure sale cannot be collaterally assailed, because the mortgagor was insane when mortgage was executed. *Luhrs v. Hancock*, 181 U. S. 567, 574, 45 L. Ed. 1005.

The foreclosure of a mortgage given by a bridge company on their bridge over the San Antonia River at the town of Helena transferred the legal title to the bridge to purchaser, the mortgagee, and rendered the stock of the bridge company valueless; and a suit to have the mortgagor decreed to be jointly interested with the purchaser in the bridge was not sustained. *McLane v. King*, 144 U. S. 260, 36 L. Ed. 428.

**38. Parties to suit to set sale aside.**—In foreclosure proceedings in Louisiana, if there be a subsequent mortgage, the prior mortgage containing the pact de non alienando, the mortgagee therein need not be made a party, but must take notice of the proceedings to enforce the prior mortgage at his peril. He may, however, apply to set aside the sale on proper grounds. *Nalle v. Young*, 160 U. S. 624, 642, 40 L. Ed. 560.

Though a mortgagee in Louisiana can proceed under the "pact de non alienando," to enforce his mortgage directly against the mortgagor, without reference to the vendee of the latter, still the vendee has sufficient interest in the matter to sue to annul the sale, if the forms of law have not been complied with by the mortgagee of his vendor in making the sale. *Watson v. Bondurant*, 21 Wall. 123, 22 L. Ed. 509.

**39. Setting aside for want of formalities in sale.**—*Watson v. Bondurant*, 21 Wall. 123, 22 L. Ed. 509.

**40. Setting aside for inadequacy of price.**—A court of equity may, prior to any order of confirmation, set aside a foreclosure sale of mortgaged property upon the single ground of inadequacy in price, if the inadequacy is so gross as to justify such action. *Ballentyne v. Smith*, 205 U. S. 285, 289, 51 L. Ed. 803.

**41. Setting aside for prevention in making defense.**—*Pacific Railroad v. Missouri Pac. R. Co.*, 111 U. S. 505, 520, 28 L. Ed. 498.



bb. *Laches in Instituting Suit*.—Time during which an appeal is pending from a decree of foreclosure cannot be counted against the plaintiff on the ground of laches in a later suit instituted to set aside the sale on the ground of fraud.<sup>42</sup>

cc. *Jurisdiction*.—If there is error in the decree of foreclosure or in the sale, the remedy of the party aggrieved is in the court which rendered the decree and confirmed the sale.<sup>43</sup> A federal court that has jurisdiction of foreclosure proceedings and renders a decree of sale thereunder, has also jurisdiction of a suit to set that sale aside for fraud, without regard to the citizenship of the present parties.<sup>44</sup>

dd. *Effect on Order of Sale*.—In Louisiana, the setting aside of a sale for irregularity does not affect the order of seizure and sale, but a new writ may issue upon it.<sup>45</sup>

ee. *Effect on Mortgage Debt*.—A mortgage debt, brought about by the sale of the mortgaged property, is vacated when the sale is set aside.<sup>46</sup>

k. *Disposition of Proceeds*.—If anything remains, either of the income or of the proceeds of the sale after the mortgage or trust debts are satisfied, it will go to the mortgagor.<sup>47</sup> In marshaling the debts payable out of the proceeds realized from a foreclosure sale it is not material whether the interests be calculated at a date prior to the sale or as of the date of decree of sale, in determining a new principal to bear interest.<sup>48</sup> Where under a mortgage given to secure the interest as well as the principal debt, suit is instituted to foreclose the mortgage for default in payment of interest, and not for principal due or in default in payment, if the proceeding results finally in a sale of the mortgaged premises, the proceeds of the sale are distributed after payment of the amount due, for nonpayment of which the sale was ordered, in satisfaction of the unpaid debt remaining, whether due or not.<sup>49</sup> If the surplus money arising from the sale under foreclosure proceedings is still undisposed of, then the whole case is under the control of the court, and no supplemental bill even is needed to prevent the consummation of a wrong by perversion of a decree.<sup>50</sup> The distribution or the proceeds of a foreclosure sale among the creditors thereto entitled, is a matter of indifference to a purchaser thereunder.<sup>51</sup> As to the disposition of funds brought into court upon proceedings under a bill to foreclose a mortgage, see the titles ATTORNEY AND CLIENT, vol. 2, p. 729; PAYMENT INTO COURT; REFERENCE.

### XIII. Redemption.

**A. Equity of Redemption**—1. **DEFINITION, NATURE AND GENERAL CONSIDERATION**.—The equity of redemption is the right to redeem the property by paying the amount due on the mortgage.<sup>52</sup> The general rule is that the equity

42. *Laches in instituting suit*.—Pacific Railroad v. Missouri Pac. R. Co., 111 U. S. 505, 520, 28 L. Ed. 498.

43. *Jurisdiction*.—Kent v. Lake Superior Ship Canal, etc., Co., 144 U. S. 75, 88, 36 L. Ed. 352.

44. *Pacific Railroad v. Missouri Pac. R. Co.*, 111 U. S. 505, 522, 28 L. Ed. 498.

45. *Effect on order of sale*.—Gordon v. Gilfoil, 99 U. S. 168, 176, 25 L. Ed. 383.

46. *Effect on mortgage debt*.—Fort v. Roush, 104 U. S. 142, 145, 26 L. Ed. 664.

47. *Rights of mortgagor to surplus*.—Grant v. Phoenix Ins. Co., 106 U. S. 429, 431, 27 L. Ed. 237.

The holder of one or more of a series of notes secured by a concurrent mortgage, in Louisiana, is entitled to a pro rata share in the net proceeds arising from the sale of the mortgaged property at the suit of the holder of any of the other notes, and that an hypothecary

action lies to enforce such claim, and the basis of the hypothecary action provided by the Code in such cases is the obligation which the law casts upon the purchaser to pay the pro rata share of the debt represented by the notes that were not the subject of the foreclosure suit. *Lovell v. Cragin*, 136 U. S. 130, 147, 34 L. Ed. 372.

48. *Calculation of interests*.—*Stuart v. Gay*, 127 U. S. 518, 531, 32 L. Ed. 191.

49. *Chicago, etc., R. Co. v. Fosdick*, 106 U. S. 47, 68, 27 L. Ed. 47.

50. *Preservation of proceeds*.—*Randall v. Howard*, 2 Black 585, 590, 17 L. Ed. 269.

51. *Duty of purchaser to see to disposition of proceeds*.—*Stuart v. Gay*, 127 U. S. 518, 530, 32 L. Ed. 191.

52. *Definition, nature and general consideration of equity of redemption*.—*Evans v. Pike*, 118 U. S. 241, 248, 30 L. Ed. 234; *Bell Silver, etc., Min. Co. v.*

of redemption is the real and beneficial estate in the land.<sup>53</sup> This right of redemption is a favored right,<sup>54</sup> and will not be taken away, except upon a strict compliance with the steps necessary to divest it.<sup>55</sup> The equity of redemption is a distinct estate from that which is vested in the mortgagee before or after condition broken.<sup>56</sup> Bills to redeem are entertained upon the principle that the mortgagee holds for the mortgagor when the debt secured by the mortgage has been paid or tendered.<sup>57</sup>

2. RIGHT TO EQUITY OF REDEMPTION.—The mortgagor has an equity of redemption, unless it has been extinguished in some legal way.<sup>58</sup> Where by the terms of a mortgage the principal debt does not become absolutely due on default in payment of interest for a certain period, but only at election of the trustee, as declared by him and notified to the mortgagor, a decree finding the whole amount due in the absence of such notice is erroneous, and redemption may be exercised by paying the interest then due and in arrears.<sup>59</sup> The principles as to redemption of the mortgage are no less applicable to the case of an absolute deed, which is intended by the parties to operate as a security for a debt, than they are to a common mortgage. A court of equity looks at the real object and intention of the conveyance; and when the grantor applies to redeem, upon an allegation that the deed was intended as a security for a debt, that court treats it precisely as it would an ordinary mortgage; provided the truth of the allegation is made out by the evidence.<sup>60</sup> The insertion of a power of sale does not affect the mortgagor's right to redeem so long as the power remains unexecuted and the mortgage is not, as it may be, foreclosed in the ordinary manner, but when a sale is made of the interest of the mortgagor, his right is wholly divested, embracing his equity of redemption.<sup>61</sup>

3. CONCURRENT REMEDY BY EJECTMENT AND BILL TO REDEEM.—In the case either of a legal or equitable mortgage, the mortgagee may pursue his legal remedy by ejectment, and, at the same time, file his bill to foreclose the equity of redemption.<sup>62</sup>

4. PROPERTY SUBJECT.—Mortgaged real estate to which is attached the right of redemption, is such and such only as could at law be levied upon and sold on execution. The right does not extend to real estate of a public corporation, mortgaged with its franchise to acquire, hold, and use property for public

First Nat. Bank, 156 U. S. 470, 475, 39 L. Ed. 497.

53. *Hutchins v. King*, 1 Wall. 53, 58, 17 L. Ed. 544; *Terrell v. Allison*, 21 Wall. 289, 292, 22 L. Ed. 634.

54. *Romig v. Gillett*, 187 U. S. 111, 117, 47 L. Ed. 97, citing *Russell v. Southard*, 12 How. 139, 13 L. Ed. 927; *Villa v. Rodriguez*, 12 Wall. 323, 20 L. Ed. 406; *Bigler v. Waller*, 14 Wall. 297, 20 L. Ed. 891; *Noyes v. Hall*, 97 U. S. 34, 24 L. Ed. 909; *Shillaber v. Robinson*, 97 U. S. 68, 24 L. Ed. 967.

55. *Chicago, etc., R. Co. v. Fosdick*, 106 U. S. 47, 71, 27 L. Ed. 47, citing *Bigler v. Waller*, 14 Wall. 297, 20 L. Ed. 891; *Shillaber v. Robinson*, 97 U. S. 68, 24 L. Ed. 967.

56. *Clark v. Reyburn*, 8 Wall. 318, 321, 19 L. Ed. 354.

57. *Brobst v. Brock*, 10 Wall. 519, 530, 19 L. Ed. 1002.

58. Right of equity of redemption generally.—*Clark v. Reyburn*, 8 Wall. 318, 322, 19 L. Ed. 354; *Dean v. Nelson*, 10 Wall. 158, 171, 19 L. Ed. 926; *Brobst v. Brock*, 10 Wall. 519, 530, 19 L. Ed. 1002; *Terrell v. Allison*, 21 Wall. 289, 292, 22 L. Ed. 634; *Peugh v. Davis*, 96 U. S. 332,

337, 24 L. Ed. 775; *Bell Silver, etc., Min. Co. v. First Nat. Bank*, 156 U. S. 470, 475, 39 L. Ed. 497; *Bradley v. Lightcap*, 195 U. S. 1, 49 L. Ed. 65.

After a mortgage debt is discharged, the mortgagor or his assignee may compel the mortgagee or his assignee to surrender the legal title. *Smith v. Orton*, 21 How. 241, 244, 16 L. Ed. 104; *Bronson v. Kinzie*, 1 How. 311, 318, 11 L. Ed. 143.

The very fact that a sale was conditional implies an expectation to redeem. *Conway v. Alexander*, 7 Cranch 218, 237, 3 L. Ed. 321.

59. Equity of redemption where election of trustee controls time for foreclosure.—*Chicago, etc., R. Co. v. Fosdick*, 106 U. S. 47, 74, 27 L. Ed. 47.

60. Equity of redemption under deed absolute in form.—*Hughes v. Edwards*, 9 Wheat. 489, 495, 6 L. Ed. 142.

61. Equity of redemption under power of sale.—*Bell Silver, etc., Min. Co. v. First Nat. Bank*, 156 U. S. 470, 478, 39 L. Ed. 497.

62. Concurrent remedy by ejectment and bill to redeem.—*Hughes v. Edwards*, 9 Wheat. 489, 6 L. Ed. 142.



purposes, and whose chief value depends upon its being so used and appropriated.<sup>63</sup>

5. **WHO MAY CLAIM.**—A purchaser of a mortgagor of a part of the mortgaged property stands in the place of those from whom he derives title. He is clothed with their rights, and is entitled to redeem his proportion of the premises upon paying that proportion of the mortgage debt and interest; and the rents, issues, and profits, and improvements made upon the premises must also be taken into the account.<sup>64</sup> One who held the equitable title to land at the time a mortgage was given therein, but subsequently acquired the legal title has an equity of redemption which entitles him to prevent a foreclosure and sale by paying the mortgage debt, though the debt is not his own but that of the former holder of the legal title.<sup>65</sup> Where property is conveyed by a deed absolute on its face there is an oral understanding that it is to secure a note, that if the note is not paid at maturity the grantor is to be allowed to sell the property and on default in payment the property is sold with the knowledge and concurrence of the grantor to a purchaser without notice, for the amount of the debt, the rights of attaching creditors of the grantor acquired by levy on the property subsequent to the sale or before the deed is executed are barred and there is no right left in them to redeem the property.<sup>66</sup>

6. **TIME FOR CLAIMING.**—The mortgagor's right to the equity of redemption must be claimed within a reasonable time,<sup>67</sup> or where the time is prescribed by

**63. Property subject to equity of redemption.**—*Hammock v. Loan, etc., Co.*, 105 U. S. 77, 90, 26 L. Ed. 1111.

**64. Who may claim the equity of redemption.**—*Villa v. Rodriguez*, 12 Wall. 323, 341, 20 L. Ed. 406.

**65.** *Ewell v. Daggs*, 108 U. S. 143, 147, 27 L. Ed. 682.

**66.** *Jackson v. Lawrence*, 117 U. S. 679, 682, 29 L. Ed. 1024.

**67. Time for claiming right to equity of redemption.**—*Terrell v. Allison*, 21 Wall. 289, 292, 22 L. Ed. 634. See, also, *Brobst v. Brock*, 10 Wall. 519, 536, 19 L. Ed. 1002; *Clay v. Freeman*, 118 U. S. 97, 106, 30 L. Ed. 104. See, generally, the title *LACHES*, vol. 7, p. 790.

Where for thirty years the mortgagee and his grantees have been in possession of the property, no claim of right being set up for the equity of redemption, or on any other account, a court of equity could give no relief had there been no legal judgment. Twenty years' undisturbed possession, without any admission of holding under the mortgage, or treating it as a mortgage during that period, is a bar to a bill to redeem. But if within that period there be any account, or solemn acknowledgment of the mortgage as subsisting, it is otherwise. *Slicer v. The Bank of Pittsburgh*, 16 How. 571, 579, 14 L. Ed. 1063.

"In the case of *Hughes v. Edwards*, 9 Wheat. 489, 490, 497, 6 L. Ed. 142, it was settled, that the right of a mortgagor to redeem is barred, after twenty years' possession by the mortgagee, after forfeiture, no interest having been paid in the meantime, and no circumstance appearing to account for the neglect." See *Willison v. Watkins*, 3 Pet. 43, 52, 7 L. Ed. 596; *Slicer v. The Bank of Pittsburgh*, 16 How. 571, 580, 14 L. Ed. 1063;

*Zeller v. Eckert*, 4 How. 239, 297, 11 L. Ed. 979.

Where a junior mortgagee is a party defendant to a foreclosure bill in which, as in the present case, there is a prayer that he be decreed to redeem, and where the priority of the plaintiff's mortgage is found or conceded, and a sale is ordered in default of payment, declaring the right of the debtor to redeem to be forever barred, a similar order as to right of redemption by the junior mortgagee is not substantially or even formally necessary. He has, of course, a right to redeem, but if he chooses not to assert such right, and stands by while the sale is made and confirmed, he must in equity be deemed to have waived his right. He cannot wait seven years and then attack it to set up his alleged rights. *Simmons v. Burlington, etc., R. Co.*, 159 U. S. 278, 288, 40 L. Ed. 150.

"At common law and in equity, in the case of an absolute sale, with an agreement for a repurchase, the time limited for the repurchase must be precisely observed, or the vendor's right to reclaim his property will be lost." *Livingston v. Story*, 11 Pet. 351, 387, 9 L. Ed. 746.

Under a *vente a remere* "if the right to redeem has not been exercised within the time agreed on by the vendor, he cannot exercise it afterwards, and the purchaser becomes irrevocably possessed of the thing sold." *Livingston v. Story*, 11 Pet. 351, 387, 9 L. Ed. 746.

But where a grantor conveyed land which he intended as a mortgage to secure debts, the understanding being that the grantee must apply the rents and profits to the payment of interest and a gradual liquidation of the principal, and in the absence of the grantor the grantee sold the land, representing that he was true owner



statute, within the statutory period;<sup>68</sup> otherwise, the right to redeem will be barred.

7. **AMOUNT REQUIRED TO REDEEM.**—Where a mortgage is foreclosed for default in payment of interest, which does not render the whole sum due, the right of the mortgagor to redeem, and thus prevent the sale, is preserved, on payment, not of the unmatured principal sum of the debt, but merely of the interest then actually due and in arrears.<sup>69</sup>

8. **DURATION OF.**—If there is no power of sale, the equity of redemption remains until it is foreclosed by a suit in chancery, or by some other mode recognized by law. If there is a power of sale, whether in the creditor or in some third person to whom the conveyance is made for that purpose, it is still in effect a mortgage, though in form a deed of trust, and may be foreclosed by sale in pursuance of the terms in which the power is conferred, or by suit in chancery.<sup>70</sup> As in cases of strict foreclosure, so in cases of sale, the equity of the mortgagor as against the mortgagee is not exhausted until sale actually confirmed; for if at any time prior he should bring into court, for the mortgagee, the amount of the debt, interest and costs, he will be allowed to redeem. It is the deed made to the purchaser, actually transferring the title of the parties to the suit, that terminates the mortgagor's equity of redemption.<sup>71</sup>

9. **LIABILITY TO DOWER.**—By the common law, dower does not attach to an equity of redemption; the fee is vested in the mortgagee, and the wife is not dowerable of an equitable seisin.<sup>72</sup> But in the United States, different views have been taken on this question, in the courts of the several states.<sup>73</sup>

10. **LIABILITY TO SALE UNDER JUDICIAL PROCESS.**—Courts of equity, at an early date, regarded the equity of redemption as subject to seizure and sale on judicial process against the holder.<sup>74</sup> As to whether an equity of redemption upon a mortgage of real property is liable to attachment or execution, see the titles **ATTACHMENT AND GARNISHMENT**, vol. 2, p. 676; **EXECUTIONS**, vol. 6, p. 93.

11. **RELEASE, MERGER AND WAIVER.**—An equity of redemption is so inseparably connected with a mortgage, that it cannot be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage.<sup>75</sup> A subsequent release of the equity of redemption may undoubtedly be made to the mortgagee. There is nothing in the policy of the law which forbids the

thereof, it was no defense in an action to redeem that the grantee has been in possession of the lands for twenty years and that the proceeds of the sale were received more than six years prior to the filing of the bill. Courts of equity apply the statute by analogy to cases at law, but it being shown that the land was conveyed in trust, there was no adverse possession to favor which the statute could run. Nor could the statute bar the right of the complainant to the proceeds of the land, as the grantee was bound to apply these to the payment of interest on the debt and in discharge of the principal. *Babcock v. Wyman*, 19 How. 289, 301, 15 L. Ed. 644.

68. *Burley v. Flint*, 105 U. S. 247, 249, 26 L. Ed. 986.

As to the bill of review brought to claim a reversal of a decree cutting off the equity of redemption, such bill being brought after the time has expired for claiming the redemption. See the title **BILL OF REVIEW**, vol. 3, p. 248.

69. **Amount required to redeem.**—Chicago, etc., R. Co. v. Fosdick, 106 U. S. 47, 75, 27 L. Ed. 47.

70. **Duration of equity of redemption.**—*Shillaber v. Robinson*, 97 U. S. 68, 78, 24 L. Ed. 967.

71. Chicago, etc., R. Co. v. Fosdick, 106 U. S. 47, 71, 27 L. Ed. 47; *Brine v. Insurance Co.*, 96 U. S. 627, 24 L. Ed. 858.

72. **Liability of equity of redemption to dower.**—*Mayburry v. Brien*, 15 Pet. 21, 10 L. Ed. 646; *Bank v. Gutschlick*, 14 Pet. 19, 28, 10 L. Ed. 335; *Stelle v. Carroll*, 12 Pet. 201, 9 L. Ed. 1056.

73. *Van Ness v. Hyatt*, 13 Pet. 294, 298, 10 L. Ed. 168.

74. *Terrell v. Allison*, 21 Wall. 289, 292, 22 L. Ed. 634. And see, also, the title **SHERIFFS', CONSTABLES' AND MARSHALS' SALES**.

75. **Release, merger and waiver.**—*Peugh v. Davis*, 96 U. S. 332, 24 L. Ed. 775.

As between the parties to the mortgage, the law protects the equity of redemption with jealous vigilance. It not only applies the maxim "once a mortgage always a mortgage," but any limitation of the right to redeem, as to time or persons, by a stipulation entered into when the mortgage is executed, or afterwards, is held to

transfer to him of the debtor's interest. The transaction will, however, be closely scrutinized, so as to prevent any oppression of the debtor.<sup>76</sup> A subsequent release of the equity of redemption to the mortgagee must appear by a writing importing in terms a transfer of the mortgagor's interest, or such facts be shown as will estop him from asserting any interest in the premises; and it must be for an adequate consideration.<sup>77</sup> It is a general rule that when the legal title becomes united with the equitable, so that the owner has the whole title, the mortgage is merged by the unity of possession.<sup>78</sup> But if the owner has an interest in keeping these titles distinct, or if there be an intervening right between the mortgage and the equity, there is no merger. The question is upon the intention, actual or presumed, of the person in whom the interests are united.<sup>79</sup> Where a junior mortgagee is a party defendant to a foreclosure bill in which there is a prayer that he be decreed to redeem, and where the priority of the plaintiff's mortgage is found or conceded, and a sale is ordered in default of payment, declaring the right of the debtor to redeem to be forever barred, a similar order as to right of redemption by the junior mortgagee is not substantially or even formally necessary. He has, of course, a right to redeem,

be oppressive, contrary to public policy and void. *Clark v. Reyburn*, 8 Wall. 318, 322, 19 L. Ed. 354.

76. *Peugh v. Davis*, 96 U. S. 332, 337, 24 L. Ed. 775; *Russell v. Southard*, 12 How. 139, 13 L. Ed. 927.

Especially is this necessary when the mortgagee, in the inception and throughout the whole conduct of the business, has shown himself ready and skillful to take advantage of the necessities of the borrower. *Russell v. Southard*, 12 How. 139, 154, 13 L. Ed. 927; *Southard v. Russell*, 16 How. 546, 567, 14 L. Ed. 1052; *Peugh v. Davis*, 96 U. S. 332, 337, 24 L. Ed. 775.

"Courts view transactions of that sort between mortgagor and mortgagee with considerable jealousy, and will set aside sales of the equity of redemption, where, by the influence of his incumbrance, the mortgagee has purchased for less than others would have given." *Russell v. Southard*, 12 How. 139, 154, 13 L. Ed. 927; *Southard v. Russell*, 16 How. 546, 567, 14 L. Ed. 1052.

"The fairness and the value must distinctly appear." *Russell v. Southard*, 12 How. 139, 154, 13 L. Ed. 927; *Southard v. Russell*, 16 How. 546, 567, 14 L. Ed. 1052.

"The law upon the subject of the right to redeem where the mortgagor has conveyed to the mortgagee the equity of redemption, is well settled. It is characterized by a jealous and salutary policy. Principles almost as stern are applied as those which govern where a sale by a cestui que trust to his trustee is drawn in question. To give validity to such a sale by a mortgagor, it must be shown that the conduct of the mortgagee was, in all things, fair and frank, and that he paid for the property what it was worth. He must hold out no delusive hopes; he must exercise no undue influence; he must take no advantage of the fears or poverty of the other party. Any indirection of obliquity of conduct is fatal to his title. Every doubt will be resolved against him. Where

confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character. The form of the instruments employed is immaterial. That the mortgagor knowingly surrendered and never intended to reclaim is of no consequence. If there is vice in the transaction, the law, while it will secure to the mortgagee his debt, with interest, will compel him to give back that which he has taken with unclean hands. Public policy, sound morals, and the protection due to those whose property is thus involved, require that such should be the law." *Villa v. Rodriguez*, 12 Wall. 323, 339, 20 L. Ed. 406.

In determining whether a transaction was intended to operate as such release, the fact that the then value of the property was greatly in excess of the amount paid, and of that originally secured, and the fact that the mortgagor retained possession and subsequently enclosed and cultivated the land, are strong circumstances tending to show that a release was not intended. *Peugh v. Davis*, 96 U. S. 332, 24 L. Ed. 775.

Three years after the transaction the grantor received one hundred dollars from the grantee upon the ground of an arithmetical error, and signed a release of all further demands. But apart from other considerations bearing upon the purchase of an equity of redemption, in the present case it was the duty of the grantee to correct errors, and consequently he paid nothing for the equity of redemption. *Russell v. Southard*, 12 How. 139, 13 L. Ed. 927; *Southard v. Russell*, 16 How. 546, 567, 14 L. Ed. 1052.

77. *Peugh v. Davis*, 96 U. S. 332, 24 L. Ed. 775.

78. *Factors', etc., Ins. Co. v. Murphy*, 111 U. S. 738, 744, 28 L. Ed. 582; *Stelle v. Carroll*, 12 Pet. 201, 205, 9 L. Ed. 1056.

79. *Factors', etc., Ins. Co. v. Murphy*, 111 U. S. 738, 744, 28 L. Ed. 582.



but if he chooses not to assert such right, and stands by while the sale is made and confirmed, he must in equity be deemed to have waived his right.<sup>80</sup>

12. **MAY PASS BY DESCENT, DEVISE OR ALIENATION.**—The equity of redemption is descendible, devisable, and alienable like other interests in real property.<sup>81</sup>

13. **ACCOUNTING BY MORTGAGEE.**—An account of the rents and profits is ordinarily an incident to a decree for redemption against a mortgagee in possession. But it is not an inseparable incident. This right to an account may be extinguished by a release, or an accord and satisfaction, or it may be barred by such neglect of the mortgagor to assert his claim, as renders it unfair for him to insist on an account extending over the whole period of possession, and unjust towards the mortgagee to order such an account. A mortgagee in possession is deemed by a court of equity a trustee; but there is no other than a constructive trust, raised by implication, for the purpose of a remedy, to prevent injustice; and it would be contrary to the fundamental principles of equity, to imply a trust, the execution of which might work injustice. And accordingly it will be found, that in such cases, courts of equity have refused to order accounts against quasi trustees.<sup>82</sup> A person holding the strict legal title, with no other right than a lien for a given sum, who sells the land to innocent purchasers, must account to the owners of the equity of redemption for all he receives beyond that sum.<sup>83</sup> In a suit to redeem mortgaged property the mortgagee is not liable for rent for occupation of land, consisting of lots open, uninclosed, with no buildings on them, and his possession is merely constructive, and the occupation is worth nothing.<sup>84</sup> In a suit to redeem mortgaged property the mortgagee is not liable for a charge of a sum equal to the interest on the sum secured, to be allowed as rent, or for occupation of the mortgaged property which consists of lots open, uninclosed, with no buildings upon them, and the possession of the mortgagee is merely constructive, and the occupation is worth nothing;<sup>85</sup> nor is he liable for the rise and fall in price of the mortgaged property while in constructive possession.<sup>86</sup> Where there was a long lapse of time and the original mortgagee had been dead for many years, an account of rents and profits and of interest upon the money loaned, will be decreed to commence from the filing of the bill.<sup>87</sup>

14. **STATUTES INTERFERING WITH RIGHT TO REDEEM.**—As to the constitutionality of statutes interfering with the rights relating to equity of redemption, see the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 758.

**B. Redemption after Foreclosure**—1. **RIGHT TO REDEEM.**—In many jurisdictions a short time is allowed to the mortgagor, within which to redeem after foreclosure, by paying the debt.<sup>88</sup> Whereas, in the case of a deed of trust,

80. *Simmons v. Burlington, etc., R. Co.*, 159 U. S. 278, 288, 40 L. Ed. 150.

81. **Equity of redemption may pass by descent, devise or alienation.**—*Clark v. Reyburn*, 8 Wall. 318, 322, 19 L. Ed. 354. As to transfers, see ante, "Transfer or Lease of Encumbered Property," X.

82. **Accounting by mortgagee.**—*Russell v. Southard*, 12 How. 139, 155, 13 L. Ed. 927; *Southard v. Russell*, 16 How. 546, 567, 14 L. Ed. 1052.

83. *Shillaber v. Robinson*, 97 U. S. 68, 24 L. Ed. 967.

84. *Peugh v. Davis*, 113 U. S. 542, 544, 28 L. Ed. 1127.

85. *Peugh v. Davis*, 113 U. S. 542, 544, 28 L. Ed. 1127.

86. *Peugh v. Davis*, 113 U. S. 542, 544, 28 L. Ed. 1127.

87. *Russell v. Southard*, 12 How. 139, 13 L. Ed. 927; *Southard v. Russell*, 16 How. 546, 567, 14 L. Ed. 1052.

88. **Right to redeem.**—*Bank v. Guttschlick*, 14 Pet. 19, 29, 10 L. Ed. 335; *Parker v. Dacres*, 130 U. S. 43, 48, 32 L. Ed. 848; *Brobst v. Brock*, 10 Wall. 519, 530, 19 L. Ed. 1002.

In Illinois it is only in the case where the court orders a sale that there is any right of redemption. *Flagg v. Walker*, 113 U. S. 659, 675, 28 L. Ed. 1072.

But in the jurisprudence of Louisiana, and under the statutes of that state, the right of redemption from a decree in foreclosure does not obtain. *Nalle v. Young*, 160 U. S. 624, 642, 40 L. Ed. 560.

No right of redemption after sale under foreclosure exists at common law, or in the system of equity as administered in the courts of England previous to the organization of our government. *Parker v. Dacres*, 130 U. S. 43, 47, 32 L. Ed. 848.

In *Parker v. Dacres*, 130 U. S. 43, 48, 32 L. Ed. 848, the court said: "It is a mis-



unless in case of some extrinsic matter of equity, a court of equity never interferes; and the only right of the grantor in the deed is the right to whatever surplus may remain after sale, of the money for which the property sold.<sup>89</sup>

2. REDEMPTION IN FEDERAL COURTS AS AFFECTED BY STATE LAWS.—As to redemption in the federal courts as affected by state laws, see the title COURTS, vol. 4, p. 1110.

3. WHO MAY REDEEM.—Persons improperly omitted as parties to the foreclosure proceedings, may redeem.<sup>90</sup>

4. AS AFFECTED BY FORECLOSURE DURING WAR.—As to the effect of war upon the right to redeem after foreclosure, see the title WAR.

5. AMOUNT REQUIRED TO REDEEM.—To redeem property which has been sold under a mortgage, it is not sufficient to tender the amount of the sale. The whole mortgage money must be tendered, or, if suit be brought, be paid into court.<sup>91</sup> A mortgagee who has paid a prior mortgage or other incumbrance upon the land is entitled to be repaid the sum so advanced when the mortgagor or his vendee comes to redeem. The same rule applies to the payment by the mortgagee of taxes on the mortgaged premises, or any valid assessment thereon for public improvement.<sup>92</sup> The right of a purchaser at a decretal sale to interest on redemption of the property depends wholly upon the law in force when he purchased and an amendatory act fixing the right of interest at eight per cent. changes a previous rule of court fixing interest at ten per cent.<sup>93</sup>

take to suppose that the case of *Clark v. Reyburn*, 8 Wall. 318, 19 L. Ed. 354, recognizes a right of redemption after a sale under a foreclosure decree, independently of statute. It is there stated that 'by the common law, when the condition of the mortgage was broken, the estate of the mortgagee became indefeasible,' and that 'equity interposed and permitted the mortgagor, within a reasonable time, to redeem upon the payment of the amount due before sale;' also, that, according to the settled practice in equity, when proceedings to foreclose were not regulated by statute, this right to redeem before sale is fixed by the primary decree, and that only in the event of final default in paying the amount ascertained to be due is an absolute sale ordered. The decree in that case was one of strict foreclosure, cutting off the right of redemption before or after sale. It did not find the amount due, and allowed no time previous to the sale to redeem by paying the debt. It was final in the first instance."

89. *Bank v. Gutschlick*, 14 Pet. 19, 29, 10 L. Ed. 335; *Morsell v. First Nat. Bank*, 91 U. S. 357, 361, 23 L. Ed. 436.

90. **Who may redeem.**—Where property is sold under a judgment and later the holder of prior mortgage thereon has the property sold under the mortgage, he becoming the purchaser, the purchaser at the first sale, not having been made a party, had the right to redeem, and to treat the deed to purchaser at the later sale as a mortgage in the hands of the purchaser, and the purchaser as a mortgagee in possession. *Insley v. United States*, 150 U. S. 512, 37 L. Ed. 1163.

A., the owner in fee of certain lands, having mortgaged them to B., to secure a debt, contracted in writing to sell and convey them to C., who thereupon, pur-

suant to the contract, entered on them, and thereafter remained in the open and visible possession of them. The assignee of B. subsequently brought suit to foreclose the mortgage, but failed to make C. a party. A decree by default was rendered, under which the lands were sold to D., who conveyed them to B., after C. had paid to A. all that was due upon the contract, and received from him a deed, which was in due time recorded. B. brought ejectment, and C. filed his bill to redeem. Held, that C., not having been served with process, was not bound by the foreclosure proceedings, and that the title which passed by the sale under them was subject to his right of redemption. *Noyes v. Hall*, 97 U. S. 34, 24 L. Ed. 909.

91. **Amount required to redeem.**—*Collins v. Riggs*, 14 Wall. 491, 20 L. Ed. 723.

The party offering to redeem proceeds upon the hypothesis that, as to him, the mortgage has never been foreclosed and is still in existence. Therefore he can only lift it by paying it. *Collins v. Riggs*, 14 Wall. 491, 493, 20 L. Ed. 723.

92. *McCormick v. Knox*, 105 U. S. 122, 126, 26 L. Ed. 940.

93. *Connecticut Mut. Life Ins. Co. v. Cushman*, 108 U. S. 51, 64, 27 L. Ed. 648.

An amendatory act entitling the purchaser of the premises sold under a mortgage to eight per cent. interest per annum instead of ten per cent. in case of redemption of the premises, as provided by the previous statute, applies to sales of mortgaged property under a decree thereafter made whether the obligation between the mortgagee and mortgagor are made before or after the passage of the statute, as it does not diminish the duty of the mortgagee to pay what he agreed to pay or shorten the period of payment or interfere with or take away

6. **TIME ALLOWED WITHIN WHICH TO REDEEM.**—The time is in the discretion of the chancellor, and to be regulated by the circumstances of the particular case;<sup>94</sup> unless otherwise provided by statute. A court of equity will refuse aid to a party, asserting under it a right of redemption, who has neglected, at least without sufficient cause, before the expiration of the statutory time from the confirmation of the sale, to invoke the authority of the proper court or judge to compel the recognition of such right by the officer whose duty it was, under the statute, to accept a tender made in conformity with the law.<sup>95</sup>

7. **DISPOSITION OF MONEY PAID TO REDEEM.**—The money will be subject to distribution between the mortgagee and the purchaser, in equitable proportion, so as to reimburse the latter his purchase money and pay the former the balance of his debt.<sup>96</sup>

**MORTMAIN.**—"Alienation in mortmain, in its primary signification, is an alienation of lands or tenements to any corporation, aggregate, ecclesiastical, or temporal, the consequence of which in former times was, that by allowing lands to become vested in objects endued with perpetuity of duration, the lords were deprived of escheats and other feudal profits, and the general policy of the common law, which favored the free circulation of property, was frustrated, although it is true that at the common law the power of purchasing lands was incident to every corporation."<sup>1</sup>

**MOTION.**—See note 2.

any remedy which the mortgagee had by existing law for the enforcement of his contract. *Connecticut Mut. Life Ins. Co. v. Cushman*, 108 U. S. 51, 64, 27 L. Ed. 648.

**94. Time allowed within which to redeem.**—*Clark v. Reyburn*, 8 Wall. 318, 324, 19 L. Ed. 354.

**95. Laches.**—*Parker v. Dacres*, 130 U. S. 43, 49, 32 L. Ed. 848; *Mason v. Northwestern Ins. Co.*, 106 U. S. 163, 165, 27 L. Ed. 129; *Burley v. Flint*, 105 U. S. 247, 26 L. Ed. 986; *Harter v. Twohig*, 158 U. S. 448, 456, 39 L. Ed. 1049; *Slicer v. The Bank of Pittsburg*, 16 How. 571, 580, 14 L. Ed. 1063; *Hughes v. Edwards*, 9 Wheat. 489, 6 L. Ed. 142. And see, generally, the title **LACHES**, vol. 7, p. 790.

Where a suit was brought by the United States to redeem property in Kansas from a claim thereto made under a mortgage, it was held not to be subject to laches, even though the suit was instituted more than twelve years after the sheriff's deed to the defendant, made under foreclosure proceedings to which the United States was not a party, and more than thirteen years after the sale of the property to the United States under an execution issued on a judgment it held. *United States v. Insley*, 130 U. S. 263, 265, 32 L. Ed. 968.

"In Connecticut mortgages are not foreclosed by a sale of the mortgaged property, but by strict foreclosure. If

there is a failure to redeem within the time limited in the decree, the mortgage debtor remains liable for the debt, after deducting the value of the property foreclosed. Under the old practice this value was ascertained in the suit to collect the deficiency." *Coney v. Winchell*, 116 U. S. 227, 229, 29 L. Ed. 610.

**96. Collins v. Riggs**, 14 Wall. 491, 493, 20 L. Ed. 723.

**1. Mortmain.**—*Perin v. Carey*, 24 How. 463, 495, 16 L. Ed. 701. See the titles **CHARITIES**, vol. 3, p. 678; **PERPETUITIES**.

**2. Train in motion.**—Where a contract between a shipper of live stock and a common carrier provided that the persons in charge of the live stock covered by the contract should remain in the caboose car attached to the train while it was in **motion**, it was held that momentary **motions** of the car made while the train was stopping at a regular station, as where the train was moved short distances in order to drop off or take on cars, to be switched on side tracks in order to accommodate passenger trains, or to take on fuel or water did not come within the provision. The court said: "The more reasonable interpretation is that by the word **motion**, as here used, is intended that continuous movements of the cars toward their destination which is commonly understood when we speak of moving trains or trains in **motion**." *Texas, etc., R. Co. v. Reeder*, 170 U. S. 530, 535, 42 L. Ed. 1134.

## MOTIONS AND SUMMARY PROCEEDINGS.

### CROSS REFERENCES.

See the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 12; ACTIONS, vol. 1, p. 96; AMENDMENTS, vol. 1, p. 288; APPEAL AND ERROR, vol. 1, p. 333; ATTACHMENT AND GARNISHMENT, vol. 2, p. 660; ATTORNEY AND CLIENT, vol. 2, p. 703; BANKRUPTCY, vol. 2, p. 792; CERTIORARI, vol. 3, p. 651; CONTEMPT, vol. 4, p. 531; CONTINUANCES, vol. 4, p. 543; COSTS, vol. 4, p. 802; COURTS, vol. 4, p. 861; FORTHCOMING AND DELIVERY BONDS, vol. 6, p. 387; INSURANCE, vol. 7, p. 66; JUDGMENTS AND DECREES, vol. 7, p. 544; MANDAMUS, ante, p. 1; MECHANICS' LIENS, ante, p. 328; MUNICIPAL CORPORATIONS; PLEADING; RES ADJUDICATA; REVENUE LAWS; SHERIFFS AND CONSTABLES; SUPERSEDEAS AND STAY OF PROCEEDINGS; SUMMONS AND PROCESS; TAXATION; UNITED STATES COMMISSIONERS; UNITED STATES MARSHALS; VENUE; WAR; WITNESSES.

As to motions to direct verdict, see the title VERDICT. As to motion in arrest of judgment, see the title JUDGMENTS AND DECREES, vol. 7, p. 544. As to motions for a new trial, see the title NEW TRIAL. As to motions to open, modify, or vacate judgments or decrees, see the title JUDGMENTS AND DECREES, vol. 7, p. 544. As to motions as supplanting writs of error coram vobis or audita querela as a mode of correcting irregularities accruing in the progress of a case, see the title JUDGMENTS AND DECREES, vol. 7, p. 544. As to the use of a motion instead of writ of audita querela to relieve against matters arising subsequent to rendition of judgments, see the title AUDITA QUERELA, vol. 2, p. 749. As to power of court on motion to direct satisfaction of judgment to be entered of record, or to direct credits to be given on a judgment, see the title JUDGMENTS AND DECREES, vol. 7, p. 544. As to motion for change of venue, see the title VENUE. As to motions to revive or continue actions, see the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 46. As to motions to amend pleadings, see the title AMENDMENTS, vol. 1, p. 302. As to motions to make pleadings more definite and certain, see the title PLEADING. As to proceedings by motion to strike out pleadings, see the title PLEADING. As to motion to compel election between inconsistent pleas, see the title PLEADING. As to motion to compel separate statements of causes of action, see the title PLEADING. As to motion for nonsuit, see the title DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 5, p. 356. As to motion to dismiss suit for want of jurisdiction, see the title DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 5, p. 374. As to motions to quash attachments, see the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 685. As to motions to quash executions, see the title EXECUTIONS, vol. 6, pp. 108, 109. As to motions to quash indictments, see the title INDICTMENTS, INFORMATIONS, PRESENTMENTS AND COMPLAINTS, vol. 6, p. 1005. As to motion to quash indictments because certain people are excluded from the jury, see the title CIVIL RIGHTS, vol. 3, p. 842. As to motions to strike out and exclude evidence, see the title EVIDENCE, vol. 5, p. 1055. As to motion for payment of money into court, see the title PAYMENT INTO COURT. As to motion to file an original bill in the United States supreme court, see the title COURTS, vol. 4, p. 1018. As to fees for hearing motions, see the title UNITED STATES COMMISSIONERS. As to mandamus to compel hearing and decision of motions, see the title MANDAMUS, ante, p. 1. As to orders of court, see ORDERS OF COURT. As to the right of appeal from decisions on motions, depending on discretion of court, see the title APPEAL AND ERROR, vol. 1, p. 996, et seq. As to right of appeal from judgments in summary proceedings see the title APPEAL AND ERROR, vol. 1, p. 928. As to division on motion constituting a certifiable question, see the title APPEAL AND ERROR, vol. 2, p. 33. As to motion for dismissal of appeals,



see the title *APPEAL AND ERROR*, vol. 2, p. 308, et seq. As to necessity for record of case in order to entertain a motion to dismiss in the appellate court, see the title *APPEAL AND ERROR*, vol. 2, p. 317. As to uniting motion to affirm with motion to dismiss, see the title *APPEAL AND ERROR*, vol. 1, p. 784; vol. 2, p. 308. As to division of opinion on motion for rehearing, see the title *APPEAL AND ERROR*, vol. 2, p. 396. As to motion to dismiss writ of error filed after lapse of period of limitation, see the title *APPEAL AND ERROR*, vol. 2, p. 139. As to determination of matters of fact on motion to dismiss appeal, see the title *APPEAL AND ERROR*, vol. 2, p. 314. As to summary entry of judgments on appeal bonds, see the title *COURTS*, vol. 4, p. 1145. As to entry of summary judgment against sureties on appeal bonds, see the title *APPEAL AND ERROR*, vol. 2, p. 193. As to motions to strike out where bill of exceptions are improperly settled and signed, see the title *EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL*, vol. 6, p. 75. As to denial of motion for order of mandate for want of notice, see the title *MANDATE AND PROCEEDINGS THEREON*, ante, p. 97. As to collection of commercial paper by summary process by execution in the nature of an attachment, see the title *BANKS AND BANKING*, vol. 3, p. 175. As to power of courts to exercise summary jurisdiction over attorneys, see the title *ATTORNEY AND CLIENT*, vol. 2, p. 732. As to summary proceedings to compel attorneys to pay over funds collected, see the title *ATTORNEY AND CLIENT*, vol. 2, p. 722. As to summary proceedings by motion against officers, see the titles *SHERIFFS AND CONSTABLES*; *UNITED STATES MARSHALS*. As to summary proceedings for petty offenses, see the titles *DUE PROCESS OF LAW*, vol. 5, p. 634; *JURY*, vol. 7, p. 748. As to collection of moneys and taxes due the government by summary proceedings, see the title *DUE PROCESS OF LAW*, vol. 5, p. 631. As to jurisdiction of courts of bankruptcy being exercised summarily, see the title *BANKRUPTCY*, vol. 2, p. 822. As to due process in motions and summary proceedings, see the title *DUE PROCESS OF LAW*, vol. 5, pp. 629, 664. As to mortgagee's right to insurance where there exists a summary remedy on the mortgage, see the title *INSURANCE*, vol. 7, p. 186. As to summary proceedings by mortgagee to recover possession on breach of condition of mortgage, see the title *MORTGAGES AND DEEDS OF TRUST*, ante, p. 452. As to proceedings to prevent the unlawful occupancy of public lands, and the abatement of enclosures, see the title *PUBLIC LANDS*. As to summary proceedings in tax sales, see the title *TAXATION*. As to summary proceedings to enforce restitution of moneys belonging to the court, see the title *WAR*.

**Not a Pleading.**—A motion, although reduced to writing, is not a pleading.<sup>1</sup>

**Use and Purpose of Motion.**—Motions are generally appropriate only in the absence of remedies by regular pleadings, and cannot be made available to settle important questions of law, or to dispose of the merits of the case.<sup>2</sup>

**Motion as an Ancillary Proceeding.**—See the title *COURTS*, vol. 4, p. 989.

**Construction of Statutes.**—Statutes are not lightly presumed to institute new and summary process.<sup>3</sup>

1. **Motion not a pleading.**—*Brownfield v. South Carolina*, 189 U. S. 426, 428, 47 L. Ed. 882.

2. **Purpose of motion.**—*Illinois Cent. R. Co. v. Adams*, 180 U. S. 28, 38, 45 L. Ed. 410.

3. **Construction of statute.**—*Ex parte Wood*, 9 Wheat. 603, 608, 6 L. Ed. 171.

In *Ex parte Wood*, 9 Wheat. 603, 607, 6 L. Ed. 171, in speaking of a rule to show cause why process should not issue to repeal a patent under § 10 of the act of February, 1793, ch. 11, the court said: "It is not lightly to be presumed, therefore, that congress, in a class of cases

placed peculiarly within its patronage and protection, involving some of the dearest and most valuable rights which society acknowledges and the constitution itself means to favor, would institute a new and summary process, which should finally adjudge upon those rights, without a trial by jury, without a right of appeal, and without any of those guards with which, in equity suits, it has fenced round the general administration of justice." See the titles *DUE PROCESS OF LAW*, vol. 5, p. 629, et seq; *PATENTS*.

**Summary Proceedings for Contempt.**—Where contempt is committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the court, without further proof or examination.<sup>4</sup>

**Indirect Contempt—Necessity of Notice.**—But in matters that arise at a distance if the court upon affidavit see sufficient ground to suspect that a contempt has been committed, a rule is made on the suspected party to show cause why an attachment should not issue against him, or, in very flagrant cases, the attachment issues in the first instance, as it also does if no sufficient cause be shown to discharge, and thereupon the court confirms and makes absolute the original rule.<sup>5</sup>

**Jurisdiction.**—In summary proceedings, where a court exercises an extraordinary power, under a special statute, which prescribes its course, that course ought to be strictly pursued.<sup>6</sup>

**Answer to motion.**—A motion, although reduced to writing, does not require a written answer.<sup>7</sup>

**Record Where Court Has Acknowledged Jurisdiction.**—In general, motions and rules made in the course of suits, over which the court has an acknowledged jurisdiction, are not entered of record.<sup>8</sup>

**Record Where Special Jurisdiction Given to Court.**—Although, in general, the interlocutory proceedings in suits are not entered of record, as they are deemed merely collateral incidents, yet where a special jurisdiction is given to a court, to be exercised upon motion or summary proceedings, all the preliminary proceedings required to found that jurisdiction should appear of record, as they constitute an essential part of the case.<sup>9</sup>

**Record Where Rule Sole Foundation of Suit.**—Where a rule is the sole foundation of the suit, and the first step in its progress, that rule can only be granted, under special circumstances prescribed by law; and it is not sufficient to show that the rule itself was granted, but it must also appear, by the proceedings, that it was rightfully granted.<sup>10</sup>

**Where Decisions on Motions Not in Law Judgments.**—See the title JUDGMENTS AND DECREES, vol. 7, p. 544.

**Finality of judgments on motions and in summary proceedings,** see the title APPEAL AND ERROR, vol. 1, pp. 964, 974.

**Conclusiveness of judgments on motions.**—See the title RES ADJUDICATA.

**Judgment on Motion in Suits on Bonds to the United States for Duties.**—See the title REVENUE LAWS.

**MOTIVE.**—See the title CRIMINAL LAW, vol. 5, p. 127. See, also, the various specific offenses. As to proof of motive, see the title EVIDENCE, vol. 5, pp. 1023, 1032.

4. **Direct contempt.**—Ex parte Terry, 128 U. S. 289, 307, 32 L. Ed. 405. See the title CONTEMPT, vol. 4, p. 539.

5. **Indirect contempt.**—Ex parte Terry, 128 U. S. 289, 307, 32 L. Ed. 405. See the title CONTEMPT, vol. 4, pp. 539, 540.

6. **Jurisdiction in summary proceedings.**—Thatcher v. Powell, 6 Wheat. 119, 120, 5 L. Ed. 221. See the title COURTS, vol. 4, p. 1060. And see, generally, the title DUE PROCESS OF LAW, vol. 5, p. 629.

7. **Answer.**—Brownfield v. South Carolina, 189 U. S. 426, 428, 47 L. Ed. 882.

8. **Record and judgment.**—Ex parte Wood, 9 Wheat. 603, 606, 6 L. Ed. 171.

9. **Special jurisdiction conferred on**

**court.**—Ex parte Wood, 9 Wheat. 603, 606, 6 L. Ed. 171.

**Jurisdiction must be shown.**—In summary proceedings, where a court exercises an extraordinary power, under a special statute, which prescribes its course, the facts which give jurisdiction ought to appear on the face of the record; otherwise, the proceedings are not merely voidable, but absolutely void, as being coram non jure. Thatcher v. Powell, 6 Wheat. 119, 120, 5 L. Ed. 221. See the titles COURTS, vol. 4, p. 1060; JURISDICTION, vol. 7, p. 738. And see, generally, the title DUE PROCESS OF LAW, vol. 5, p. 629.

10. **Rule foundation of suit.**—Ex parte Wood, 9 Wheat. 603, 606, 6 L. Ed. 171.

**MOULD.**—"A mould is a receptacle into which a softer material is injected, to take its shape when hardened."<sup>1</sup>

**MOUNTED PAY.**—See the title *ARMY AND NAVY*, vol. 2, pp. 502, 508.

**MOVABLES.**—See note 2.

**MUCH.**—See note 3.

1. Rubber-Coated Harness-Trimming Co. v. Welling, 97 U. S. 7, 10, 24 L. Ed. 942.

2. **Movables.**—Where a testator bequeaths to his wife all his "wearing apparel, household furniture, plate, linen, books, and every movable whatever," and it was urged, that the words were broad enough to cover the debts due to the testatrix, the court said: "If the plaintiff's construction were right, all the rest of the will would be destroyed. In this case, **movables** must be confined to things of the same nature with those before specified." *Jackson v. Vandersprengle*, 2 Dall. 142, 1 L. Ed. 323.

3. **Much.**—An act provided: "That unimproved lots in the city of Washington, on which two years' taxes remain due and unpaid, or so much thereof as may be necessary to pay such taxes, may be sold, at public sale for such taxes due thereon." The court said: "The provisions of the

act are clearly intended to raise the tax of each lot from itself. The words are, so **much** thereof, not so many; as they must have been, after speaking of "unimproved lots," had it been intended to authorize the sale of some, for the taxes of others; and not the sale of each one, or "so **much**" as is necessary of each one, for the payment of its own taxes. Apply the enacting words to the case of an owner of a single lot, and the effect of the word **much**, can only be to authorize a sale of part of a lot, whenever circumstances will admit of such a sale, and the sum due will not require more. But if taxes be due by one and the same individual, in small sums, upon many lots, and one lot being set up for sale, produces a sum adequate to the payment of all, the whole arrears become paid off, and no excuse can then exist for making further sales. *Washington v. Pratt*, 8 Wheat. 681, 683, 685, 5 L. Ed. 714.



# MULTIFARIOUSNESS.

BY GORDON NELSON.

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### CROSS REFERENCES.

As to joinder of causes of action, see the title *ACTIONS*, vol. 1, p. 111. As to joinder of parties, see the title *PARTIES*. As to joining in one indictment several offenses of the same nature, see the title *INDICTMENTS, INFORMATIONS, PRESENTMENTS AND COMPLAINTS*, vol. 6, p. 1001. As to time of objecting to multifarious indictment, see the title *INDICTMENTS, INFORMATIONS, PRESENTMENTS AND COMPLAINTS*, vol. 6, p. 1007. As to bills praying for alternative relief, see the title *EQUITY*, vol. 5, p. 854. As to plea containing too many defenses, see the title *EQUITY*, vol. 5, p. 861. As to multifarious cross bill and demurrer therefor, see the title *CROSS BILLS*, vol. 5, p. 144. As to multifariousness of bill to enjoin violation of anti-trust act, see the title *MONOPOLIES AND CORPORATE TRUSTS*, ante, p. 431. As to plaintiff's right to object to bill to defeat the right of removal, see the title *REMOVAL OF CAUSES*. As to judgment on demurrer for misjoinder of parties and causes of action, see the title *DEMURRERS*, vol. 5, p. 315. As to whether an appeal can be taken from judgment on demurrer for multifariousness, see the title *APPEAL AND ERROR*, vol. 1, p. 957.

### I. Definition and General Nature.

**A. Definition.**—Multifariousness has been defined to mean, "the improperly joining in one bill, distinct and independent matters, and thereby confounding them."<sup>1</sup>

**1. Definition.**—*Shields v. Thomas*, 18 How. 253, 260, 15 L. Ed. 368; *Harrison v. Perea*, 168 U. S. 311, 319, 42 L. Ed. 478; *Walker v. Powers*, 104 U. S. 245, 251, 26 L. Ed. 729.

The example by which Justice Story illustrates this definition is thus given: "The uniting in one bill several matters perfectly distinct and unconnected against one defendant, or the demand of several matters of a distinct and independent nature, against several defendants in the same bill." *Shields v. Thomas*, 18 How. 253, 260, 15 L. Ed. 368; *Walker v. Powers*, 104 U. S. 245, 251, 26 L. Ed. 729.

In Daniell's *Chancery Practice*, 335, it is said in explanation of this that "it may be that the plaintiffs and defendants are parties to the whole of the transactions which form the subject of the suit, and,

nevertheless, those transactions may be so dissimilar that the court will not allow them to be joined together, but will require distinct records." *Walker v. Powers*, 104 U. S. 245, 251, 26 L. Ed. 729.

**Bill to enforce disconnected demands against different persons.**—What shall constitute multifariousness is a matter about which there is a great diversity of opinion. In general terms a bill is said to be multifarious, which seeks to enforce against different individuals, demands which are wholly disconnected. In illustration of this, it is said, if an estate be sold in lots to different persons, the purchasers could not join in exhibiting one bill against the vendor for a specific performance. Nor could the vendor file a bill for a specific performance against all the purchasers. The contracts of pur-

**B. Nature and Purpose of Rule.**—The doctrine of multifariousness, whether relating to improperly combining persons or grievances in the bill, is simply a rule of pleading adopted by courts of equity. It has been found convenient in the administration of justice, and promotive of that end, that parties who have no proper connection with each other shall not be compelled to litigate together in the same suit, and that matters wholly distinct from and having no relation to each other, and requiring defenses equally unconnected, shall not be alleged and determined in one suit.<sup>2</sup>

**C. Rules for Determining Multifariousness.**—It is impossible to lay down any general rule as to what constitutes multifariousness in a bill in equity. Every case must be governed by its own circumstances, and the court must exercise a sound discretion.<sup>3</sup> But it must be tested and determined by the struc-

ture being distinct, in no way connected with each other, a bill for a specific execution, whether filed by the vendor or vendee, must be limited to one contract. It has been decided that an author cannot file a joint bill against several booksellers for selling the same spurious edition of his work, as there is no privity between them. But it has been ruled that a bill may be sustained by the owner of a sole fishery against several persons who claimed under distinct rights. The only difference between these cases would seem to be, that the right of fishery was necessarily more limited than that of authorship. And how this should cause any difference of principle between the cases is not easily perceived. *Gaines v. Chew*, 2 How. 619, 11 L. Ed. 402; *Brown v. Guarantee Trust, etc., Co.*, 128 U. S. 403, 410, 32 L. Ed. 468.

**Joining disconnected parties and subjects of complaint.**—When parties and subjects of complaint having no proper connection with each other are grouped together in a bill, they, by the accepted canons of equity pleading, render it multifarious. *United States v. Union Pac. R. Co.*, 98 U. S. 569, 601, 25 L. Ed. 143.

**Bill must affect all defendants alike.**—A bill cannot be said to be multifarious unless it embraces distinct matters, which do not affect all the defendants alike. *Payne v. Hook*, 7 Wall. 425, 433, 19 L. Ed. 260. See post, "Forms of Multifariousness," II.

2. *United States v. Union Pac. R. Co.*, 98 U. S. 569, 604, 25 L. Ed. 143.

**Purpose of rule.**—The object of the rule against multifariousness is to protect a defendant from the unnecessary inconvenience and expense, in litigating matters in which he has no interest. *Gaines v. Chew*, 2 How. 619, 11 L. Ed. 402.

3. **Impossible to lay down general rule.**—*Gaines v. Chew*, 2 How. 619, 11 L. Ed. 402; *Oliver v. Piatt*, 3 How. 333, 412, 11 L. Ed. 622; *Shields v. Thomas*, 18 How. 253, 260, 15 L. Ed. 368; *Harrison v. Perea*, 168 U. S. 311, 319, 42 L. Ed. 478; *Fitch v. Creighton*, 24 How. 159, 16 L. Ed. 596; *Barney v. Latham*, 103 U. S. 205, 215, 26 L. Ed. 514.

The cases upon the subject are ex-

tremely various, and the court, in deciding upon them, seems to have considered what was convenient in particular cases, rather than to have attempted to lay down an absolute rule. *Shields v. Thomas*, 18 How. 253, 259, 15 L. Ed. 368; *Harrison v. Perea*, 168 U. S. 311, 319, 42 L. Ed. 478.

"Lord Cottenham, in *Campbell v. Mackay*, 7 Simon, 564, and in *Mylne v. Craig*, 603, says, to lay down any rule, applicable universally, or to say what constitutes multifariousness, as an abstract proposition, is, upon the authorities, utterly impossible. Every case must be governed by its circumstances; and as these are as diversified as the names of the parties, the court must exercise a sound discretion on the subject. Whilst parties should not be subjected to expense and inconvenience in litigating matters in which they have no interest, multiplicity of suits should be avoided by uniting in one bill all who have an interest in the principal matter in controversy, though the interests may have arisen under distinct contracts." *Fitch v. Creighton*, 24 How. 159, 163, 16 L. Ed. 596. See *Virginia v. West Virginia*, 206 U. S. 290, 322, 51 L. Ed. 1068; *Gaines v. Chew*, 2 How. 619, 11 L. Ed. 402; *Brown v. Guarantee Trust, etc., Co.*, 128 U. S. 403, 411, 32 L. Ed. 468.

**Each case must be decided on its own merits.**—Each case, if not brought directly within the principle of some preceding case, must be decided upon its own merits and upon a survey of the real and substantial convenience of all parties, the adequacy of the legal remedy, the situations of the different parties, the points to be contested and the result which would follow if jurisdiction should be assumed or denied. The single fact that a multiplicity of suits may be prevented by this assumption of jurisdiction is not in all cases enough to sustain it. *Hale v. Allinson*, 188 U. S. 56, 77, 47 L. Ed. 380.

"There is, perhaps, no rule established for the conducting of equity pleadings, with reference to which (whilst as a rule it is universally admitted) there has existed less of certainty and uniformity in application, than has attended this relating to multifariousness. This effect,

ture of the bill alone, and cannot be enforced, explained, or removed by proceedings posterior to the bill and demurrer, nor by the evidence.<sup>4</sup>

## II. Forms of Multifariousness.

**A. Misjoinder of Causes of Action.**—Although a suit may, under correct pleading, embrace several controversies,<sup>5</sup> a bill is multifarious where the causes of action and the relief sought are distinct and in some respects antagonistic and cannot properly be joined.<sup>6</sup>

But by some authorities this is more properly termed misjoinder.<sup>8</sup> To support the objection of multifariousness, because the bill contains different causes of suit against the same person, two things must concur; first, the grounds of

flowing, perhaps inevitably, from the variety of modes and degrees of right and interest entering into the transactions of life, seems to have led to a conclusion rendering the rule almost as much an exception as a rule, and that conclusion is, that each case must be determined by its peculiar features." *Shields v. Thomas*, 18 How. 253, 259, 15 L. Ed. 368; *Harrison v. Perea*, 168 U. S. 311, 319, 42 L. Ed. 478; *Brown v. Guarantee Trust, etc., Co.*, 128 U. S. 403, 410, 32 L. Ed. 468.

**4. Must be tested by structure of bill.**—*Nelson v. Hill*, 5 How. 127, 132, 12 L. Ed. 81.

**5. Misjoinder of causes of action.**—*Barney v. Latham*, 103 U. S. 205, 210, 26 L. Ed. 514. See, generally, the title **ACTIONS**, vol. 1, p. 111.

**6. Bills cannot join distinct and antagonistic causes of action.**—*Walker v. Powers*, 104 U. S. 245, 26 L. Ed. 729. See ante, "Definition," I, A.

**Bills with double aspect.**—As to bills stating alternative case, see the title **EQUITY**, vol. 5, p. 851.

**Alternative claims against different persons cannot be joined in one bill.**—

Two alternative claims, each belonging to many persons, one of whom has no interest in one claim, and the others of whom have no interest in the other claim, cannot be joined in one bill in equity. *Stebbins v. St. Anne*, 116 U. S. 386, 392, 29 L. Ed. 667.

**Bill to enforce specific performance and obtain relief against fraud.**—Where the leading object of a bill is to enforce specific performance of an award of arbitrators, and if the award cannot be enforced, the bill further asks that the court will relieve against the unfairness or fraud of the partition, it is apparent that these are matters of a distinct character which cannot be joined. The one relates to the validity of the submission and award and the power and propriety of enforcing a specific performance, and the other to the equity and fairness of the partition. The matters involve totally distinct questions, requiring different evidence, and leading to different decrees. *Walker v. Powers*, 104 U. S. 245, 250, 26 L. Ed. 729.

**In suit to foreclose court will not determine validity of title prior to the mortgage.**—As a general rule, a court of

equity, in a suit to foreclose a mortgage, will not undertake to determine the validity of a title prior to the mortgage and adverse to both mortgagor and mortgagee; because such a controversy is independent of the controversy between the mortgagor and the mortgagee as to the foreclosure or redemption of the mortgage, and to join the two controversies in one bill would make it multifarious. *Hefner v. Northwestern Life Ins. Co.*, 123 U. S. 747, 751, 31 L. Ed. 309.

**Equitable matters mixed up with others of different character.**—Where the bill prays that the executor may account for all moneys received by him from the succession, and for a reference to a master to ascertain and settle all claims against the estate, and that a receiver may be appointed to take charge of the estate; that the will may be declared valid; that the complainants may be put into possession of the plantation; that the executor may be removed; and that an injunction may issue to enjoin and restrain the defendants from further prosecuting the said suits, or any other suits or litigation in the premises, the court said: "A mere statement of the bill is sufficient to show that it cannot be sustained. Whilst it undoubtedly presents some matters of equitable consideration, they are so mixed up with others of a different character, \* \* \* which constitute the main object and purpose of the suit, as to make the bill essentially bad on demurrer." *Haines v. Carpenter*, 91 U. S. 254, 256, 23 L. Ed. 345.

**Amended bill changing the original case.**—Where in a suit by the United States against a surety on an official bond, the bill is amended so as to include another claim against such surety on another bond, this does not make the bill multifarious. *United States v. Beebe*, 180 U. S. 343, 355, 45 L. Ed. 563. See the title **AMENDMENTS**, vol. 1, p. 296.

**8. Misjoinder.**—Frequently, the objection raised, though termed multifariousness, is in fact more properly misjoinder; that is to say, the cases or claims united in the bill are of so different a character that the court will not permit them to be litigated in one record. *Shields v. Thomas*, 18 How. 253, 259, 15 L. Ed. 368; *Harrison v. Perea*, 168 U. S. 311, 319, 42 L. Ed. 478.



suit must be different; second, each ground must be sufficient as stated to sustain a bill.<sup>9</sup>

**Causes of Action Consolidated under Authority of Statute.**—The doctrine of multifariousness may be modified, limited and controlled by the same power which creates the court and confers its jurisdiction and where causes of action are consolidated in one bill in United States courts under the authority of an act of congress, such bill cannot be said to be multifarious.<sup>10</sup>

**B. Misjoinder of Parties.**—The principle of multifariousness is one very largely of convenience, and is more often applied where two parties are attempted to be brought together by a bill in chancery who have no common interest in the litigation, whereby one party is compelled to join in the expense and

9. *Brown v. Guarantee Trust, etc., Co.*, 128 U. S. 403, 412, 32 L. Ed. 468.

**Bill may open settlements and cancel receipts.**—A bill involving but a single matter and affecting all defendants alike is not multifarious, although it may seek both to open settlements and to cancel receipts as fraudulent. *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260.

**Bill showing agreement to convey land may ask for the payment of money.**—A bill is not open to the charge of multifariousness, although it sets out a verbal agreement to convey a half interest in land, and the prayer is for the payment of a certain amount of money. The discrepancy is explained by the fact that, in view of a trust deed, a decree for a half interest in the land will fail to satisfy plaintiff's claim, and that his lien is claimed to extend not merely to the half interest but to the whole property to satisfy decedent's promise to convey to him a half of its unencumbered value. *Townsend v. Vanderwerker*, 160 U. S. 171, 187, 40 L. Ed. 383.

**Bills asserting different titles to same property.**—"Two persons cannot unite two distinct titles in an original bill, although against the same person. Such a proceeding, if allowed, might be extended indefinitely, and might give such a complexity to chancery proceedings, as would render them almost interminable. But we know of no principle, which shall prevent a person claiming the same property, by different titles, from asserting all his titles in the same bill." *Stephens v. McCargo*, 9 Wheat. 502, 505, 6 L. Ed. 145.

**Bill claiming liens upon several lots.**—A bill is not multifarious because it claims to enforce liens upon several lots. *Fitch v. Creighton*, 24 How. 159, 16 L. Ed. 596.

10. *United States v. Union Pac. R. Co.*, 98 U. S. 569, 604, 25 L. Ed. 143.

"The two subjects of applying the assets of the bank and enforcing the liability of a stockholder, however otherwise distinct, are by the statute made connected parts of the whole series of transactions which constitute the liquidation of the affairs of the bank," and a bill joining them is not multifarious. *Richmond v. Irons*, 121 U. S. 27, 50, 30 L. Ed. 864; *Wyman v. Wallace*, 201 U. S. 230,

242, 50 L. Ed. 738; *Frenzer v. Wallace*, 201 U. S. 244, 50 L. Ed. 742.

**Bill asserting the validity of two patents.**

—A bill is not multifarious because it assails two patents, issued nearly a year apart, to the same party, and relating to the same subject, the latter patent being supposed to be for an improvement upon the invention of the earlier one, where both are held by the same defendant, and are used by it in the same operations. "There is no such diversity of the subject matter embraced in the assault on the two patents that they cannot be conveniently considered together, and although it may be possible that one patent may be sustained and the other may not, yet it is competent for the court to make a decree in conformity with such finding. It seems to us in every way appropriate that the question of the validity of the two patents should be considered together." *United States v. American Bell Tel. Co.*, 128 U. S. 315, 351, 32 L. Ed. 480.

**Objections treated as resting on matter of surplusage.**—In a suit in equity brought by Virginia against the state of West Virginia, the court, in considering the question of the multifariousness of the bill, said: "It is true that the prayer contains, among other things, the request, 'that all proper accounts may be taken to determine and ascertain the balance due from the state of West Virginia to your oratrix in her own right and as trustee aforesaid,' but it also prays that the court 'will adjudicate and determine the amount due to your oratrix by the state of West Virginia in the premises.' And we understand the reference to holding in trust to be in the interest of mere convenience, and that the bill cannot properly be regarded as seeking in chief anything more than a decree for 'an equitable proportion of the public debt of the commonwealth of Virginia on the first day of January, 1861.' The objections of misjoinder of parties and misjoinder of causes of action may be treated as resting on matter of surplusage merely, and at all events further consideration thereof may wisely be postponed to final hearing. *Florida v. Georgia*, 17 How. 478, 491, 492, 15 L. Ed. 181; *California v. Southern Pac. Co.*, 157 U. S. 229, 249, 39 L. Ed. 683." *Virginia v. West Virginia*, 206 U. S. 290,

trouble of a suit in which he and his codefendant have no common interest, or in which one party is joined as complainant with another party with whom in like manner he either has no interest at all, or no such interest as requires the defendant to litigate it in the same action.<sup>11</sup>

### III. Time and Method of Raising Objections.

The objection of multifariousness cannot, as a matter of right, be taken by the parties to the bill except by demurrer, plea, or answer, and if not so taken it is deemed waived;<sup>13</sup> although it has been said that the objection may be made

322, 51 L. Ed. 1068. See the title **DEMURRERS**, vol. 5, p. 315.

**11. Misjoinder of parties.**—United States *v.* American Bell Tel. Co., 128 U. S. 315, 532, 32 L. Ed. 450; *Oliver v. Piatt*, 3 How. 333, 11 L. Ed. 622; *Walker v. Powers*, 104 U. S. 245, 26 L. Ed. 729. See ante, "Definition," I, A.

As to joinder of parties generally, see the title **PARTIES**.

A suit cannot be maintained in equity on the ground of preventing a multiplicity of suits where the demands against each of the defendants, although of the same nature, are entirely distinct from and unconnected with any other defendant. In such case each defendant has a right to object to the joining of any distinct and unconnected causes of action. *Hale v. Allinson*, 188 U. S. 56, 74, 47 L. Ed. 380.

"Sir Thomas Plumer, V. C., in allowing a demurrer which had been interposed by one of several defendants to a bill on the ground that it was multifarious, remarks, that 'the court is always averse to multiplicity of suits, but certainly a defendant has the right to insist that he is not bound to answer a bill containing several distinct and separate matters relating to individuals with whom he has no connection.'" *Shields v. Thomas*, 18 How. 253, 260, 15 L. Ed. 368; *Harrison v. Perea*, 168 U. S. 311, 316, 42 L. Ed. 478.

A bill is multifarious where there is a misjoinder of parties complainant. *Walker v. Powers*, 104 U. S. 245, 26 L. Ed. 729.

**Several creditors uniting.**—As to creditors uniting to attach effects of debtor, see the title **ACTIONS**, vol. 1, p. 112.

**Several tenants cannot be joined in bill for quit rents.**—In a case where it was held that a bill would not lie against several tenants of a manor for quit rents, the plaintiff's remedy being at law, and the suit also multifarious as to the different tenants, the Lord Chancellor said: "Upon what principle two different tenants, of distinct estates, should be brought hither to hear each other's rights discussed, I cannot conceive. The court has gone great lengths in bills of this sort; and, taking the authority for granted, I cannot conceive on what ground such a suit can stand." *Hale v. Allinson*, 188 U. S. 56, 74, 47 L. Ed. 380.

**Several landowners cannot join in suit against corporation for taking their lands.**

—A plaintiff cannot maintain an action against several defendants to recover matters of different natures against them. It was a suit in equity by several landowners of different lands not coming under a common title, against the defendant for taking their lands for the purposes of its incorporation, and not paying or compensating the owners therefor. The court held the bill could not be maintained, as the same was multifarious, and said the fact that the plaintiffs had a common interest in the question and that to sustain the jurisdiction would relieve the necessity of a number of suits at law brought by the separate plaintiffs, would not confer jurisdiction on the court upon any principle of equity. *Hale v. Allinson*, 188 U. S. 56, 75, 47 L. Ed. 380.

**Bill of foreclosure must not join as defendant person claiming title adversely.**

—A bill of foreclosure is bad for misjoinder of parties and for multifariousness, where persons are made defendants thereto who claim title adversely to the mortgagor and the complainant, and the latter seeks in that suit to litigate and settle his rights. *Dial v. Reynolds*, 96 U. S. 340, 24 L. Ed. 644.

**13. Objection taken by demurrer, plea or answer.**—*Oliver v. Piatt*, 3 How. 333, 11 L. Ed. 622; *Hefner v. Northwestern Life Ins. Co.*, 123 U. S. 747, 751, 31 L. Ed. 309; *Shields v. Thomas*, 18 How. 253, 15 L. Ed. 368; *Fitch v. Creighton*, 24 How. 159, 16 L. Ed. 596; *Barney v. Latham*, 103 U. S. 205, 215, 26 L. Ed. 514.

**Objection by plea or answer.**—*Story v. Livingston*, 13 Pet. 359, 10 L. Ed. 200; *House v. Mullen*, 22 Wall. 42, 22 L. Ed. 838.

**Demurrer.**—"That a bill is multifarious may be demurred to for that cause is a general principle." *Gaines v. Chew*, 2 How. 619, 11 L. Ed. 402; *Haines v. Carpenter*, 91 U. S. 254, 256, 23 L. Ed. 345. See the title **DEMURRER**, vol. 5, p. 304.

**Demurrer for misjoinder.**—*Story v. Livingston*, 13 Pet. 359, 10 L. Ed. 200; *Livingston v. Woodworth*, 15 How. 546, 14 L. Ed. 809; *House v. Mullen*, 22 Wall. 42, 22 L. Ed. 838.

As to dismissal of bill by misjoinder of defendants apparent, see the title **DISMISSAL, DISCONTINUANCE AND NONSUIT**, vol. 5, p. 370.



by answer,<sup>14</sup> the rule has been inferentially laid down that the objection must be made before answer.<sup>15</sup> It cannot be insisted upon by the parties at the hearing of the cause or in the appellate court but it may at any time either at the hearing or on appeal, be taken by the court *sua sponte*, whenever it is deemed by the court to be necessary and proper to assist it in the due administration of justice.<sup>16</sup>

#### IV. Amendment.

The defect of multifariousness may be cured by an application to the court for leave to amend,<sup>17</sup> and this may be done after the demurrer on that ground has

14. See the cases in the preceding note. As to what defenses can be properly set up by answer, see the title *EQUITY*, vol. 5, p. 865.

15. **Objection must be made before answer.**—An objection that a bill is multifarious must be made before answer, and can be tested only by the structure of the bill itself. *Nelson v. Hill*, 5 How. 127, 12 L. Ed. 81.

"The objection of multifariousness is one of which it is said by the authorities a defendant can avail himself by demurrer or exception taken to the pleading only. That being designed for his protection against the vexation and expense of answering to matters irrelevant to the true controversy existing between him and the complainant, if instead of arresting the irregularity at the commencement and claiming the exemption intended for him, he will go on and answer the bill, the reason for the exemption designed by the rule no longer exists; and although at the hearing the court may, *sua sponte*, make an objection for multifariousness, it is no longer in the power of a party, after answer, to do so. From the character of this objection, then, and from the established requisition as to the time and mode of making it by a defendant, it must of course be tested and determined by the structure of the bill alone, and cannot be enforced, explained, or removed by proceedings posterior to the bill and demurrer, nor by the evidence." *Nelson v. Hill*, 5 How. 127, 131, 12 L. Ed. 81.

16. *Oliver v. Piatt*, 3 How. 333, 11 L. Ed. 622; *Nelson v. Hill*, 5 How. 127, 132, 12 L. Ed. 81; *Hefner v. Northwestern Life Ins. Co.*, 123 U. S. 747, 751, 31 L. Ed. 309; *Shields v. Thomas*, 18 How. 253, 15 L. Ed. 368; *Fitch v. Creighton*, 24 How. 159, 16 L. Ed. 596; *Barney v. Latham*, 103 U. S. 205, 215, 26 L. Ed. 514. See the title *APPEAL AND ERROR*, vol. 2, p. 112.

**Objection urged at argument.**—Where the objection of multifariousness was urged at the argument, the court held that if the objection were tenable, it would be too late to insist upon it. *Oliver v. Piatt*, 3 How. 333, 441, 11 L. Ed. 622.

**Objection too late on appeal.**—*Story v. Livingston*, 13 Pet. 359, 10 L. Ed. 200.

"In the case before us the objection of misjoinder of the plaintiffs nowhere appears upon the pleadings, nor, for aught that is disclosed, was it insisted upon even at the hearing; it is urged for the first

time after the hearing and after a final decree, and to allow this objection at so late a stage of the proceedings, would be a surprise upon the appellees, and might operate the most serious mischiefs." *Livingston v. Woodworth*, 15 How. 546, 14 L. Ed. 809.

**Objection cannot be made in appellate court.**—"As there was no demurrer to the bill, as the answer sets up no objection to the jurisdiction, but denies that there is any thing in the condition of the land to forbid actual partition, we see no reason why the bill may not be treated as sufficient for a partition suit. If there is any thing in the allegations which concern the partnership, which introduces another matter, the objection should have been taken by demurrer for multifariousness. It is not fatal to the bill on appeal." *Briges v. Sperry*, 95 U. S. 401, 405, 24 L. Ed. 390.

At so late a period as the hearing, so reluctant is the court to countenance the objection, that, if it can get on in the cause to a final decree without serious embarrassment, it will do so, disregarding the fault or error, when it has been acquiesced in by the parties up to that time. A fortiori on appellate court would scarcely entertain the objection, if it was not forced upon it by moral necessity. *Oliver v. Piatt*, 3 How. 333, 412, 11 L. Ed. 622.

**Collateral attack.**—As to collateral attack on decree because of multifariousness of bill, see *Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 29, 39 L. Ed. 873, citing with approval *Gaines v. Chew*, 2 How. 619, 642, 11 L. Ed. 402. See, generally, the title *JUDGMENTS AND DECREES*, vol. 7, p. 628.

17. **Defective bill cured by amendment.**—Where petition is demurred to because of multifariousness, such objection may be removed by an application to the court for leave to amend. *De Armas v. United States*, 6 How. 102, 103, 12 L. Ed. 361.

Where the bill prays that some of the defendants may be decreed to account for moneys, etc., which came into their hands, as executors, under a will; and that the other defendants, who purchased from them real and personal property, may be compelled to surrender the same, and account, etc., on the ground that they had notice of the fraud of the executors, it was held that in the rendition of this account the other defendants have no in-



been sustained.<sup>18</sup> And although the question has not been raised by the parties, the court may, on its own motion, either at the hearing or on appeal, order the bill to be amended.<sup>19</sup>

### V. Dismissal.

Where the defect is not cured by amendment, it is proper for the court to dismiss the bill.<sup>20</sup> The dismissal may be ordered by the court in sustaining a demurrer to the bill,<sup>21</sup> or it may be ordered by the court sua sponte,<sup>22</sup> and it may order that the dismissal shall be without prejudice.<sup>23</sup>

terest, and such a matter, therefore, ought not to be connected with the general objects of the bill. The bill in these respects may be so amended. *Gaines v. Chew*, 2 How. 619, 643, 11 L. Ed. 402.

As to amendment by striking out improper party and claim, see post, "Dismissal," V. And see the title AMENDMENTS, vol. 1, p. 294.

**18.** *Walker v. Powers*, 104 U. S. 245, 249, 26 L. Ed. 729.

As to amendment of bill after demurrer, see the title AMENDMENTS, vol. 1, p. 290.

**19. Court may order bill to be amended.**—*Hefner v. Northwestern Life Ins. Co.*, 123 U. S. 747, 751, 31 L. Ed. 309, citing *Oliver v. Piatt*, 3 How. 333, 412, 11 L. Ed. 622; *Nelson v. Hill*, 5 How. 127, 132, 12 L. Ed. 81.

If the court should be of the opinion that the suit is obnoxious to the objection of multifariousness or misjoinder, it may for that reason require the pleadings to be reformed both as to subject matter and as to parties. *Barney v. Latham*, 103 U. S. 205, 216, 26 L. Ed. 514.

**20. Multifarious bills dismissed.**—The complainants not having amended by striking out so much of the bills as related to an improper party and his claim, it was proper for the court to sustain the demurrers and dismiss the bills. *Dial v. Reynolds*, 96 U. S. 340, 24 L. Ed. 644.

Where on demurrer no leave to amend was asked, the demurrer was sustained and the bill, as it originally stood, was dismissed. *Walker v. Powers*, 104 U. S. 245, 249, 26 L. Ed. 729.

As to dismissal for misjoinder, see the title DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 5, pp. 370, 371.

Multifariousness is fatal to a bill on demurrer. *Shields v. Thomas*, 18 How. 253, 260, 15 L. Ed. 368; *Harrison v. Perea*, 168 U. S. 311, 319, 42 L. Ed. 478; *United States v. Union Pacific R. R. Co.*, 98 U. S. 569, 601, 25 L. Ed. 143; *Haines v. Carpenter*, 91 U. S. 254, 256, 23 L. Ed. 345.

Where one of the parties complainant has no standing in court and matters are introduced which are totally destructive in the right asserted and the relief sought, the bill was properly dismissed. *Walker v. Powers*, 104 U. S. 245, 252, 26 L. Ed. 729.

**21.** See cases in preceding note.

**22. Court may order bill to be dismissed.**—*Hefner v. Northwestern Life Ins. Co.*, 123 U. S. 747, 751, 31 L. Ed. 309, citing *Oliver v. Piatt*, 3 How. 333, 412, 11 L. Ed. 622; *Nelson v. Hill*, 5 How. 127, 132, 12 L. Ed. 81.

**23. Dismissal without prejudice.**—*Williams v. Jackson*, 107 U. S. 478, 484, 27 L. Ed. 529; *House v. Mullen*, 22 Wall. 42, 22 L. Ed. 838.

# MULTIPLICITY OF SUITS.

BY H. H. THURLOW.

- I. General Rule, 539.
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## CROSS REFERENCES.

As to necessity for accounting as ground for equity jurisdiction, see the title ACCOUNTS AND ACCOUNTING, vol. 1, p. 73. As to grounds in general, see the title EQUITY, vol. 5, p. 840. As to irreparable injury as ground, see the title INJUNCTIONS, vol. 6, p. 1041. As to parties by representation, see the title PARTIES. As to bills to quiet title, see the title QUIETING TITLE.

### I. General Rule.

A suit in equity to enforce a legal right can be brought only when the court can give more complete and effectual relief, in kind or in degree, on the equity side than on the common-law side.<sup>1</sup> On the other hand, equity will not assume jurisdiction where the case is by no means a complex or difficult one, the facts are few and easily proved, the transactions are open and patent to everybody, and an action at law would afford complete and ample remedy for the wrong complained of.<sup>2</sup> Under this rule, there can be no doubt that, in a proper case relief will be given in order to prevent a multiplicity of suits.<sup>3</sup> The reason is that the remedy at law would not be as effectual as the remedy in equity, nor is there any effectual remedy at all at law, where the direct proceeding in equity will save time, expense, and a multiplicity of suits, and settle finally the rights of all concerned in one litigation.<sup>4</sup> But the circumstances of each case must

1. Suit lies when legal remedy inadequate.—*Boyce v. Grundy*, 3 Pet. 210, 215, 7 L. Ed. 655; *Parker v. Winnipiseogee Lake Cotton, etc., Co.*, 2 Black 545, 552, 17 L. Ed. 333; *Jones v. Bolles*, 9 Wall. 364, 369, 19 L. Ed. 734; *Buzard v. Houston*, 119 U. S. 347, 352, 30 L. Ed. 451. See the title EQUITY, vol. 5, p. 815.

2. Not where adequate and complete.—*Lacombe v. Forstall's Sons*, 123 U. S. 562, 31 L. Ed. 255; *Buzard v. Houston*, 119 U. S. 347, 352, 30 L. Ed. 451. See the title EQUITY, vol. 5, p. 815.

Judiciary act merely confirms rule.—The 16th section of the judiciary act of 1789 provides, "that suits in equity shall not be sustained in any case where plain, adequate, and complete remedy can be had at law;" but this is merely declaratory of the pre-existing rule, and does not apply where the remedy is not "plain, adequate, and complete;" or, in other words, "where it is not as practicable and efficient to the ends of justice and to its prompt administration, as the remedy in equity." *Oelrichs v. Spain*, 15 Wall. 211, 228, 21 L. Ed. 43; *Boyce v. Grundy*, 3 Pet. 210, 215, 7 L. Ed. 655. See the title EQUITY, vol. 5, p. 818.

Effect of state legislation.—No change in state legislation giving, in like cases, a remedy by action at law, can, of itself, curtail the jurisdiction in equity of the courts of the United States. The adequate remedy at law, which is the test of equitable jurisdiction in these courts, is that which existed when the judiciary act of 1789 was adopted, unless subsequently changed by act of congress. *McConihay v. Wright*, 121 U. S. 201, 206, 30 L. Ed. 922. See the title EQUITY, vol. 5, p. 829.

3. Relief to prevent multiplicity of suits.—*Carroll v. Safford*, 3 How. 441, 463, 11 L. Ed. 671; *Parker v. Winnipiseogee Lake Cotton, etc., Co.*, 2 Black 545, 551, 17 L. Ed. 333.

4. Reason is inadequate legal remedy.—*Oelrichs v. Spain*, 15 Wall. 211, 228, 21 L. Ed. 43; *Reynes v. Dumont*, 130 U. S. 354, 394, 32 L. Ed. 934; *United States v. Union Pac. R. Co.*, 160 U. S. 1, 51, 40 L. Ed. 319.

Earliest exercise of rule.—The subject is discussed at length in 1 Pomeroy's Equity Jurisprudence, 2d Ed., p. 318, § 243, et seq. It is therein shown that the foundation of the jurisdiction, or perhaps the

determine the question whether or not there is a plain and adequate remedy at law.<sup>5</sup>

## II. Consolidation of Actions.

One of the great principles, upon which courts of equity generally require all persons who are known, and within the reach of its jurisdiction, to be made parties, is to prevent future litigation, and to take away multiplicity of suits.<sup>6</sup> But it is well settled that where the parties plaintiff are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of all; or if the parties defendant be numerous, under like circumstances, a bill may be brought against some of them as representing all.<sup>7</sup>

earliest exercise of it upon this ground, was in so-called "bills of peace," where in one class of such bills the suit was brought to establish a general right between a single party and numerous other persons claiming distinct and individual interests; the second class being where the complainant sought to quiet his title and possession of land and to prevent the bringing of repeated actions of ejectment against him. The ground was, that the title could never be finally established by indefinite repetitions of such legal actions. *Hale v. Allinson*, 188 U. S. 56, 72, 47 L. Ed. 380; *Equator Co. v. Hall*, 106 U. S. 86, 87, 27 L. Ed. 114. See the titles *EJECTMENT*, vol. 5, p. 695; *QUIETING TITLE*.

**5. Circumstances of each case control.**—*Watson v. Sutherland*, 5 Wall. 74, 79, 18 L. Ed. 580; *United States v. Union Pac. R. Co.*, 160 U. S. 1, 51, 40 L. Ed. 319.

**The rule applied.**—Cases can be cited to show how divergent are the decisions on the question of this jurisdiction. "It is easy to say it rests upon the prevention of a multiplicity of suits, but to say whether a particular case comes within the principle is sometimes a much more difficult task. Each case, if not brought directly within the principle of some preceding case, must, as we think, be decided upon its own merits and upon a survey of the real and substantial convenience of all parties, the adequacy of the legal remedy, the situations of the different parties, the points to be contested and the result which would follow if jurisdiction should be assumed or denied; these various matters being factors to be taken into consideration upon the question of equitable jurisdiction on this ground, and whether within reasonable and fair grounds the suit is calculated to be in truth one which will practically prevent a multiplicity of litigation and will be an actual convenience to all parties, and will not unreasonably overlook or obstruct the material interests of any. The single fact that a multiplicity of suits may be prevented by this assumption of jurisdiction is not in all cases enough to sustain it. It might be that the exercise of equitable jurisdiction on this ground, while preventing a formal multiplicity of suits, would nevertheless be attended with more and deeper inconvenience to the defendants than

would be compensated for by the convenience of a single plaintiff, and where the case is not covered by any controlling precedent the inconvenience might constitute good ground for denying jurisdiction." *Hale v. Allinson*, 188 U. S. 56, 77, 47 L. Ed. 380.

**6. Consolidations of actions.**—*Mandeville v. Riggs*, 2 Pet. 482, 486, 7 L. Ed. 493. See, generally, the title *CONSOLIDATION OF ACTIONS*, vol. 3, p. 1096.

**Reason and exceptions.**—It is a matter of justice, as well as of convenience, that all the parties who are ultimately liable to contribution, should, when practicable, be brought before the court, so that the equities between them may be adjusted, as well as the rights of the plaintiff. There are exceptions, it is true, but they are founded upon special considerations; such as where a decree of contribution would be useless, or where the proceeding would defeat the jurisdiction of the court, and the parties are not indispensable to a decree; or where the convenient administration of justice forbids it in the particular case. *Mandeville v. Riggs*, 2 Pet. 482, 486, 7 L. Ed. 493.

**7. Some parties representing all.**—*Story*, Eq. Pl., §§ 97, 98, 99, 103, 107, 110, 111, 116, 120; *Smith v. Swormstedt*, 16 How. 288, 301, 14 L. Ed. 942. See the title *PARTIES*.

**Rule long settled.**—It has long been settled, that if any person has a common right against a great many of the King's subjects, inasmuch as he cannot contend with all the King's subjects, a court of equity will permit him to file a bill against some of them; taking care to bring so many persons before the court, that their interests shall be such as to lead to a fair and honest support of the public interest; and when a decree has been obtained, then, with respect to the individuals whose interest is so fully and honestly established, the court, on the footing of the former decree, will carry the benefit of it into execution, against other individuals who were not parties. *Hale v. Allinson*, 188 U. S. 56, 75, 47 L. Ed. 380.

**Common interest in subject matter.**—The interest that will allow parties to join in a bill of complaint, or that will enable the court to dispense with the presence of all the parties, when numerous,



### III. Injunctions.

It is universally admitted that an injunction will issue to suppress oppressive or interminable litigation or to prevent a multiplicity of suits.<sup>8</sup>

### IV. Particular Instances.

A great variety of cases have arisen in which courts of equity have been asked to take jurisdiction on the ground of preventing a multiplicity of suits. They have taken such jurisdiction in a suit to enjoin an interference with their own decrees,<sup>9</sup> to enjoin nuisance and trespass of a continuing nature,<sup>10</sup> to enjoin the denial of contract rights,<sup>11</sup> and to enjoin the enforcement of illegal ordinances

except a determinate number, is not only an interest in the question, but one in common in the subject matter of the suit; such as the case of disputes between the lord of a manor and his tenants; or where several tenants of a manor claim the profits of a fair; or between the tenants of one manor and those of another; or in a suit to settle a general fine to be paid by all the copyhold tenants of a manor, in order to prevent a multiplicity of suits. *Scott v. Donald*, 165 U. S. 107, 116, 41 L. Ed. 648.

**Question of privity.**—The question has arisen whether the defendants in a suit by one complainant to establish his right against them all must be connected by some kind of privity among themselves, or can they hold their rights wholly separate and distinct from each other? The question has been answered differently by different courts, and while assuming that there was not always a necessity to show a common interest or privity between the members of the same class of defendants, the courts have also differed in regard to the jurisdiction of a court of equity in particular cases, even upon such assumption. Numerous cases are cited by Mr. Pomeroy, showing both sides of this question. In any case where the facts bring it within the possible jurisdiction of the court, according to the view taken by it in regard to such facts, the decision must depend largely upon the question of the reasonable convenience of the remedy, its effectiveness and the inadequacy of the remedy at law. *Hale v. Allinson*, 188 U. S. 56, 72, 47 L. Ed. 380.

**Demands may not be distinct and unconnected.**—A suit cannot be maintained in equity on the ground of preventing a multiplicity of suits where the demands against each of the defendants, although of the same nature, are entirely distinct from and unconnected with any other defendant. In such case defendant has a right to object to the joining of any distinct and unconnected causes of action. *Hale v. Allinson*, 188 U. S. 56, 74, 47 L. Ed. 380.

**No representation where parties joined necessarily.**—Where all persons who were guilty of a wrong must be made parties in either a court of law or equity, in order to bind them, there is no jurisdiction on the ground of prevention of a multiplicity of suits. Such alleged multiplicity is not

avoided in one court more than in the other. It is not a case where a few defendants may be made parties as representatives of a class holding under or claiming the same title or right, and so that a judgment against the representative defendants may bind all others of the class. There is no class and there can be no representatives. *United States v. Bitter Root Develop. Co.*, 200 U. S. 451, 479, 50 L. Ed. 550.

**8. Injunctions.**—See the title INJUNCTIONS, vol. 6, p. 1040.

**9. Injunction to effectuate decrees.**—*Root v. Woolworth*, 150 U. S. 401, 37 L. Ed. 1123. See the title INJUNCTIONS, vol. 6, p. 1022.

**10. Enjoining nuisance.**—Equity jurisdiction, on the ground of preventing a multiplicity of suits, has been upheld in a suit by several distinct property owners to prevent a nuisance. *Hale v. Allinson*, 188 U. S. 56, 76, 47 L. Ed. 380. See the title NUISANCES.

**Enjoining trespass.**—Where, according to the record, the attempt of the defendants, despite the objections of the company, to use its station house and depot grounds for the purpose of meeting passengers, and soliciting their patronage, was of constant, daily, almost hourly occurrence, the case was one of a continuing trespass, involving injury of a permanent nature. A suit at law could only have determined the particular wrong occurring on a particular occasion, and would not reach other wrongs of like character that would occur almost every hour of each day, as passengers arrived at the station of the company. Only a court of equity was competent to meet such an unusual emergency, and by a comprehensive decree determine finally and once for all the entire controversy between the parties—thus avoiding a multiplicity of suits and conserving the public interests. No remedy at law would be so complete or efficacious as a suit in equity in such a case as this one. *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 304, 305, 50 L. Ed. 192; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 36 L. Ed. 537; *Smyth v. Ames*, 169 U. S. 466, 517, 42 L. Ed. 819. See the title TRESPASS.

**11. Enjoining denial of contract rights.**—Suits at law, from time to time, to recover damages for the refusal of a telegraph company to transmit messages

after their passage,<sup>12</sup> of illegal railroad rates,<sup>13</sup> and the collection of illegal taxes;<sup>14</sup> in a suit to enforce an administration bond, or a lease by a railroad of

over their wires, would not give the relief necessary to secure rights under a contract. Such a remedy would not be complete, nor an adequate substitute for an injunction against perpetually recurring denials of such rights. *Franklin Tel. Co. v. Harrison*, 145 U. S. 459, 474, 36 L. Ed. 776; *Joy v. St. Louis*, 138 U. S. 1, 46, 34 L. Ed. 843; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 567, 36 L. Ed. 537.

**12. Enjoining enforcement of illegal ordinances.**—In view of the controversies, confusion, risks and multiplicity of suits which would necessarily be occasioned by the resistance of a street railway company to the enforcement of an illegal ordinance reducing fares, and in view of the public interests and the vast number of people to be affected, the case is one within the jurisdiction of a court of equity. *Cleveland v. Cleveland City R. Co.*, 194 U. S. 517, 531, 48 L. Ed. 1102, citing *Detroit v. Detroit Citizens' St. R. Co.*, 184 U. S. 368, 46 L. Ed. 592. See the title ORDINANCES.

**No injunction against their mere passage.**—If city ordinances already passed are in derogation of plaintiff's contract rights, their enforcement can be prevented by appropriate proceedings instituted directly against the parties who seek to have the benefit of them. This may involve the plaintiff in a multiplicity of actions, but that circumstance cannot justify an injunction before their passage, and against the legislative power of government. *McChord v. Louisville, etc., R. Co.*, 183 U. S. 483, 496, 46 L. Ed. 289, citing *New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 471, 472, 41 L. Ed. 518; *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 409, 50 L. Ed. 246.

**Where insolvency is threatened.**—Where the ability of the complainant to renew or extend its mortgage indebtedness might depend upon belief in the validity of contracts as to rates of fare agreed upon before an attempted alteration thereof by city ordinances, and the immediate enforcement of these later ordinances might result in such a decrease of income as to seriously imperil the solvency of the complainant, an equitable action would certainly be more adequate and offer more effective and immediate relief than for the complainant to await the various actions at law to which it would otherwise be subjected by the defendants and the individuals demanding the reduced rates for transportation. It is a matter of general public interest, as well as of vital importance to the complainant, that the question involved in this litigation should be determined at the earliest possible moment, and once for all, and thus a multiplicity of suits and other complications prevented. *Detroit v. Detroit Citi-*

*zens' St. R. Co.*, 184 U. S. 368, 380, 381, 46 L. Ed. 592, citing *Smyth v. Ames*, 169 U. S. 466, 42 L. Ed. 819.

**13. Enjoining enforcement of illegal railroad rates.**—Where the plaintiffs, stockholders in a corporation named, asked a decree enjoining the enforcement of certain rates for transportation upon the ground that the statute prescribing them is repugnant to the constitution of the United States, a court of equity can make a comprehensive decree covering the whole ground of controversy and thus avoid the multiplicity of suits that would inevitably arise under the statute. *Smyth v. Ames*, 169 U. S. 466, 517, 42 L. Ed. 819.

**Rule especially effective in this case.**—The transactions along the line of any one of these railroads, out of which causes of action might arise under the statute, are so numerous and varied that the interference of equity could well be justified upon the ground that a general decree, according to the prayer of the bills, would avoid a multiplicity of suits, and give a remedy more certain and efficacious than could be given in any proceeding instituted against the company in a court of law; for a court of law could only deal with each separate transaction involving the rates to be charged for transportation. The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. Only a court of equity is competent to meet such an emergency and determine, once for all and without a multiplicity of suits, matters that affect not simply individuals, but the interests of the entire community as involved in the use of a public highway and in the administration of the affairs of the quasi public corporation by which such highway is maintained. *Smyth v. Ames*, 169 U. S. 466, 517, 42 L. Ed. 819.

**14. Enjoining collection of illegal taxes.**—It has been the settled law of the country for a great many years, that an injunction bill to restrain the collection of a tax, on the sole ground of the illegality of the tax, cannot be maintained. There must be an allegation of fraud; that it creates a cloud upon the title; that there is apprehension of a multiplicity of suits, or some cause presenting a case of equity jurisdiction. *Hannewinkle v. Georgetown*, 15 Wall. 547, 548, 21 L. Ed. 231, citing *Dows v. Chicago*, 11 Wall. 108, 109, 20 L. Ed. 65; *Union Pac. R. Co. v. Cheyenne*, 113 U. S. 516, 526, 28 L. Ed. 1098. See the title TAXATION.

**Void assessments for paving.**—*Ogden City v. Armstrong*, 168 U. S. 224, 239, 42 L. Ed. 444.

**Tax against corporate shares.**—Where a



its rolling stock,<sup>15</sup> to rescind a fraudulent contract,<sup>17</sup> to cancel municipal certificates wrongfully issued,<sup>18</sup> and to annul or correct proceedings of inferior boards or tribunals;<sup>19</sup> in an infringement suit;<sup>20</sup> in an ejectment suit;<sup>21</sup> in suits by or against tenants;<sup>22</sup> in a suit upon similar railroad affreightments;<sup>23</sup> in a suit on

corporation is required to pay a tax assessed on the shares of its stockholders, and the tax is illegal, equity has jurisdiction to enjoin such collection in order to prevent a multiplicity of suits. *Cummings v. National Bank*, 101 U. S. 153, 157, 25 L. Ed. 903.

**Effect of state legislation.**—Equity has jurisdiction to entertain a suit for the recovery of taxes wrongfully assessed, on the ground of preventing a multiplicity of suits, where the remedy under a state statute is by a single action at law, with the right of appeal. *Indiana Mfg. Co. v. Koehne*, 188 U. S. 681, 689, 47 L. Ed. 651. See ante, "General Rule," I.

**15. Enforcing administration bond.**—The jurisdiction of a court of equity to enforce an administration bond arises from its jurisdiction over administrators, its disposition to prevent multiplicity of suits, and its power to adapt its decrees to the substantial justice of the case. *Green v. Creighton*, 23 How. 90, 108, 16 L. Ed. 419.

**Enforcing railroad lease.**—Where a defendant railroad agreed to keep a leased road, its rolling stock, and its equipment in good condition, equal to a first class western railroad, the plaintiff has a right to have this done specifically, and is not bound to bring action after action for damages at every stage of this depreciation. These suits would be vexatious, unsatisfactory, expensive, and the relief would be inadequate. *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 306, 30 L. Ed. 83.

**Justice requires resort to equity.**—To sue for every monthly installment of rent, even if the principal and the guarantors can be sued jointly, is almost equivalent to a denial of justice. If a lease is to continue and the leased road run by the lessee company, which is insolvent, a monthly resort to a suit at law against the guarantors is destructive of the substantial right of the plaintiff under the contract. *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 305, 30 L. Ed. 83.

**17. Rescinding contract for fraud.**—Equity has jurisdiction where an agreement procured by fraud is of a continuing nature, and its rescission will prevent a multiplicity of suits. *Boyce v. Grundy*, 3 Pet. 210, 215, 7 L. Ed. 655; *Jones v. Bolles*, 9 Wall. 364, 369, 19 L. Ed. 734; *Buzard v. Houston*, 119 U. S. 347, 352, 30 L. Ed. 451. See, generally, the title RESCISSION, CANCELLATION AND REFORMATION.

**18. Canceling municipal certificates wrongfully issued.**—*Hale v. Allinson*, 188 U. S. 56, 76, 47 L. Ed. 380. See, generally, the title RESCISSION, CANCELLATION AND REFORMATION.

**19. Correcting proceedings of inferior boards.**—With the proceedings and determinations of inferior boards or tribunals of special jurisdiction, courts of equity will not interfere, unless it should become necessary to prevent a multiplicity of suits or irreparable injury, or unless the proceeding sought to be annulled or corrected is valid upon its face, and the alleged invalidity consists in matters to be established by extrinsic evidence. In other cases the review and correction of the proceedings must be obtained by the writ of certiorari. *Ewing v. St. Louis*, 5 Wall. 413, 418, 18 L. Ed. 657.

**20. In an infringement suit.**—A court of equity will prevent a defeated party in an infringement suit from bringing like suits against the customers of the successful party, one ground being to prevent a multiplicity of suits. *Kessler v. Eldred*, 206 U. S. 285, 289, 51 L. Ed. 1065.

**21. In an ejectment suit.**—An ejectment suit in equity will not be sustained where "the evidence to support it appears from documents accessible to either party; and no particular circumstances are stated, showing the necessity of the courts interfering, either for preventing a multiplicity of suits or other vexation, or for preventing an injustice, irremediable at law." *Smyth v. New Orleans Canal, etc., Co.*, 141 U. S. 656, 661, 35 L. Ed. 891, citing *Hipp v. Babin*, 19 How. 271, 277, 15 L. Ed. 633; *Scott v. Neely*, 140 U. S. 106, 110, 35 L. Ed. 358.

**Under common-law rule.**—Under the rule of the common law allowing interminable actions in ejectment, equity assumed jurisdiction in order to prevent a multiplicity of suits, and enjoined an unsuccessful party after repeated actions had gone against him. *Equator Co. v. Hall*, 106 U. S. 86, 87, 27 L. Ed. 114. See ante, "General Rule," I. And see the title EJECTMENT, vol. 5, p. 695.

**22. Suits by or against tenants.**—*Scott v. Donald*, 165 U. S. 107, 116, 41 L. Ed. 648; *Hale v. Allinson*, 188 U. S. 56, 47 L. Ed. 380.

**Joint actions against owner and tenants.**—Where twenty-three judgments were held by the same party jointly against the owner of a certain plantation and each of twenty-three tenants, and their validity depended upon the same facts, such owner was entitled, in order to avoid a multiplicity of actions, and to protect herself against the vexation and cost that would come from numerous executions and levies, to bring one suit for a decree finally determining the matter in dispute in all the cases. *Marshall v. Holmes*, 141 U. S. 589, 595, 35 L. Ed. 870.

**23. Suits upon similar affreightments.**—Where a bill discloses fifteen different



a complicated telegraphic contract;<sup>24</sup> or involving legislation on the general subject of telegraphic communication;<sup>25</sup> and in a suit against remote endorser, though not the usual practice.<sup>26</sup> They have refused such jurisdiction in a suit to enforce a statutory liability against stockholders;<sup>27</sup> in proceedings in which all parties were joined necessarily;<sup>28</sup> and in every case where the remedy at law was adequate.<sup>29</sup>

### V. Pleading.

The bill must allege that there would be a multiplicity of suits if complainants were left to their remedy at law, or equity will not take jurisdiction.<sup>30</sup> And if defendant wishes to object to such jurisdiction, he must do so by plea or an-

contracts of affreightment, of a similar character, which have been adjusted by the appellees, an insurance company, and which form the subject of the suit, they are properly joined in the same bill, since the inconvenience and vexations of a multiplicity of suits is thereby prevented. *Garrison v. Memphis Ins. Co.*, 19 How. 312, 317, 15 L. Ed. 656.

**24. Suits on telegraph contracts.**—Where a contract between a telegraph company and the state of Georgia, containing mutual covenants, was broken by the state, the court was of opinion that to prevent multiplicity of suits, and to have an accounting, instead of bringing a suit on every specific violation of the covenants of the state, complainant had a right to relief in equity. *Western Union Tel. Co. v. Western, etc.*, R. Co., 91 U. S. 283, 291, 23 L. Ed. 350.

**25. Suit concerning general subject of telegraphic communication.**—Jurisdiction in equity being acquired for that purpose, the court, in order to avoid a multiplicity of suits, can proceed to a decree that will settle all matters in dispute between the United States, a railway company, and a telegraph company which relate to the general subject of telegraphic communication between points named by congress. *United States v. Union Pac. R. Co.*, 160 U. S. 1, 50, 40 L. Ed. 319.

**26. Suits against remote endorser.**—Undoubtedly, an indorsee may go against his immediate indorser at law; and if there were twenty successive indorsers of a note, this circuitous course might still be pursued, and by the time the ultimate indorser was reached, the value of the note would be expended in the pursuit. This circumstance alone would afford a strong reason for enabling the holder to bring all the indorsers into that court which could, in a single decree, put an end to litigation. No principle adverse to such a proceeding is perceived. Its analogy to the familiar case of a suit in chancery by a creditor against the legatees of his debtor, is not very remote. And in the event of insolvency of the executor or the indorsee, the only remedy would be in equity. *Riddle v. Mandeville*, 5 Cranch 322, 328, 3 L. Ed. 114. See the title *EXECUTORS AND ADMINISTRATORS*, vol. 6, p. 161.

**General rule contra.**—But *Biddle v. Mandeville* is strongly distinguished in

*Hayward v. Andrews*, 106 U. S. 672, 678, 27 L. Ed. 271, and the decision is placed upon the ground that the Virginia law at that time allowed no legal remedy against remote endorser. It seems clear that, in general, an adequate legal remedy may be had against a remote indorser, by suing in the name of the assignee, or in one's own name under some of the codes. *Lenox v. Roberts*, 2 Wheat. 373, 4 L. Ed. 264; *Thompson v. Railroad Companies*, 6 Wall. 134, 18 L. Ed. 765; *Walker v. Dreville*, 12 Wall. 440, 20 L. Ed. 429; *Van Norden v. Morton*, 99 U. S. 378, 25 L. Ed. 453; *Hurt v. Hollingsworth*, 100 U. S. 100, 25 L. Ed. 569; *New York Guaranty Co. v. Memphis Water Co.*, 107 U. S. 205, 27 L. Ed. 484; *Smith v. Bourbon County*, 127 U. S. 105, 111, 32 L. Ed. 73. See the title *BILLS, NOTES AND CHECKS*, vol. 3, p. 357.

**27. Not in enforcing statutory liability against stockholders.**—A receiver of a foreign corporation cannot maintain a single suit in a court of equity to enforce a statutory liability of Pennsylvania stockholders, on the ground of preventing a multiplicity of suits. Manifestly the defendants have no common interest in these questions; there is in reality a congeries of suits with little relation to each other, except that there is a common plaintiff, who has similar claims against many persons. *Hale v. Allinson*, 188 U. S. 56, 79, 47 L. Ed. 380. See the title *CORPORATIONS*, vol. 4, p. 621.

**28. Nor in proceedings where parties joined necessarily.**—Where persons licensed to cut timber from government lands have wrongfully cut from other lands also, but in proceeding against them all must be made parties either at law or in equity, no court of equity can get jurisdiction on the ground of preventing a multiplicity of suits. *United States v. Bitter Root Develop. Co.*, 200 U. S. 451, 479, 50 L. Ed. 550.

**29. Nor where legal remedy is adequate.**—Where the land department orders a survey of disputed public lands, equity may not enjoin such action where the persons directly interested are not made parties, are not numerous, and assert separate and independent rights. *Kirwan v. Murphv*, 189 U. S. 35, 54, 47 L. Ed. 698, citing *Hale v. Allinson*, 188 U. S. 56, 47 L. Ed. 380; *Cruickshank v. Bidwell*, 176 U. S. 73, 44 L. Ed. 377.

**30. Multiplicity must be pleaded.**—

swer.<sup>31</sup> But the question of jurisdiction under this head may be waived, in which case a decree cannot afterward be set aside on that ground.<sup>32</sup>

**MUNGO.**—"Mungo," properly signifies the disintegrated rags of woolen cloth, as distinguished from those of worsted, which form shoddy.<sup>1</sup>

**MUNICIPAL BONDS.**—See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

*Cruickshank v. Bidwell*, 176 U. S. 73, 81, 44 L. Ed. 377.

**31. Objection must be by plea or answer.**—The want of jurisdiction must be set up by plea or answer; at least, where the subject matter belongs to a class over which a court of equity usually has jurisdiction. *Reynes v. Dumont*, 130 U. S. 354, 395, 32 L. Ed. 934; *Wylie v. Cox*, 15 How. 415, 420, 14 L. Ed. 753; *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 554, 39 L. Ed. 759. See the title EQUITY, vol. 5, p. 825.

**32. Jurisdiction may be waived.**—

8 U S Enc—35

Where a bill contains allegations of threatened multiplicity of suits and irreparable injury; and, so far as it was within the power of the government to do so, the question of jurisdiction, for the purposes of the case, was explicitly waived on the argument, the decree of a court of equity will not be set aside on this ground. *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 554, 39 L. Ed. 759. See the title EQUITY, vol. 5, p. 826.

**1. Mungo.**—*Patton v. United States*, 159 U. S. 500, 503, 40 L. Ed. 233. See the title REVENUE LAWS.

# MUNICIPAL CORPORATIONS.

BY A. P. WALKER.

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#### **I. Definition and General Consideration.**

**A. Definition, Nature and Purpose.**—Municipal corporations are instrumentalities of the state for the convenient administration of government within their limits.<sup>1</sup> They are established to aid in the administration of the affairs of

<sup>1</sup> **Definition, nature and purpose.**—*Louisiana v. New Orleans*, 109 U. S. 285, 287, 27 L. Ed. 936; *Board of Commissioners v. Lucas*, 93 U. S. 108, 114, 23 L. Ed. 822; *Broughton v. Pensacola*, 93 U. S. 266,

269, 23 L. Ed. 896; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 529, 25 L. Ed. 699; *Worcester v. Worcester Consolidated St. R. Co.*, 196 U. S. 539, 550, 49 L. Ed. 591; *Mobile v. Watson*, 116 U. S. 289, 304, 29



the state,<sup>2</sup> for the better administration of the government in matters of local concern.<sup>3</sup> They are merely agencies<sup>4</sup> or auxiliaries,<sup>5</sup> of the state for local purposes or government. Their functions are for the public good.<sup>6</sup> They are but instruments of the state, created to carry out its will,<sup>7</sup> and in the exercise of their duties, including those most strictly local or internal, a department of the state.<sup>8</sup> Such corporation is a portion of the sovereign power of the state.<sup>9</sup> They

L. Ed. 620. See to the same effect *United States v. New Orleans*, 98 U. S. 381, 392, 25 L. Ed. 225; *Covington v. Kentucky*, 173 U. S. 231, 241, 43 L. Ed. 679; *Railroad Co. v. County of Otoe*, 16 Wall. 667, 676, 21 L. Ed. 375; *Commissioners v. Commissioners*, 92 U. S. 307, 312, 23 L. Ed. 552; *Fowle v. Alexandria*, 3 Pet. 398, 7 L. Ed. 719.

A municipal corporation, so far as it is invested with subordinate legislative powers for local purposes, is a mere instrumentality of the state for the convenient administration of government. *Broughton v. Pensacola*, 93 U. S. 266, 23 L. Ed. 896.

A municipal corporation is a public corporation, used for public purposes. *State Bank v. Knoop*, 16 How. 369, 380, 14 L. Ed. 977.

2. *Covington v. Kentucky*, 173 U. S. 231, 241, 43 L. Ed. 679.

"Municipal corporations are created to aid the state government in the regulation and administration of local affairs." *Ottawa v. Carey*, 108 U. S. 110, 121, 27 L. Ed. 669.

In *Commissioners v. Commissioners*, 92 U. S. 307, 23 L. Ed. 552, it was held that public or municipal corporations were but parts of the machinery employed in carrying on the affairs of the state. *Worcester v. Worcester Consolidated St. R. Co.*, 196 U. S. 539, 556, 49 L. Ed. 591.

Municipal corporations are of a public character, instituted for purposes of local government, and constitutes part of the domestic government of the state. *The Mayor v. Ray*, 19 Wall. 468, 469, 22 L. Ed. 164; *The Mayor v. Lindsey*, 19 Wall. 485, 22 L. Ed. 180.

Municipal corporations are established for the general purposes of government, as a part of the government of the country. *Fowle v. Alexandria*, 3 Pet. 398, 7 L. Ed. 719.

**By the law of France.**—See *New Orleans v. United States*, 10 Pet. 662, 719, 9 L. Ed. 573.

3. *United States v. New Orleans*, 98 U. S. 381, 392, 25 L. Ed. 225. See, also, *McCulloch v. Maryland*, 4 Wheat. 316, 411, 4 L. Ed. 579.

4. *Ottawa v. Carey*, 108 U. S. 110, 27 L. Ed. 669; *Barnett v. Denison*, 145 U. S. 135, 139, 36 L. Ed. 652; *Klein v. New Orleans*, 99 U. S. 149, 25 L. Ed. 430; *Detroit Citizens' St. R. Co. v. Detroit Railway*, 171 U. S. 48, 54, 43 L. Ed. 67; *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 35 L. Ed. 943; *Worcester v. Worcester Consolidated St. R. Co.*, 196 U. S. 539, 551, 49 L. Ed. 591; *Hill v. Mem-*

*phis*, 134 U. S. 198, 203, 33 L. Ed. 887; *Merrill v. Monticello*, 138 U. S. 673, 691, 34 L. Ed. 1069; *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 8, 33 L. Ed. 231.

In *Williams v. Eggleston*, 170 U. S. 304, 310, 42 L. Ed. 1047, it was said that "a municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the state for conducting the affairs of government." *Atkin v. Kansas*, 191 U. S. 207, 220, 48 L. Ed. 148.

"A municipal corporation is a subordinate branch of the domestic government of a state. It is instituted for public purposes only. \* \* \* As a local governmental institution, it exists for the benefit of the people within its corporate limits." *The Mayor v. Ray*, 19 Wall. 468, 469, 475, 22 L. Ed. 164.

5. *Commissioners v. Commissioners*, 92 U. S. 307, 311, 23 L. Ed. 552; *Atkin v. Kansas*, 191 U. S. 207, 220, 48 L. Ed. 148; *United States v. Railroad Co.*, 17 Wall. 322, 327, 21 L. Ed. 597.

"Inferior and subordinate communities, imperia in imperio, such as cities and towns, \* \* \* are allowed to assume to themselves some of the duties of the state in a partial or detailed form, but having neither property nor power for the purposes of personal aggrandizement, they can be considered in no other light than as auxiliaries of the government, and as the secondary deputies and trustees and servants of the people." *United States v. Railroad Co.*, 17 Wall. 322, 328, 21 L. Ed. 597.

6. *Detroit Citizens' St. R. Co. v. Detroit Railway*, 171 U. S. 48, 54, 43 L. Ed. 67.

7. *Railroad Co. v. County of Otoe*, 16 Wall. 667, 676, 21 L. Ed. 375.

8. *Barnes v. District of Columbia*, 91 U. S. 540, 544, 23 L. Ed. 440; *Maxwell v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 445; *Dant v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 446.

9. *United States v. Railroad Co.*, 17 Wall. 322, 21 L. Ed. 597.

As is stated in *United States v. Railroad Co.*, 17 Wall. 322, 329, 21 L. Ed. 597, a municipal corporation is not only a part of the state but is a portion of its governmental power. "It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the state." *Worcester v. Worcester Consolidated St. R. Co.*, 196 U. S. 539, 549, 49 L. Ed. 591.

are created, among other purposes, to manage the concerns, and police, and public interests of the people living within their territory.<sup>10</sup> They are incorporated for public, and not private objects, and are allowed to hold privileges or property only for public purposes.<sup>11</sup>

**Division of the State.**—Municipal corporations are political divisions of the state.<sup>12</sup>

**Counties, cities and towns** are municipal corporations. They are, in general, made bodies politic and corporate.<sup>13</sup>

**The District of Columbia** is a municipal corporation.<sup>14</sup>

**Irrigation districts** are public municipal corporations.<sup>15</sup>

**School Districts.**—See the title **SCHOOLS**.

**A Civil Corporation.**—A municipal corporation is included under the generic name of civil corporation.<sup>16</sup>

**B. As a Public Corporation.**—Municipal corporations are properly denominated public corporations, for the reason that they are but parts of the machinery employed in carrying on the affairs of the state.<sup>17</sup>

**C. Quasi Corporations.**—What is meant by the words “quasi corporation,” as used in the authorities, is not always very clear. It is a phrase generally applied to a body which exercises certain functions of a corporate character, but which has not been created a corporation by any statute, general or special.<sup>18</sup>

**D. Congressional Townships.**—A congressional township is one of the principal subdivisions which congress has provided for in the survey of the pub-

10. *Van Ness v. Washington*, 4 Pet. 232, 7 L. Ed. 842.

“They are invested with public trusts of a governmental and administrative character; they are the local governments of the people, established by them as their representatives in the management and administration of municipal affairs affecting the peace, good order, and general well-being of the community as a political society and district; and invested with power by taxation to raise the revenues necessary for those purposes.” *The Mayor v. Ray*, 19 Wall. 468, 469, 476, 22 L. Ed. 164. See the title **TAXATION**.

11. *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 534, 13 L. Ed. 518. See post, “Municipal Property,” VII.

12. **Division of the state.**—*Loan Ass'n v. Topeka*, 20 Wall. 655, 659, 22 L. Ed. 455; *Worcester v. Worcester Consolidated St. R. Co.*, 196 U. S. 539, 548, 49 L. Ed. 591; *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 533, 13 L. Ed. 518.

Municipal corporations are the creatures, mere political subdivisions, of the state for the purpose of exercising a part of its powers. *Atkin v. Kansas*, 191 U. S. 207, 220, 48 L. Ed. 148.

13. *Commissioners v. Commissioners*, 92 U. S. 307, 308, 23 L. Ed. 552.

**A city** is a municipal corporation and a political subdivision of the state. *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528, 43 L. Ed. 796; *Ford v. Delta, etc., Land Co.*, 164 U. S. 662, 672, 41 L. Ed. 590.

“If there can exist a municipal corporation, as that expression is generally understood, the cities of this country, like Baltimore, Philadelphia, and New York, fall within the definition.” *United States v. Railroad Co.*, 17 Wall. 322, 331, 21 L. Ed. 597.

In *New Orleans v. Clark*, 95 U. S. 644, 654, 24 L. Ed. 521, it was stated that: “A city is only a political subdivision of the state, made for the convenient administration of the government. It is an instrumentality, with powers more or less enlarged, according to the requirements of the public.” *Worcester v. Worcester Consolidated St. R. Co.*, 196 U. S. 539, 549, 49 L. Ed. 591.

**Counties.**—See the title **COUNTIES**, vol. 4, p. 827.

**Towns and townships.**—See the title **TOWNS AND TOWNSHIPS**.

14. *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 33 L. Ed. 231. See the title **DISTRICT OF COLUMBIA**, vol. 5, p. 404.

15. *Tulare Irrig. District v. Shepard*, 185 U. S. 1, 8, 46 L. Ed. 773. See the title **WATERS AND WATERCOURSES**.

16. *Supervisors v. United States*, 18 Wall. 71, 21 L. Ed. 771.

17. **As a public corporation.**—*Commissioners v. Commissioners*, 92 U. S. 307, 310, 23 L. Ed. 552.

**Distinguished from private corporations,** see post, “Alteration, Modification, Consolidation and Dissolution,” IV, C. See the title **CORPORATIONS**, vol. 4, p. 631.

**Trade corporations.**—A municipal corporation has none of the peculiar qualities and characteristics of a trade corporation, instituted for purposes of private gain, except that of acting in a corporate capacity. Its objects, its responsibilities, and its forms are different. *The Mayor v. Ray*, 19 Wall. 468, 469, 475, 22 L. Ed. 164.

18. **Quasi corporations.**—*School District v. Insurance Co.*, 103 U. S. 707, 708, 26 L. Ed. 601.

**A levy court** in the District of Colum-



lic lands of the United States for the purpose of entry and sale, and is not necessarily a political subdivision of a state or county; but in many of the states the congressional or original surveyed townships were made public corporations for school purposes only. They were not created for managing the general affairs of a political subdivision of the state.<sup>19</sup>

## II. Incorporation, Creation and Organization.

**A. In General.**—Each state has the right to make political subdivisions of its territory for municipal purposes.<sup>20</sup> Municipal corporations are created by the authority of the legislature.<sup>21</sup>

**B. Manner.**—1. **IN GENERAL.**—A municipal corporation may be formed in any manner that a state sees fit to adopt.<sup>22</sup>

2. **UNDER GENERAL LAW OR BY SPECIAL ACT**—a. *In General.*—Municipal corporations are usually organized in this country by special acts or pursuant to some general state law.<sup>23</sup>

b. *Creation by Implication.*—Where there are certain powers, privileges, and duties which cannot be performed except in a corporate capacity, a corporation by implication will result.<sup>24</sup>

bia is more properly called a quasi corporation than a municipal corporation. *Levy Court v. Coroner*, 2 Wall. 501, 17 L. Ed. 851.

The levy court of Washington County in the District of Columbia is a board charged with the administration of the financial and ministerial duties of Washington County, but in the absence of a charter is not properly a municipal corporation, but a quasi corporation. *Levy Court v. Coroner*, 2 Wall. 501, 17 L. Ed. 851.

**19. Congressional townships.**—*Weightman v. Clark*, 103 U. S. 256, 260, 26 L. Ed. 392. See the titles PUBLIC LANDS; SCHOOLS; TAXATION.

**20. Incorporation, creation and organization.**—*Gardner v. Michigan*, 199 U. S. 325, 334, 50 L. Ed. 212; *Missouri v. Lewis*, 101 U. S. 22, 30, 25 L. Ed. 989. See, also, *Williams v. Eggleston*, 170 U. S. 304, 310, 42 L. Ed. 1047; *Goodrich v. Detroit*, 184 U. S. 432, 439, 46 L. Ed. 627; *Spencer v. Merchant*, 125 U. S. 345, 356, 31 L. Ed. 763; *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. Ed. 943.

**21.** *Bissell v. Jeffersonville*, 24 How. 287, 294, 16 L. Ed. 664; *Rogers v. Burlington*, 3 Wall. 654, 18 L. Ed. 79; *St. Joseph Tp. v. Rogers*, 16 Wall. 644, 663, 21 L. Ed. 328; *Commissioners v. Commissioners*, 92 U. S. 307, 308, 23 L. Ed. 552; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 524, 25 L. Ed. 699; *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 534, 13 L. Ed. 518. See, also, *Bernards Tp. v. Morrison*, 133 U. S. 523, 528, 33 L. Ed. 726.

A municipal corporation exists by virtue of the exercise of the power of the state through its legislative department. It is the creature of the state. *Worcester v. Worcester Consolidated St. R. Co.*, 196 U. S. 539, 548, 49 L. Ed. 591; *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 533, 534, 13 L. Ed. 518.

The constitution of many states empower the legislatures to provide for the organization of cities and incorporated

villages. *Campbell v. Kenosha*, 5 Wall. 194, 18 L. Ed. 610.

**22. Manner.**—*Hancock v. Louisville, etc., R. Co.*, 145 U. S. 409, 415, 36 L. Ed. 755.

**23. Under general law or by special act.**—*Mount Pleasant v. Beckwith*, 100 U. S. 514, 531, 25 L. Ed. 699.

In some states provision is made in the constitution thereof for the organization of municipal corporations by general law. *Loan Ass'n v. Topeka*, 20 Wall. 655, 22 L. Ed. 455; *School District v. Insurance Co.*, 103 U. S. 707, 709, 26 L. Ed. 601.

A constitutional provision that "the legislature shall pass no special act conferring corporate powers" applies to public as well as to private corporations. There is no reason why the local corporate bodies discharging public functions should not be governed by general and uniform laws as well as those for private enterprises. In fact, the weight of the argument seems to be the other way, for it can very well be seen that the aggregation of individual capital and energy into an associated organization may require different powers to be exercised by cities, towns, townships, and school districts in the same state may or should be uniform in character all over the state. *School District v. Insurance Co.*, 103 U. S. 707, 709, 26 L. Ed. 601.

**Creation by special act.**—The constitutions of some states provide that the creation of municipal corporations may be by special laws. *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. Ed. 520.

Article 8, § 2, of the constitution of Iowa, provides that: "Corporations shall not be created in this state by special laws, except for political or municipal purposes." *Gelpcke v. Dubuque*, 1 Wall. 175, 176, 17 L. Ed. 520.

**24. Creation by implication.**—*Levy Court v. Coroner*, 2 Wall. 501, 17 L. Ed. 851.

Giving to a defined portion of a county power to issue bonds and create in-



**C. Inhabitants.**—Public or municipal corporations are composed of all the inhabitants of the territory included within the political organization; and the attribute of individuality is conferred on the entire mass of such residents,<sup>25</sup> each individual being entitled to participate in its proceedings;<sup>26</sup> but the members are not shareholders, nor joint partners in any corporate estate.<sup>27</sup>

**D. De Facto Corporations**—1. **IN GENERAL.**—That there may be a de facto municipal corporation cannot be doubted.<sup>28</sup>

2. **REQUISITES.**—The requisites to constitute a municipal corporation de facto are three: (1) A charter or general law under which such a corporation as it purports to be might lawfully be organized; (2) An attempt to organize thereunder; and (3) actual user of the corporate franchises.<sup>29</sup>

3. **LEGISLATIVE RECOGNITION AND VALIDATING ACTS.**—When a legislature has full power to create corporations, its act recognizing as valid a de facto municipal corporation operates to cure all defects in steps leading up to the organization and makes a de jure out of what before was only a de facto corporation. There must be a de facto organization upon which this recognition may act.<sup>30</sup>

4. **IMPEACHING VALIDITY**—a. *In General.*—None but the state can impeach the validity of the creation of a municipal organization, or call its existence in question, and if it acquiesces therein, the corporate existence cannot be collaterally attacked.<sup>31</sup> A mere irregular organization of a municipality is valid against

debtedness, is the creation of an entity with power to act. That this entity was not, in terms, named a corporation is not decisive. It is enough that an artificial entity was created, with power to exercise the functions of a corporation. It was, though not named, a corporate entity. *Hancock v. Louisville, etc., R. Co.*, 145 U. S. 409, 415, 36 L. Ed. 755.

A municipal corporation was created by the act of the Kentucky legislature of 1869, granting authority to a defined portion of Shelby County to subscribe stock and vote bonds in aid of a railroad company. The acts of 1870 and 1873 prescribed who should represent the corporation and by what name it should be known. *Hancock v. Louisville, etc., R. Co.*, 145 U. S. 409, 415, 36 L. Ed. 755.

25. **Inhabitants.**—*Commissioners v. Commissioners*, 92 U. S. 307, 23 L. Ed. 552; *Worcester v. Worcester Consolidated St. R. Co.*, 196 U. S. 539, 540, 49 L. Ed. 591; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 524, 25 L. Ed. 699.

The citizens or inhabitants of a city, not the common council or local legislature, constitute the "corporation" of the city. *Werlein v. New Orleans*, 177 U. S. 390, 402, 44 L. Ed. 817.

26. *Mount Pleasant v. Beckwith*, 100 U. S. 514, 524, 25 L. Ed. 699.

27. *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 534, 13 L. Ed. 518.

28. **De facto corporations.**—*Tulare Irrig. District v. Shepard*, 185 U. S. 1, 8, 46 L. Ed. 773, citing *Baltimore, etc., R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 571, 34 L. Ed. 784; *Shapleigh v. San Angelo*, 167 U. S. 646, 655, 42 L. Ed. 310.

29. **Requisites.**—*Tulare Irrig. District v. Shepard*, 185 U. S. 1, 13, 46 L. Ed. 773.

The case of *Norton v. Shelby County*, 118 U. S. 425, 30 L. Ed. 178, contains no doctrine in opposition. It was held in

that case that there could be no de facto officer where the office itself had no legal existence. *Tulare Irrig. District v. Shepard*, 185 U. S. 1, 13, 46 L. Ed. 773. See the title *DE FACTO OFFICERS*, vol. 5, p. 284.

The law of California provided for the incorporation of irrigation districts as public municipal districts. There was a bona fide attempt to organize under it, and there was actual user of the franchise. It was held that a corporation de facto was thereby constituted. *Tulare Irrig. District v. Shepard*, 185 U. S. 1, 13, 46 L. Ed. 773.

30. **Legislative recognition or validating acts.**—*Comanche County v. Lewis*, 133 U. S. 198, 202, 33 L. Ed. 604; *Harper v. Rose*, 140 U. S. 71, 75, 35 L. Ed. 344.

The power which can direct what proceedings shall be had for the organization of a municipal corporation can approve and make valid any proceedings which are actually taken. The power which can give authority to act can ratify any act that is taken, and generally legislative recognition of a municipal corporation validates the corporation, although it may not have had full prior legal authority. *Street v. United States*, 133 U. S. 299, 307, 33 L. Ed. 631.

31. **Impeaching validity.**—*Shapleigh v. San Angelo*, 167 U. S. 646, 42 L. Ed. 310; *Tulare Irrig. District v. Shepard*, 185 U. S. 1, 15, 46 L. Ed. 773.

The rule as stated by Cooley in *Constitutional Limitations*, 6th Ed., 309, is as follows: "In proceedings where the question whether a corporation exists or not arises collaterally, the courts will not permit its corporate character to be questioned, if it appears to be acting under color of law, and recognized by the state as such. \* \* \* And the rule, we apprehend, would be no different, if the constitution

every one except the state in a direct proceeding instituted for the purpose of testing the validity of the charter.<sup>32</sup>

**Irrigation District.**—This rule applies to irrigation districts.<sup>33</sup>

b. *Where Corporation Seeks to Condemn Land.*—The question of valid organizations can be raised when a de facto municipal corporation undertakes to condemn land. The right of eminent domain cannot be exercised by corporations de facto, but only by a corporation de jure, that is one of the exceptions to the general rule in regard to a corporation de facto.<sup>34</sup>

### III. Charters.

**A. Power to Issue.**—The legislature of a territory, as well as of a state, has power to issue a charter to a municipal corporation.<sup>35</sup>

**B. Object or Purpose.**—The legislative charter of a municipal corporation indicates its extent, and regulates the distribution of its power.<sup>36</sup>

**C. Preparation and Adoption**—1. **IN GENERAL.**—A state constitution may give a city express authority to frame its own charter.<sup>37</sup>

itself prescribed the manner of incorporation. Even in such a case, proof that the corporation was acting as such, under legislative action, would be sufficient evidence of right, except as against the state, and private parties could not enter upon any question of regularity. And the state itself may justly be precluded, on principles of estoppel, from raising any such objection, where there has been long acquiescence and recognition." *Tulare Irrig. District v. Shepard*, 185 U. S. 1, 15, 46 L. Ed. 773.

**32.** *Shapleigh v. San Angelo*, 167 U. S. 646, 42 L. Ed. 310.

In *Shapleigh v. San Angelo*, 167 U. S. 646, 42 L. Ed. 310, the court, through Mr. Justice Shiras, said: "The doctrine successfully invoked in the court below by the defendant, that where a municipal incorporation is wholly void ab initio, as being created without warrant of law, it could create no debts and could incur no liabilities, does not, in our opinion, apply to the case of an irregularly organized corporation, which had obtained, by compliance with a general law authorizing the formation of municipal corporations, an organization valid as against everybody, except the state acting by direct proceedings. Such an organization is merely voidable, and if the state refrains from acting until after debts are created, the obligations are not destroyed by a dissolution of the corporation, but it will be presumed that the state intended that they should be devolved upon the new corporation which succeeded, by operation of law, to the property and improvements of its predecessor." *Tulare Irrig. District v. Shepard*, 185 U. S. 1, 15, 46 L. Ed. 773.

**California.**—The court of California agrees that such is the rule. *Tulare Irrig. District v. Shepard*, 185 U. S. 1, 46 L. Ed. 773.

**Texas.**—This rule is recognized in Texas. *Shapleigh v. San Angelo*, 167 U. S. 646, 42 L. Ed. 310.

**Action to recover money judgment.**—In an action by an individual plaintiff

against a corporation de facto, to recover a money judgment for a debt due the plaintiff, the question of valid organization cannot be raised. *Tulare Irrig. District v. Shepard*, 185 U. S. 1, 17, 46 L. Ed. 773.

**33. Irrigation district.**—*Tulare Irrig. District v. Shepard*, 185 U. S. 1, 16, 46 L. Ed. 773. See, also, *Fallbrook Irrig. District v. Bradley*, 164 U. S. 112, 41 L. Ed. 369.

**34. Where corporation seeks to condemn land.**—*Tulare Irrig. District v. Shepard*, 185 U. S. 1, 17, 46 L. Ed. 773.

When a corporation seeks to divest title to private property and to take it for the purposes of its incorporation, it must then show that it is a corporation de jure, for the law has only given the right to take private property to that kind of a corporation. But even in such case it may happen that a party would be precluded from setting up the defense by matters in pais amounting to an estoppel or an admission. *Tulare Irrig. District v. Shepard*, 185 U. S. 1, 17, 46 L. Ed. 773.

**35. Power to issue.**—*Rogers v. Burlington*, 3 Wall. 654, 18 L. Ed. 79.

**36. Barnes v. District of Columbia**, 91 U. S. 540, 546, 23 L. Ed. 440; *Maxwell v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 445; *Dant v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 446. See ante, "Definition, Nature and Purpose," I. A.

**37. Preparation and adoption.**—*St. Louis v. Western Union Tel. Co.*, 149 U. S. 465, 467, 37 L. Ed. 810.

A municipal charter, prepared and adopted in pursuance of provisions of the state constitution granting such authority, is the "organic law" of the city, and the powers granted by it, so far as they are in harmony with the constitution and laws of the state, and have not been set aside by any act of the general assembly, are the powers vested in the city. And this charter is an organic act, so defined in the constitution, and is to be construed as organic acts are construed. The city is in a very just sense an "imperium



2. **NECESSITY FOR ACCEPTANCE.**—A charter must be accepted by a municipal corporation before it is binding on it.<sup>38</sup>

**D. Form and Contents.**—The charter of a municipality contains usually in express terms the powers granted and duties imposed upon a municipal corporation, but some of these may be implied.<sup>39</sup>

**E. Effect as Contract.**—A charter granted to a municipal corporation does not constitute a contract between the state and the corporation.<sup>40</sup>

**F. Amendment, Repeal and Surrender.**—The legislature may alter, amend, change, modify, or annul, repeal or revoke, the charter of a municipal corporation, at its pleasure or as the exigencies of the public service or the public welfare may demand.<sup>41</sup>

**Acceptance of General Law for Incorporation of Cities.**—A city charter may be surrendered and the corporation duly organized under a subsequent general law for the incorporation of cities, which provides, in effect, that the

in imperio." Its powers are self-appointed, and the reserved control existing in the general assembly does not take away this peculiar feature of its charter. *St. Louis v. Western Union Tel. Co.*, 149 U. S. 465, 467, 37 L. Ed. 810.

"The city of St. Louis \* \* \* does not, like most cities, derive its powers by grant from the legislature, but it framed its own charter under express authority from the people of the state, given in the constitution. Sections 20 and 21 of article 9 of the constitution of 1875 of the state of Missouri authorized the election of thirteen freeholders to prepare a charter to be submitted to the qualified voters of the city, which, when ratified by them, was to 'become the organic law of the city.' Section 22 provided for amendments, to be made at intervals of not less than two years and upon the approval of three-fifths of the voters. Sections 23 and 25 required the charter and amendments to always be in harmony with and subject to the constitution and laws of Missouri, and gave to the general assembly the same power over this city, notwithstanding the provisions of this article, as was had over other cities." *St. Louis v. Western Union Tel. Co.*, 149 U. S. 465, 467, 37 L. Ed. 810.

**38. Necessity for acceptance.**—*Dartmouth College v. Woodward*, 4 Wheat. 518, 659, 661, 4 L. Ed. 629; *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 536, 13 L. Ed. 518.

**39. Form and contents.**—The Mayor *v. Ray*, 19 Wall. 468, 22 L. Ed. 164. See post, "Power Conferred by Usual Form of Charter or under General Law." V. C; "Express and Implied Powers." V, H, 2, c.

**40. Effect of charter as contract.**—*East Hartford v. Hartford Bridge Co.*, 10 How. 511, 13 L. Ed. 518; *Commissioners v. Commissioners*, 92 U. S. 307, 311, 23 L. Ed. 552; *Board of Commissioners v. Lucas*, 93 U. S. 108, 114, 23 L. Ed. 822; *Worcester v. Worcester Consolidated St. R. Co.*, 196 U. S. 539, 550, 49 L. Ed. 591; *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 35 L. Ed. 943; *State Bank v. Knoop*, 16 How. 369, 380, 14 L. Ed. 977. See the

title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 844.

**Power of taxation.**—See the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 847.

**41. Amendment, repeal and surrender.**—*Girard v. Philadelphia*, 7 Wall. 1, 14, 19 L. Ed. 53; *Dartmouth College v. Woodward*, 4 Wheat. 518, 695, 4 L. Ed. 629; *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 534, 13 L. Ed. 518; *Fowle v. Alexandria*, 3 Pet. 398, 7 L. Ed. 719; *Broughton v. Pensacola*, 93 U. S. 266, 268, 23 L. Ed. 896; *Commissioners v. Commissioners*, 92 U. S. 307, 310, 23 L. Ed. 552; *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 35 L. Ed. 943; *Worcester v. Worcester Consolidated St. R. Co.*, 196 U. S. 539, 550, 49 L. Ed. 591. See to the same effect *Bissell v. Jeffersonville*, 24 How. 287, 293, 16 L. Ed. 664; *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. Ed. 520; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 529, 25 L. Ed. 699. See the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 844.

A grant of charter powers to a municipal corporation, in regard to its public functions and purposes, is liable, as to its public powers, rights, and duties, to be modified or abolished at any moment by the legislature, as the public interest may demand. *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 534, 13 L. Ed. 518.

In matters of public concern, where the charter is silent on the subject, the legislature may amend or repeal at pleasure, as public need requires; much more so, when such power is expressly reserved to the legislature in the charter. *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 537, 13 L. Ed. 518.

Where a limitation or restriction in a charter is one created by the legislature which granted the charter, certainly it is competent for the same authority to repeal it altogether, or to substitute some other in its place. *Bissell v. Jeffersonville*, 24 How. 287, 294, 16 L. Ed. 664.

**Taxation.**—A city charter may be



acceptance of that act by any incorporated city shall be deemed a surrender by such city of its prior charter.<sup>42</sup>

#### IV. Territory and Subdivisions.

**A. In General.**—What portion of a state shall be within the limits of a city and be governed by its authorities and its laws has always been considered to be a proper subject of legislation. How thickly or how sparsely the territory within a city must be settled is one of the matters within legislative discretion. Whether territory shall be governed for local purposes by a county, a city, or a township organization, is one of the most usual and ordinary subjects of state legislation.<sup>43</sup>

**B. Boundaries.**—Where a municipal corporation is bounded by a river, the boundary is the middle of the main channel of the river.<sup>44</sup>

**Change of Boundaries.**—See post, "Power of Legislature Generally," IV, C, 1.

**Boundaries and Limits a Matter of a Local Nature.**—See the title COURTS, vol. 4, p. 1098.

**C. Alteration, Modification, Consolidation and Dissolution**—1. POWER OF LEGISLATURE GENERALLY.—The state has plenary power over its municipal corporations, to change their organization, to modify their method of internal government, or to abolish them altogether. Contracts entered into with them by private parties cannot deprive the state of this paramount authority.<sup>45</sup>

amended by legislative enactment so as to give power to levy and collect taxes for any purpose, beyond the original charter powers. *Campbell v. Kenosha*, 5 Wall. 194, 18 L. Ed. 610; *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. Ed. 520. See the title TAXATION.

The act of congress of 1804, amending the charter of Alexandria, does not transfer generally, to the common council, the powers of the mayor and commonalty; but the powers given to them are specially enumerated. The act amending the charter changed the corporate body so entirely as to require a new provision to enable it to execute the powers conferred by the law of Virginia; an enabling clause, empowering the common council to act in the particular case, or some general clause which might embrace the particular case, is necessary, under the new organization of the corporate body. *Fowle v. Alexandria*, 3 Pet. 398, 7 L. Ed. 719.

**42. Acceptance of general law for incorporation of cities.**—*Bissell v. Jeffersonville*, 24 How. 287, 293, 16 L. Ed. 664.

**43. Territory and subdivision.**—*Kelly v. Pittsburgh*, 104 U. S. 78, 80, 26 L. Ed. 658. See post, "Alteration, Modification, Consolidation and Dissolution," IV, C.

**44. Boundaries.**—*The Schools v. Risley*, 10 Wall. 91, 19 L. Ed. 850; *Jones v. Soulard*, 24 How. 41, 65, 16 L. Ed. 604. And see the title BOUNDARIES, vol. 3, p. 478, et seq.

The eastern boundary of the corporation of St. Louis of 1809, and the eastern line of the out-boundary of December 8, 1840, both extend to the middle of the main channel of the Mississippi River. *The Schools v. Risley*, 10 Wall. 91, 19 L. Ed. 850.

The eastern line of the city of St. Louis,

as it was incorporated in 1809, is as follows: From the sugar loaf due east to the Mississippi; "from thence, by the Mississippi, to the place first mentioned." This last call made the city a riparian proprietor upon the Mississippi, and, as such, it was entitled to all accretions as far out as the middle thread of the stream. *Jones v. Soulard*, 24 How. 41, 16 L. Ed. 604.

Duncan's island, upon which was the land in dispute, and which became connected with the shore as fast land, was included in a grant made by congress, in 1812, to the town of St. Louis, for the public schools; and it neither passed to the state of Missouri by her admission into the Union, in 1820, nor by the act of congress passed in 1851. *Jones v. Soulard*, 24 How. 41, 16 L. Ed. 604.

**45. Power of legislature.**—*Amy v. Watertown*, No. 1, 130 U. S. 301, 319, 32 L. Ed. 946; *Shapleigh v. San Angelo*, 167 U. S. 646, 654, 42 L. Ed. 310. See to the same effect *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197; *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 536, 13 L. Ed. 518; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 525, 25 L. Ed. 699; *Commissioners v. Commissioners*, 92 U. S. 307, 23 L. Ed. 552; *Attorney General v. Lowrey*, 199 U. S. 233, 279, 50 L. Ed. 167; *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 90, 35 L. Ed. 943; *Terrett v. Taylor*, 9 Cranch 43, 44, 52, 3 L. Ed. 650; *Dartmouth College v. Woodward*, 4 Wheat. 518, 663, 4 L. Ed. 629; *Aspinwall v. Board of Comm'rs*, 22 How. 364, 378, 16 L. Ed. 296. See post, "Form of Government," X, B, 2. See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 843.

"A municipal corporation, in which is

**Boundaries.**—Power exists in the legislature, not only to fix the boundaries of a municipality when incorporated, but to enlarge or diminish the same subsequently, unless restrained by the constitution.<sup>46</sup>

2. **CONSENT OF INHABITANTS.**—The legislature may extend the limits of municipal corporations, detach territory therefrom, consolidate or divide them, at its will, without the consent of the inhabitants of either the corporation or of the part to be annexed or detached.<sup>47</sup>

3. **ANNEXATION AND CONSOLIDATION**—a. *In General.*—The legislature may annex or authorize the annexation of territory to a municipality, subject of course to constitutional limitations.<sup>48</sup>

b. *Agriculture Lands.*—Ordinarily land used for agricultural purposes cannot be annexed merely to increase the revenue of the municipality.<sup>49</sup>

**Land Owned by Corporation.**—The legislature may authorize the annexation of lands used for agriculture if owned by corporations, and exclude it if owned by individuals.<sup>50</sup>

c. *Effect*—(1) *In General.*—Where the boundary of the city is enlarged, the annexed territory comes under the control of the municipality for all purposes.<sup>51</sup>

(2) *Effect on Identity of Corporation.*—The identity of a municipal corporation is not destroyed by an enlargement of its area; or an increase in numbers of its incorporators.<sup>52</sup>

vested some portion of the administration of the government, may be changed at the will of the legislature." *State Bank v. Knoop*, 16 How. 369, 380, 14 L. Ed. 977.

"The main distinction between public and private corporations is, that over the former the legislature, as guardian of the public interests, has the exclusive and unrestrained control; and acting as such, as it may create, so it may modify or destroy, as public exigency requires or recommends, or the public interest will be best subserved. It possesses the right to alter, abolish, or destroy all such institutions, as mere municipal regulations must, from the nature of things, be subject to the absolute control of the government." *United States v. Railroad Co.*, 17 Wall. 322, 328, 21 L. Ed. 597. See, also, the title **CORPORATIONS**, vol. 4, p. 631.

46. **Boundaries.**—*Mount Pleasant v. Beckwith*, 100 U. S. 514, 531, 25 L. Ed. 699.

47. **Consent of inhabitants.**—*Commissioners v. Commissioners*, 92 U. S. 307, 23 L. Ed. 552; *Worcester v. Worcester Consolidated St. R. Co.*, 196 U. S. 539, 550, 49 L. Ed. 591; *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 35 L. Ed. 943; *Essex Public Road Board v. Skinkle*, 140 U. S. 334, 35 L. Ed. 446; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 531, 25 L. Ed. 699.

"The attribute of individuality \* \* \* may be modified or taken away at the mere will of the legislature, according to its own views of public convenience, and without any necessity for the consent of those composing the body politic." *Commissioners v. Commissioners*, 92 U. S. 307, 310, 23 L. Ed. 552.

48. **Annexation and consolidation.**—*Clark v. Kansas City*, 176 U. S. 114, 44 L. Ed. 392; *Commissioners v. Commissioners*, 92 U. S. 307, 23 L. Ed. 552; *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 35 L. Ed. 943.

Unless the constitution of a state or the organic law of a territory otherwise prescribes, the legislature has the power to enlarge the area of a county, whenever the public convenience or necessity requires. *Commissioners v. Commissioners*, 92 U. S. 307, 23 L. Ed. 552.

It is within the scope of legislative power, by special act to incorporate surrounding territory with a city, even when such territory is itself composed of smaller municipal corporations. *Girard v. Philadelphia*, 7 Wall. 1, 19 L. Ed. 53.

49. **Agriculture lands.**—*Clark v. Kansas City*, 176 U. S. 114, 44 L. Ed. 392.

The growth of cities is inevitable, and in providing for their expansion it may be the judgment of an agricultural state that they should find a limit in the lands actually used for agriculture. Such use it could be taken for granted would be only temporary. Other uses can receive all the benefits of the growth of a city and not be moved to submit to the burdens. Besides, such uses or manufacturing uses adjacent to a city may, for its order and health, need control. Affecting it differently from what farming uses do may justify, if not require, their inclusion within the municipal jurisdiction. *Clark v. Kansas City*, 176 U. S. 114, 120, 44 L. Ed. 392.

50. **Land owned by corporation.**—*Clark v. Kansas City*, 176 U. S. 114, 44 L. Ed. 392.

51. **Effect.**—*Illinois Cent. R. Co. v. Chicago*, 176 U. S. 646, 44 L. Ed. 622.

Where a section of the charter of a railroad company provided that it should not locate its track within any city without the consent of the common council, it was held that this restriction applies to territory subsequently annexed to the city. *Illinois Cent. R. Co. v. Chicago*, 176 U. S. 646, 44 L. Ed. 622.

52. **Effect on identity of corporation.**—*Girard v. Philadelphia*, 7 Wall. 1, 19 L. Ed. 53.



(3) *Powers of Corporation*.—On the dissolution of a municipal corporation, by consolidation with other territory, the powers of the old are continued in the new.<sup>53</sup>

(4) *As Entitling Inhabitants to Municipal Rights and Subjecting Them to Burdens*.—Where the act annexing territory to a municipal corporation does not itself exempt them from any of the liabilities of the municipal corporation of which they became a part, the people residing in it become at once entitled to a common ownership of the city's property and privileges, subject to the same duties as those residing in others. They are on an exact equality with all the owners of property in the city, equally entitled with them to all municipal rights and privileges, and equally subject to all municipal burdens and charges.<sup>54</sup> But a discrimination in their favor, exempting them from the liabilities of the municipality, may be made either in the act of annexation, or by a subsequent act.<sup>55</sup>

(5) *Property, Immunities, Debts, Liabilities, etc.*—On the dissolution of a municipal corporation, by consolidation with other territory, or merger in another corporation, the rights, property, immunities, duties, obligations and liabilities of the extinguished municipality are continued in the new, if no legislative arrangements are made;<sup>56</sup> but the legislature may provide for their recognition and enforcement.<sup>57</sup>

In *Girard v. Philadelphia*, 7 Wall. 1, 19 L. Ed. 53, it was held by the federal supreme court that the annexation to the city of Philadelphia, having a territory of only two square miles, of twenty-eight other municipalities with all their inhabitants, comprising districts, boroughs, and townships of various territorial extent, and the changing of its name, did not destroy its identity. *Mobile v. Watson*, 116 U. S. 289, 301, 29 L. Ed. 620.

**53. Powers of corporation.**—*Girard v. Philadelphia*, 7 Wall. 1, 19 L. Ed. 53; *Louisiana v. Pilsbury*, 105 U. S. 278, 287, 26 L. Ed. 1090.

**54. As entitling inhabitants to municipal rights and subjecting them to burdens.**—*United States v. Memphis*, 97 U. S. 284, 291, 24 L. Ed. 937.

**55. United States v. Memphis**, 97 U. S. 284, 291, 24 L. Ed. 937. See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 849.

**Taxation of annexed portion.**—See post, "Apportionment of Property and Burdens," IV, C, 4, c. See, also, the title TAXATION.

**56. Property, immunities, debts and liabilities.**—*Girard v. Philadelphia*, 7 Wall. 1, 19 L. Ed. 53; *Louisiana v. Pilsbury*, 105 U. S. 278, 287, 26 L. Ed. 1090; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 528, 25 L. Ed. 699; *Morgan v. Beloit*, 7 Wall. 613, 617, 19 L. Ed. 203; *Mobile v. Watson*, 116 U. S. 289, 301, 29 L. Ed. 620.

Where one town is by a legislative act merged in two others, it would doubtless be competent for the legislature to regulate the rights, duties, and obligations of the two towns whose limits are thus enlarged; but if that is not done, it must follow that the two towns succeed to all the public property and immunities of the extinguished municipality. *Mount Pleasant v. Beckwith*, 100 U. S. 514, 528, 25 L. Ed. 699; *Morgan v. Beloit*, 7 Wall. 613,

617, 19 L. Ed. 203.

In *Mount Pleasant v. Beckwith*, 100 U. S. 514, 25 L. Ed. 699, a municipal corporation had been dissolved and its territory divided between and annexed to three adjacent corporations. Upon this state of facts the court held that, unless the legislature otherwise provided, the corporations to which the territory and the inhabitants of the divided corporation had been transferred, became entitled to all its property and immunities, were severally liable for their proportionate share of its debts, and were vested with its power to raise revenue wherewith to pay them by levying taxes upon the property transferred and the persons residing therein. *Mobile v. Watson*, 116 U. S. 289, 302, 29 L. Ed. 620.

**The District of Columbia** created by act of Feb. 21, 1871, c. 62, 16 Stat. 419, succeeded to the property and liabilities of the municipalities which were thereby abolished. *District of Columbia v. Cluss*, 103 U. S. 705, 26 L. Ed. 455.

**57. Broughton v. Pensacola**, 93 U. S. 266, 23 L. Ed. 896; *New Orleans v. Clark*, 95 U. S. 644, 653, 24 L. Ed. 521.

**As to acts of 1852, of the Louisiana legislature**, consolidating the three previously existing municipalities within the limits of New Orleans into one, and adding to it the adjacent city of Lafayette, see *Louisiana v. Pilsbury*, 105 U. S. 278, 26 L. Ed. 1090.

**The act of 1874, which annexed Carrollton to New Orleans**, provided that all property, rights, and interest of every kind of the former city should be vested in the latter, and that the debts and liabilities of Carrollton, "including the funding and improvement bonds, and the bonds issued to the Jefferson City Gas-light Company, and known as gas bonds," should be assumed and paid by the city of New Orleans; and that city was in



**Right of Old Municipality to Hold Property.**—The right of a municipal corporation to hold property devised to it is not destroyed by an enlargement of its area, or an increase in the number of its corporators.<sup>58</sup>

4. **DIVISION AND REDUCTION OF AREA**—a. *In General.*—The legislature possesses power to divide municipal corporations at its pleasure.<sup>59</sup> It may diminish their area whenever the public convenience or necessity requires.<sup>60</sup>

b. *Conditions upon Which Division, etc., Made.*—In dividing municipal corporations, the legislature may settle the terms and conditions on which the division shall be made. It may enlarge or diminish their territorial liabilities, may extend or abridge their privileges, and may impose new liabilities.<sup>61</sup>

c. *Apportionment of Property and Burdens*—(1) *Power of Legislature.*—Where the legislature divides a municipal corporation it has the power to apportion the common property and the common burdens in such manner as may seem reasonable and equitable,<sup>62</sup> even to the extent of providing that a certain portion of the property of the old town shall be transferred to the new corporation.<sup>63</sup>

(2) *In Absence of Legislative Apportionment.*—But if the legislature omits to apportion the common property and common burdens, the presumption, as between the parties, is that they did not consider that any regulation was necessary. Where none is made, in case of division, the old corporation owns and retains all the public property within her new limits, and is responsible for all the debts of the corporation contracted before the act of separation was passed. Debts previously contracted must be paid entirely by the old corporation without any claim for contribution from the new; nor has the new municipality any claim to any portion of the public property, except what falls within her boundaries, and to all that the old corporations has no claim whatever.<sup>64</sup>

terms declared liable therefor. Independently of this legislation, the liabilities of Carrollton would have devolved with its property upon New Orleans on the annexation to that city, so far, at least, that they could be enforced against the inhabitants and property brought by the annexation within its jurisdiction. *Broughton v. Pensacola*, 93 U. S. 266, 23 L. Ed. 896. Equitable claims which had existed against the dissolved city would continue as before, and be equally subject to legislative recognition and enforcement, or their payment might be required, as in this case, by the act of annexation. *New Orleans v. Clark*, 95 U. S. 644, 653, 24 L. Ed. 521.

**58. Right of old municipality to hold property.**—*Girard v. Philadelphia*, 7 Wall. 1, 19 L. Ed. 53.

In *Girard v. Philadelphia*, 7 Wall. 1, 19 L. Ed. 53, it was held by the federal supreme court that the annexation to the city of Philadelphia, having a territory of only two square miles, of twenty-eight other municipalities with all their inhabitants, comprising districts, boroughs, and townships of various territorial extent, and the changing of its name, did not impair its right to hold property devised to it. *Mobile v. Watson*, 116 U. S. 289, 301, 29 L. Ed. 620.

**59. Division and reduction of area.**—*Commissioners v. Commissioners*, 92 U. S. 307, 312, 23 L. Ed. 552; *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 13 L. Ed. 518; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 525, 25 L. Ed. 699.

**60. Commissioners v. Commissioners**, 92

U. S. 307, 311, 23 L. Ed. 552; *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 90, 35 L. Ed. 943; *Attorney General v. Lowrey*, 199 U. S. 233, 239, 50 L. Ed. 167.

**61. Conditions upon which division, etc., made.**—*Commissioners v. Commissioners*, 92 U. S. 307, 313, 23 L. Ed. 552. See post, "Apportionment of Property and Burdens," IV, C, 4, c.

The legislature may, as between the parties in interest, settle all the terms and conditions of the division of their territory, or the alteration of the boundaries, as fixed by any prior law. *Mount Pleasant v. Beckwith*, 100 U. S. 514, 525, 25 L. Ed. 699.

**62. Power of legislature.**—*Commissioners v. Commissioners*, 92 U. S. 307, 312, 23 L. Ed. 552; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 531, 25 L. Ed. 699.

The act of the general assembly of Kentucky of January 30, 1878, which vested in the county court of Carter county power to bind the parts of Elliott and Boyd counties which had been set off from Carter county in compromising and settling with the holders of the bonds and coupons executed by Carter county while such parts of Elliott and Boyd counties were still a part of Carter county, is valid. *Carter County v. Sinton*, 120 U. S. 517, 523, 30 L. Ed. 701.

**63. Commissioners v. Commissioners**, 92 U. S. 307, 313, 23 L. Ed. 552.

**64. In absence of legislative apportionment.**—*Mount Pleasant v. Beckwith*, 100 U. S. 514, 525, 25 L. Ed. 699; *Commission-*

5. **DISSOLUTION, AND CHANGE OF FORM**—a. *Power of Legislature*.—The legislature may abolish wholly a public political corporation, as is yearly done in discontinuing old towns and counties.<sup>65</sup> It can at any time terminate the existence of the corporation itself, and provide other and different means for the government of the district comprised within the limits of the former city.<sup>66</sup>

b. *What Amounts to Dissolution*.—**Superseding Functions**.—A public corporation, charged with specific duties, such as building and repairing levees within a certain district, being superseded in its functions by a law dividing the district, and creating a new corporation for one portion, and placing the other under charge of the local authorities, ceases to exist except so far as its existence is expressly continued for special objects, such as settling up its indebtedness and the like.<sup>67</sup>

*ers v. Commissioners*, 92 U. S. 307, 23 L. Ed. 552.

"If a part of its territory and inhabitants are separated from it by annexation to another, or by the erection of a new corporation, the former corporation still retains all its property, powers, rights, and privileges, and remains subject to all its obligations and duties, unless some new provision should be made by the act authorizing the separation." *Commissioners v. Commissioners*, 92 U. S. 307, 310, 23 L. Ed. 552.

"The old town, unless the legislature otherwise provides, continues to be seised of all its lands held in a proprietary right, continues to be the sole owner of all its personal property, is entitled to all its rights of action, is bound by all its contracts, and is subject to all the duties and obligations it owed before the act was passed effecting the separation." *Commissioners v. Commissioners*, 92 U. S. 307, 311, 23 L. Ed. 552.

Where a city is created out of the territory of a town, it would seem that the indebtedness existing at the time of division attached to the older organization; unless a statute provides that the city and town shall bear the indebtedness in the same proportions as if they had not been dissolved. *Beloit v. Morgan*, 7 Wall. 619, 19 L. Ed. 205.

Where two separate towns are created out of one, each, in the absence of any statutory regulation, is entitled to hold in severalty the public property of the old corporation which falls within its limits. *Mount Pleasant v. Beckwith*, 100 U. S. 514, 532, 25 L. Ed. 699.

Where the legislature of Wyoming Territory organized two new counties, and included within their limits a part of the territory of an existing county, but made no provision for apportioning debts or liabilities, held, that the old county, being solely responsible for the debts and liabilities it had previously incurred, had, on discharging them, no claim upon the new counties for contribution. *Commissioners v. Commissioners*, 92 U. S. 307, 23 L. Ed. 552.

65. **Power of legislature**.—*East Hartford v. Hartford Bridge Co.*, 10 How. 511, 536, 13 L. Ed. 518; *Shapleigh v. San An-*

*gelo*, 167 U. S. 646, 654, 42 L. Ed. 310.

Unless there is some constitutional limitation on the right, the state legislature may destroy the municipal corporations of the state and the corporations cannot prevent it. *Atkin v. Kansas*, 191 U. S. 207, 221, 48 L. Ed. 148.

In *Mount Pleasant v. Beckwith*, 100 U. S. 514, 25 L. Ed. 699, it was held that, where no constitutional restriction is imposed, the corporate existence of counties, cities and towns is subject to the legislative control of the state creating them. *Worcester v. Worcester Consolidated St. R. Co.*, 196 U. S. 539, 550, 49 L. Ed. 591.

In *Louisiana*, a municipal corporation may be dissolved, whenever deemed necessary or convenient to the public interest. *McDonogh v. Murdoch*, 15 How. 367, 403, 14 L. Ed. 732.

66. *Worcester v. Worcester Consolidated St. R. Co.*, 196 U. S. 539, 548, 49 L. Ed. 591; *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 533, 534, 13 L. Ed. 518.

67. **Superseding functions**.—*Barkley v. Levee Comm'rs*, 93 U. S. 258, 23 L. Ed. 893.

If, with such limited existence, no provision is made for the continuance or new election of the officers of such corporation, the functions of the existing officers will cease when their respective terms expire, and the corporation will be de facto extinct. In such case, if there be a judgment against the corporation, mandamus will not lie to enforce the assessment of taxes for its payment, there being no officers to whom the writ can be directed. The court cannot, by mandamus, compel the new corporations to perform the duties of the extinct corporation in the levy of taxes for the payment of its debts, especially where their territorial jurisdiction is not the same, and the law has not authorized them to make such levy. Nor can the court order the marshal to levy taxes in such a case; nor in any case, except where a specific law authorizes such a proceeding. Under these circumstances, the judgment creditor is, in fact, without remedy, and can only apply to the legislature for relief. *Barkley v. Levee Comm'rs*, 93 U. S. 258, 23 L. Ed. 893. See the title **MANDAMUS**, ante, p. 1.



**Consolidation with Another Municipality.**—See ante, "Powers of Corporation," IV, C, 3, c, (3).

c. *Effect upon Powers, Property, Immunities, Debts and Liabilities*—(1) *Change in Continuity of Political Organizations*—(a) *In General*.—Change in the continuity of the political organizations, neither by municipal law nor the law of nations destroys the territorial responsibility for legal obligations. A change in form does not destroy responsibility.<sup>68</sup>

(b) *Change of Town to Village or City*.—A town whose growth enables it to cast off its village organization and assume the habiliments of a city continues liable for all debts theretofore contracted.<sup>69</sup>

**Liability for Negligence.**—During its change from a town to a village organization, a municipal corporation is not released from the obligation to exercise the power with which it is invested to keep its streets and sidewalks in a safe condition. For neglect in that regard it is liable to a party who thereby sustains special damages.<sup>70</sup>

(c) *Change of Class of City*.—See ante, "In General," IV, C, 5, c, (1), (a).

(d) *New Name or New Corporation Made Out of Old*—aa. *In General*.—Where a municipal charter is repealed and the old charter organization abolished; but the same or substantially the same inhabitants are erected into a new corporation, whether with extended or restricted territorial limits, such new corporation is treated as in law the successor of the old one, entitled to its property rights, and subject to its liabilities.<sup>71</sup>

**68. Change in continuity of political organizations.**—Comanche County v. Lewis, 133 U. S. 198, 205, 33 L. Ed. 604.

**Effect of change of class.**—The corporate powers lawfully conferred upon the board of education of the city of Topeka, when said city was a city of the second class, have not been lost or destroyed by reason of the transition of the city from a city of such class to a city of the first class. That which was true of Topeka is of course true of Atchison, and the board of education of the city of Atchison. Atchison Board of Education v. De Kay, 148 U. S. 591, 603, 37 L. Ed. 573.

**69. Change of town to village or city.**—Comanche County v. Lewis, 133 U. S. 198, 205, 33 L. Ed. 604.

**70. Liability for negligence.**—Evanston v. Gunn, 99 U. S. 660, 25 L. Ed. 306.

Inasmuch as the village succeeds to all the property and funds as well as to the liabilities of the town, and has power to borrow money to provide for improvements rendered necessary by any casualty or accident happening after the annual appropriation, it cannot, when sued by such party, set up that its board of trustees were unauthorized to make that appropriation for the year in which the plaintiff's injury occurred, nor that the board and the other officers of the village were prohibited by law from adding to the corporate expenditures in any one year an amount above that provided for in the annual appropriation bill for that year. Evanston v. Gunn, 99 U. S. 660, 25 L. Ed. 306.

**Illinois.**—So held under the statute of Illinois of April 10, 1872. Evanston v. Gunn, 99 U. S. 660, 25 L. Ed. 306.

**71. New name or new corporation made**

**out of old.**—Shapleigh v. San Angelo, 167 U. S. 646, 654, 42 L. Ed. 310.

Neither the identity of a municipal corporation, nor its right to hold property devised to it, is destroyed by a change of its name. Girard v. Philadelphia, 7 Wall. 1, 19 L. Ed. 53.

"In Mobile v. Watson, 116 U. S. 289, 29 L. Ed. 620, it was held that: when a municipal corporation with fixed boundaries is dissolved by law, and a new corporation is created by the legislature for the same general purposes, but with new boundaries, embracing less territory but containing substantially the same population, the great mass of the taxable property, and the corporate property of the old corporation which passes without consideration and for the same uses, the debts of the old corporation fall upon the new as its legal successor; and that powers of taxation to pay them, which it had at the time of their creation and which entered into the contracts, also survive and pass into the new corporation." Shapleigh v. San Angelo, 167 U. S. 646, 653, 42 L. Ed. 310. See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 847.

The cases of Broughton v. Pensacola, 93 U. S. 266, 23 L. Ed. 896, and Mobile v. Watson, 116 U. S. 289, 29 L. Ed. 620, were cases in which a new name was given to an old corporation, or a new corporation was made out of an old one—that was the substance of it—and the question was whether the new corporation, or the old corporation by its new name, was liable for the old debts; and it was held that it was. That was a question of liability, not a question of procedure. There the way was open for



bb. *De Facto Corporations*.—The abolition of a city government, as at first organized, because of some disregard of law, and its reconstruction so as to include within its limits the public improvements for which bonds had been issued during the first organization, devolved upon the city so reorganized the obligations that would have attached to the original city if the state had continued to acquiesce in the validity of its incorporation.<sup>72</sup> But a holder of such bonds cannot recover the principal amount of bonds which have not matured upon the theory that the liability of the new municipality is of an equitable character, and that the outstanding obligations of the old corporation can be regarded as presently due. The new corporation is subject to the obligations of the preceding corporation, by which is meant subject to them as existing legal obligations, in manner and form as they would have been enforceable had there been no change of organization.<sup>73</sup>

(c) *Organization Abandoned*.—The debts of a county, contracted during a valid organization, remain the obligations of the county, although for a time the organization be abandoned and there be no officers to be reached by the process of the courts.<sup>74</sup>

(2) *Consolidation*.—See ante, "Property, Immunities, Debts, Liabilities, etc.," IV, C, 3, c, (5).

## V. Powers, Privileges and Obligations.

A. *In General*.—Municipal corporations are subject to legal obligations and duties. They derive all their powers from the legislature except where the constitution of the state otherwise provides.<sup>75</sup> They have only such powers as the

looking into the actual relations of the old and new corporations, and deciding according to the justice of the case. *Amy v. Watertown*, No. 1, 130 U. S. 301, 319, 32 L. Ed. 946.

The disincorporation by legal proceedings of the city of San Angelo did not avoid legally subsisting contracts, and upon the reincorporation of the same inhabitants and of a territory inclusive of the improvements made under such contracts, the obligation of the old devolved upon the new corporation. *Shapleigh v. San Angelo*, 167 U. S. 646, 655, 42 L. Ed. 310.

72. *De facto corporations*.—*Shapleigh v. San Angelo*, 167 U. S. 646, 652, 42 L. Ed. 310.

A municipal corporation, though irregularly formed under a general statute, is competent to contract for municipal purposes, and the obligations of such contracts devolve by operation of law upon its successor a new corporation, and the official action and character of the mayor and secretary in signing and sealing the securities cannot be challenged. Such objection raises merely the same question in another form. *Shapleigh v. San Angelo*, 167 U. S. 646, 658, 42 L. Ed. 310.

The doctrine that where a municipal incorporation is wholly void ab initio, as being created without warrant of law, it could create no debts and could incur no liabilities, does not apply to the case of an irregularly organized corporation, which had obtained, by compliance with a general law authorizing the formation of municipal corporations, an organiza-

tion valid as against everybody, except the state acting by direct proceedings. Such an organization is merely voidable, and if the state refrains from acting until after debts are created, the obligations are not destroyed by a dissolution of the corporation, but it will be presumed that the state intended that they should be devolved upon the new corporation which succeeded, by operation of law, to the property and improvement of its predecessor. *Shapleigh v. San Angelo*, 167 U. S. 646, 655, 42 L. Ed. 310.

73. *Shapleigh v. San Angelo*, 167 U. S. 646, 658, 42 L. Ed. 310.

74. *Organization abandoned*.—*Comanche County v. Lewis*, 133 U. S. 198, 205, 33 L. Ed. 604, citing *Broughton v. Pensacola*, 93 U. S. 266, 23 L. Ed. 896; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 25 L. Ed. 699.

75. *Powers, privileges and obligations*.—*Commissioners v. Commissioners*, 92 U. S. 307, 310, 23 L. Ed. 552; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 524, 25 L. Ed. 699. See, also, *United States v. Railroad Co.*, 17 Wall. 322, 332, 21 L. Ed. 597; *Rogers v. Burlington*, 3 Wall. 654, 663, 18 L. Ed. 79; *St. Joseph Tp. v. Rogers*, 16 Wall. 663, 21 L. Ed. 328.

"The whole municipal authority emanates from the legislature." *Barnes v. District of Columbia*, 91 U. S. 540, 546, 23 L. Ed. 440; *Maxwell v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 445; *Dant v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 446.

Cities are charged with certain specified duties of government within its terri-

legislature confers upon them.<sup>76</sup> The legislature invests a municipal corporation with such powers as it deems adequate to the ends to be accomplished.<sup>77</sup> All the rights, duties and obligations of such a corporation must be ascertained and defined by the laws of the state which created it.<sup>78</sup> The powers of such corporations are such as belong to sovereignty.<sup>79</sup>

**Corporate rights and privileges** are usually possessed by such corporations.<sup>80</sup>

**B. Subordinate Legislative Powers.**—Municipal corporations are invested with subordinate legislative powers, to be exercised for local purposes connected with the public good.<sup>81</sup>

**They have no inherent jurisdiction** to make laws, or to adopt governmental regulations; nor can they exercise any other powers in that regard than such as are expressly or impliedly derived from their charters, or other statutes of the state.<sup>82</sup>

**C. Powers Conferred by Usual Form of Charter or under General Law.**—The usual form of municipal charters, confers upon the corporation power to receive, hold, and dispose of property, to levy taxes, appropriate money, and provide for the payment of the debts and expenses of the city; to establish hospitals, schools, waterworks, markets, and erect buildings necessary for the use of the city; to open, regulate, and light the streets; to establish a police, night watch, etc., and to pass all ordinances necessary to carry out the intent of the charter.<sup>83</sup>

torial limits. *Ford v. Delta, etc., Land Co.*, 164 U. S. 662, 672, 41 L. Ed. 590.

**"Public duties are required of counties as well as of towns,** as a part of the machinery of the state; and, in order that they may be able to perform those duties, they are vested with certain corporation powers; but their functions are wholly of a public nature." *Worcester v. Worcester Consolidated St. R. Co.*, 196 U. S. 539, 550, 49 L. Ed. 591; *Commissioners v. Commissioners*, 92 U. S. 307, 23 L. Ed. 552.

**Presumption that legislature will not obstruct fundamental object.**—Where the legislative power creates a municipal corporation, it will be presumed, that the legislature will do no act and place no obstruction in the way of its carrying out its fundamental object or interest. *Van Ness v. Washington*, 4 Pet. 232, 282, 7 L. Ed. 842.

**Extent and character of power a matter of local policy—Determination by state courts.**—See the title COURTS, vol. 4, p. 1097.

76. *Rogers v. Burlington*, 3 Wall. 654, 663, 18 L. Ed. 79; *St. Joseph Tp. v. Rogers*, 16 Wall. 644, 663, 21 L. Ed. 328; *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 8, 33 L. Ed. 231; *United States v. Railroad Co.*, 17 Wall. 322, 332, 21 L. Ed. 597; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 524, 25 L. Ed. 699; *Commissioners v. Commissioners*, 92 U. S. 307, 310, 23 L. Ed. 552; *Thomson v. Lee County*, 3 Wall. 327, 18 L. Ed. 177.

A municipal corporation acts wholly under a delegated authority. *Thomson v. Lee County*, 3 Wall. 327, 330, 18 L. Ed. 177. See post, "Delegated Powers," V, E.

77. *The Mayor v. Ray*, 19 Wall. 468, 469, 475, 22 L. Ed. 164.

78. *United States v. Council of Keokuk*, 6 Wall. 514, 516, 18 L. Ed. 933.

79. *Klein v. New Orleans*, 99 U. S. 149, 150, 25 L. Ed. 430.

80. *Commissioners v. Commissioners*, 92 U. S. 307, 310, 23 L. Ed. 552.

81. **Subordinate legislative powers.**—*Bissell v. Jeffersonville*, 24 How. 287, 294, 16 L. Ed. 664; *People's Railroad v. Memphis Railroad*, 10 Wall. 38, 52, 19 L. Ed. 844. See to the same effect *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 8, 33 L. Ed. 231; *Thomson v. Lee County*, 3 Wall. 327, 18 L. Ed. 177.

Municipal corporations are usually invested with certain subordinate legislative powers, to facilitate the due administration of their own internal affairs, and to promote the general welfare of the municipality. *Commissioners v. Commissioners*, 92 U. S. 307, 308, 23 L. Ed. 552.

A municipal corporation is a body with limited legislative powers. *Fowle v. Alexandria*, 3 Pet. 398, 7 L. Ed. 719.

Municipal corporations are vested with quasi legislative powers. *Loan Ass'n v. Topeka*, 20 Wall. 655, 659, 22 L. Ed. 455.

Municipal corporations are often clothed with legislative functions. *Harshman v. Bates County*, 92 U. S. 569, 23 L. Ed. 747.

A municipal corporation can legislate within its prescribed limits. *Clark v. Washington*, 12 Wheat. 40, 53, 6 L. Ed. 544.

82. **Inherent powers.**—*Commissioners v. Commissioners*, 92 U. S. 307, 308, 23 L. Ed. 552; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 524, 25 L. Ed. 699. See, also, *Thomson v. Lee County*, 3 Wall. 327, 18 L. Ed. 177.

83. **Powers conferred by usual form of**

**D. Classification of Powers, etc., as Public and Private.**—The rights, powers and duties of municipal corporations are distinguished or classed as public and private.<sup>84</sup> There is a clear distinction as respects responsibility for negligence between the powers granted to a corporation for governmental purposes and those in aid of private business,<sup>85</sup> and a like distinction is to be recognized when it is sought to limit the full power of imposing excises granted to the national government by an implied inability to impede or embarrass a state in the discharge of its functions.<sup>86</sup>

**E. Delegated Powers.**—State legislatures may not only exercise their sovereignty directly, but may delegate such portions of it to inferior legislative bodies as, in their judgment, is desirable for local purposes.<sup>87</sup> Where the con-

charter or under general laws.—*The Mayor v. Ray*, 19 Wall. 468, 472, 22 L. Ed. 164.

"By the charter of the city of Richmond, that city 'may contract or be contracted with,' and is endowed generally with 'all the rights, franchises, capacities, and powers appertaining to municipal corporations.' The charter also provides that 'the council of the city may in the name and for the use of the city contract loans, and cause to be issued certificates of debt or bonds.'" *Thomas v. Richmond*, 12 Wall. 349, 350, 20 L. Ed. 453.

**New Orleans.**—The privileges which ordinarily belong to municipal corporation legally existing under the Louisiana laws have been granted to the inhabitants of New Orleans in various legislative acts. *McDonogh v. Murdoch*, 15 How. 367, 406, 14 L. Ed. 732.

**84. Classification of powers, etc., as public and private.**—*South Carolina v. United States*, 199 U. S. 437, 467, 50 L. Ed. 261; *United States v. Railroad Co.*, 17 Wall. 322, 21 L. Ed. 597.

A municipal corporation in its governmental or public character is made, by the state, one of its instruments, or the local depository of certain limited and prescribed political powers, to be exercised for the public good on behalf of the state rather than for itself. In this respect it is assimilated, in its nature and functions, to a county corporation, which is purely part of the governmental machinery of the sovereignty which creates it. Over all its civil, political or governmental powers, the authority of the legislature is, in the nature of things, supreme and without limitation, unless the limitation is found in the constitution of the particular state. *Covington v. Kentucky*, 173 U. S. 231, 240, 43 L. Ed. 679.

But in its proprietary or private character, the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the state at large, but for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual; and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded *quo ad hac* as a private corporation or at least

not public in the sense that the power of the legislature over it or the rights represented by it is omnipotent. *Covington v. Kentucky*, 173 U. S. 231, 240, 43 L. Ed. 679.

**85. South Carolina v. United States**, 199 U. S. 437, 463, 50 L. Ed. 261. See post, "Negligence," VIII, F.

**86. South Carolina v. United States**, 199 U. S. 437, 463, 50 L. Ed. 261. See the title CONSTITUTIONAL LAW, vol. 4, p. 210, et seq.

**87. Delegated power.**—*Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 9, 43 L. Ed. 341. See, also, *Wright v. Nagle*, 101 U. S. 791, 25 L. Ed. 921; *Hamilton Gas Light, etc., Co. v. Hamilton*, 146 U. S. 258, 266, 36 L. Ed. 963; *Bacon v. Texas*, 163 U. S. 207, 216, 41 L. Ed. 132; *New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 471, 41 L. Ed. 518. See, also, *Norfolk, etc., R. Co. v. Sims*, 191 U. S. 441, 446, 48 L. Ed. 254. See post, "Particular Powers and Privileges," V, L.

It is a cardinal principle of our system of government, that local affairs shall be managed by local authorities, and general affairs by the central authority, and hence, while the rule is also fundamental that the power to make laws cannot be delegated, the creation of municipalities exercising local self-government has never been held to trench upon that rule. Such legislation is not regarded as a transfer of general legislative power, but rather as the grant of the authority to prescribe local regulations, according to immemorial practice, subject of course to the interposition of the superior in cases of necessity. *Stoutenburgh v. Hennick*, 129 U. S. 141, 147, 32 L. Ed. 637. And see *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 534, 13 L. Ed. 518; *Goszler v. Georgetown*, 6 Wheat. 593, 596, 5 L. Ed. 339.

**District of Columbia.**—As the repository of the legislative power of the United States, congress in creating the District of Columbia "a body corporate for municipal purposes" could only authorize it to exercise municipal powers, and this is all that congress attempted to do. *Stoutenburgh v. Hennick*, 129 U. S. 141, 147, 32 L. Ed. 637.

**Power to grant franchise.**—See post, "Grant of Franchise," VI, I, 1.



stitution of a state lays a restraint upon the granting certain powers to municipal corporations, the legislature cannot validly grant such power to a municipal corporation.<sup>88</sup>

**F. Legislative Control and Regulation**—1. IN GENERAL.—A municipal corporation, organized for public purposes, has, as a general rule, and as between it and the state, no privileges or powers which are not subject at all times, under the constitution, to legislative control.<sup>89</sup> Such powers, etc., in the absence of any constitutional regulation forbidding it, may be changed, qualified or enlarged, increased or diminished, extended, restricted or curtailed, or withdrawn, revoked or repealed altogether, as the legislature shall determine, without the consent of the municipality or even without notice, the authority of the legislature, when restricting or withdrawing such powers, being subject only to the fundamental condition that the collective and individual rights of the people of the municipality shall not thereby be destroyed;<sup>90</sup> or the state may itself directly exercise

88. *Thomson v. Lee County*, 3 Wall. 327, 329, 331, 18 L. Ed. 177.

Since a municipal corporation is merely the agent of the state for local purposes, what the state can do itself it has the power to direct its agent, the municipality, to do. *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528, 43 L. Ed. 796. See also, ante, "Definition, Nature and Purpose," I, A.

89. **Legislative control and regulation.**—*Bolles v. Brimfield*, 120 U. S. 759, 761, 30 L. Ed. 786; *Bissell v. Jeffersonville*, 24 How. 287, 294, 16 L. Ed. 664; *St. Joseph Tp. v. Rogers*, 16 Wall. 644, 663, 21 L. Ed. 328; *Rogers v. Burlington*, 3 Wall. 654, 663, 18 L. Ed. 79; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 25 L. Ed. 699; *Worcester v. Worcester Consolidated St. R. Co.*, 196 U. S. 539, 550, 49 L. Ed. 591; *Atkin v. Kansas*, 191 U. S. 207, 220, 48 L. Ed. 148; *Stoutenburgh v. Hennick*, 129 U. S. 141, 147, 32 L. Ed. 637; *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. Ed. 440; *Maxwell v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 445; *Dant v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 446; *Williams v. Eggleston*, 170 U. S. 304, 310, 42 L. Ed. 1047; *Commissioners v. Commissioners*, 92 U. S. 307, 310, 23 L. Ed. 552.

The power of the legislature over all local municipal corporations is unlimited save by the restrictions of the state and federal constitutions. *Williams v. Eggleston*, 170 U. S. 304, 310, 42 L. Ed. 1047.

Where not restrained by some constitutional provision, the power to regulate municipal corporations is inherent in its nature, design, and attitude; and the community possesses as deep and permanent an interest in such power remaining in and being exercised by the legislature, when the public progress and welfare demand it, as individuals or corporations can, in any instance, possess in restraining it. *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 534, 13 L. Ed. 518.

The subordinate rights of a municipal corporation are within the control of the legislature. *Mount Pleasant v. Beckwith*, 100 U. S. 514, 532, 25 L. Ed. 699.

**Subordinate legislative power.**—See

*People's Railroad v. Memphis Railroad*, 10 Wall. 38, 52, 19 L. Ed. 844.

**Uniform laws in all municipal corporations not required.**—See the title CONSTITUTIONAL LAW, vol. 4, p. 359.

**Public road board created by the act of New Jersey legislature of March 31, 1882.**—*Essex Public Road Board v. Skinkle*, 140 U. S. 334, 339, 35 L. Ed. 446. See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 845.

90. *Rogers v. Burlington*, 3 Wall. 654, 663, 18 L. Ed. 79; *Wolff v. New Orleans*, 103 U. S. 358, 365, 26 L. Ed. 395; *Von Hoffman v. Quincy*, 4 Wall. 535, 18 L. Ed. 403; *Williams v. Eggleston*, 170 U. S. 304, 310, 42 L. Ed. 1047; *Board of Commissioners v. Lucas*, 93 U. S. 108, 114, 23 L. Ed. 822; *Atkin v. Kansas*, 191 U. S. 207, 220, 48 L. Ed. 148; *Worcester v. Worcester Consolidated St. R. Co.*, 196 U. S. 539, 550, 49 L. Ed. 591; *New Orleans v. Clark*, 95 U. S. 644, 649, 654, 24 L. Ed. 521; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 453, 36 L. Ed. 1018; *Rogers Locomotive Machine Works v. American Emigrant Co.*, 164 U. S. 559, 576, 41 L. Ed. 552, citing *United States v. Railroad Co.*, 17 Wall. 322, 329, 21 L. Ed. 597, and *Maryland v. Baltimore, etc., R. Co.*, 3 How. 534, 555, 11 L. Ed. 714; *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. Ed. 440; *Maxwell v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 445; *Dant v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 446; *United States v. Railroad Co.*, 17 Wall. 322, 328, 329, 21 L. Ed. 597; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 525, 25 L. Ed. 699; *State Bank v. Knoop*, 16 How. 369, 380, 14 L. Ed. 977; *Hill v. Memphis*, 134 U. S. 198, 203, 33 L. Ed. 887; *Barnett v. Denison*, 145 U. S. 135, 139, 36 L. Ed. 652.

"The state may withdraw these local powers of government at pleasure, and may, through its legislature or other appointed channels, govern the local territory as it governs the state at large. It may enlarge or contract its powers or destroy its existence." *United States v. Railroad Co.*, 17 Wall. 322, 329, 21 L. Ed. 597; *Worcester v. Worcester Consolidated*

in any locality all the powers usually conferred upon such a corporation.<sup>91</sup> Such changes do not alter its fundamental character.<sup>92</sup> The people can in a state constitution or a fundamental law regulate as they please the powers of the political subdivisions of municipal corporations of the state. Such a regulation, if made, would operate as a limitation on the legislative power of the state government over the subject, but it would form part of the fundamental law of the locality to which it applied.<sup>93</sup>

2. **POWER TO DELEGATE OR ABANDON.**—A legislature can neither delegate its duty of regulation of municipal corporations nor permanently suspend or abandon them itself, without being usually regarded as unfaithful, and, indeed, attempting what is wholly beyond its constitutional competency.<sup>94</sup>

**G. Forms and Requisites of Grant of Power, etc.**—See ante, "Power Conferred by Usual Form of Charter or under General Law," V, C.

**Powers Granted in General Terms.**—It is enough if, in the charter, the powers are granted in general terms.<sup>95</sup>

**H. Construction of Grants of Power and Privileges**—1. **IN GENERAL.**—In the construction of a grant of power to a municipal corporation, the same rules apply as in the construction of similar grants to an individual.<sup>96</sup> A power conferred upon a municipality is not different from what the same power would be when possessed by another holder.<sup>97</sup>

2. **RULE OF STRICT CONSTRUCTION**—a. *In General.*—Acts of incorporation and other statutes granting special privileges to municipal corporations are to be construed strictly, and whatever is not given in unequivocal terms is withheld.<sup>98</sup>

St. R. Co., 196 U. S. 539, 549, 49 L. Ed. 591.

The legislature may give a municipal corporation all the powers such a being is capable of receiving, making it a miniature state within its locality. Again, it may strip it of every power, leaving it a corporation in name only; and it may create and recreate these changes as often as it chooses. Its acts are not regarded as at some times those of an agency of the state, and at others those of a municipality; but that, its character and nature remaining at all times the same, it is great or small according as the legislature shall extend or contract the sphere of its action. *Barnes v. District of Columbia*, 91 U. S. 540, 544, 23 L. Ed. 440; *Maxwell v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 445; *Dant v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 446.

**Counties** are at all times as much subject to the will of the legislature as incorporated towns. *Worcester v. Worcester Consolidated St. R. Co.*, 196 U. S. 539, 550, 49 L. Ed. 591; *Commissioners v. Commissioners*, 92 U. S. 307, 23 L. Ed. 552.

**Conferring corporate powers on township created with no grant of power.**—When a township has been created by law, as a territorial division of the state, with no express grant of corporate powers, and with no definition or restriction of the purposes for which it is created, it is within the power of the legislature, at any time, to declare it to be a corporation, and to confer upon it such and so many corporate powers, appropriate to be vested in a territorial corporation for

the benefit of its inhabitants, as the legislature may think fit. *Folsom v. Ninety Six*, 159 U. S. 611, 629, 40 L. Ed. 278. See, also, the title **TOWNS AND TOWNSHIPS**.

**Police power.**—See post, "Police Powers and Regulations of Municipal Affairs," V, L, 17.

91. *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. Ed. 440; *Maxwell v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 445; *Dant v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 446.

92. *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. Ed. 440, citing *Maxwell v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 445; *Dant v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 446.

93. *East St. Louis v. Amy*, 120 U. S. 600, 603, 30 L. Ed. 798.

94. **Power to delegate or abandon.**—*East Hartford v. Hartford Bridge Co.*, 10 How. 511, 534, 13 L. Ed. 518.

95. **Powers granted in general terms.**—*Paulsen v. Portland*, 149 U. S. 30, 37 L. Ed. 637.

96. **Construction of grant.**—*Minturn v. Larne*, 23 How. 435, 437, 16 L. Ed. 574.

**Construed with reference to public good.**—The powers given to a municipal corporation and to be exercised by it must be construed with reference to the public good and to the distinctions which are recognized as important in the administration of public affairs. *Detroit Citizens' St. R. Co. v. Detroit Railway*, 171 U. S. 48, 54, 43 L. Ed. 67.

97. *Converse v. Fort Scott*, 92 U. S. 503, 509, 23 L. Ed. 621.

98. **Rule of strict construction.**—*Moran v. Commissioners*, 2 Black 722, 17 L. Ed.



b. *Powers Granted in General Terms.*—Any grant of power in general terms read literally can be construed to be unlimited, but it may, notwithstanding, receive limitation from its purpose—from the general purview of the act which confers it.<sup>99</sup>

c. *Express and Implied Powers.*—(1) *In General.*—A municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.<sup>1</sup>

(2) *Power to Construct as Implying Power to Manage and Operate.*—An ex-

342. See, also, *Los Angeles v. Los Angeles Water Co.*, 177 U. S. 558, 570, 44 L. Ed. 886.

99. *Powers granted in general terms.*—*Detroit Citizens' St. R. Co. v. Detroit Railway*, 171 U. S. 48, 54, 43 L. Ed. 67.

1. *Express and implied powers.*—*Merrill v. Monticello*, 138 U. S. 673, 681, 34 L. Ed. 1069; *Detroit Citizens' St. R. Co. v. Detroit Railway*, 171 U. S. 48, 54, 43 L. Ed. 67. And see to the same effect *Los Angeles v. Los Angeles Water Co.*, 177 U. S. 558, 560, 44 L. Ed. 886; *The Mayor v. Ray*, 19 Wall. 468, 22 L. Ed. 164; *Seybert v. Pittsburgh*, 1 Wall. 272, 17 L. Ed. 553; *Fowle v. Alexandria*, 3 Pet. 398, 7 L. Ed. 719; *Minturn v. Larue*, 23 How. 435, 16 L. Ed. 574; *Rogers v. Burlington*, 3 Wall. 654, 668, 18 L. Ed. 79; *Thomas v. Richmond*, 12 Wall. 349, 353, 20 L. Ed. 453; *Thomson v. Lee County*, 3 Wall. 327, 330, 18 L. Ed. 177; *Ottawa v. Carey*, 108 U. S. 110, 27 L. Ed. 669; *Barnett v. Denison*, 145 U. S. 135, 136, 36 L. Ed. 652; *Atkin v. Kansas*, 191 U. S. 207, 220, 48 L. Ed. 148.

"Municipal corporations \* \* \* have only such powers of governments as are expressly granted them, or such as are necessary to carry into effect those that are granted. No powers can be implied except such as are essential to the objects and purposes of the corporation as created and established." *Ottawa v. Carey*, 108 U. S. 110, 121, 27 L. Ed. 669. See *Barnett v. Denison*, 145 U. S. 135, 139, 36 L. Ed. 652.

Municipal corporations being established for purposes of local government, cannot, in the absence of specific delegation of power, engage in any undertakings not directed immediately to the accomplishment of these purposes. *Hill v. Memphis*, 134 U. S. 198, 203, 33 L. Ed. 887; *Merrill v. Monticello*, 138 U. S. 673, 691, 34 L. Ed. 1069. See ante, "Definition, Nature and Purpose," I, A.

"No matter how much authority there may be in the legislature to grant a particular power, if the grant has not been made, the city cannot act under it." *Ottawa v. Carey*, 108 U. S. 110, 122, 27 L. Ed. 669.

*Ambiguity or doubt.*—"It is well-settled rule of construction of grants by the

legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public." *Minturn v. Larue*, 23 How. 435, 436, 16 L. Ed. 574.

*What powers are necessarily incident.*—The general rule is that those powers which are within the intent and purposes of the creation of a municipal corporation, and essential to give effect to the powers expressly granted, may be exercised as necessarily incident thereto, and that a discretion exists in the choice of the means to accomplish the required result, unless restricted by the terms of the grant. *Woodruff v. Mississippi*, 162 U. S. 291, 299, 40 L. Ed. 973. See post, "Exercise of Power," V, I.

"This would make 'necessarily implied' mean inevitably implied. The court of appeals of the sixth circuit, by Circuit Judge Lurton, adopts Lord Hardwick's explanation, quoted by Lord Eldon in *Wilkinson v. Adams*, 1 Ves. & B. 422, 466, that 'a necessary implication means not natural necessity, but so strong a probability of intention, that an intention contrary to that which is imputed to the testator, cannot be supposed.' If this be more than expressing by circumlocution an inevitable necessity, we need not stop to remark; or if it mean less, to sanction it." *Detroit Citizens' St. R. Co. v. Detroit Railway*, 171 U. S. 48, 54, 43 L. Ed. 67.

The power, if not expressly given, will not be presumed unless necessarily or fairly implied in or incident to other powers expressly given—not simply convenient, but indispensable to them. In other words, the rule of strict construction is invoked against the grant of such power to the city. *Los Angeles v. Los Angeles Water Co.*, 177 U. S. 558, 570, 44 L. Ed. 886.

*Implied power not unnecessarily extended.*—Implied powers should not be encouraged or extended beyond the fair inference to be gathered from the circum-



PLICIT grant of power is not necessary to enable the city to manage its own works constructed to provide the city and inhabitants thereof with water, light, power, heat, telephone service, etc. The power to construct would have implied the power to manage and operate.<sup>2</sup>

3. **CONFLICT BETWEEN CHARTER AND SUBSEQUENT LEGISLATIVE POWER.**—Where a municipal corporation has by charter no power to do certain acts, and subsequently the legislature gives it such power, the legislative authority prevails over the limitation in the charter.<sup>3</sup>

1. **Exercise of Power**—1. **IN GENERAL.**—The powers and privileges conferred upon a municipal corporation are limited to the objects for which they are granted, and cannot be employed for ends foreign to the corporation.<sup>4</sup>

**Power Conferred by Two or More Acts.**—There is nothing in the nature of things preventing a municipal corporation from exercising all the powers conferred by two or more acts, where the acts do not involve in and of themselves substantial contradictions.<sup>5</sup>

2. **WHETHER MANDATORY OR DISCRETIONARY.**—Municipal corporations undoubtedly are invested with certain powers, which, from their nature, are discretionary, such as the power to adopt regulations or by-laws for the management of their own affairs, or for the preservation of the public health, or to pass ordinances prescribing and regulating the duties of policemen and firemen, and for many other useful and unimportant objects within the scope of their charters. Such powers are generally regarded as discretionary, because, in their nature, they are legislative; and although it is the duty of such corporation to carry out the powers so granted and make them beneficial, still it has never been held that an action on the case would lie against the corporation at the suit of an individual for the failure on their part to perform such duties.<sup>6</sup> What a pub-

stances of each case. *Police Jury v. Britton*, 15 Wall. 566, 21 L. Ed. 251.

**Power to issue evidence of a debt.**—See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES. See, also, post, "Power to Incur Debts and Issue Evidence Thereof," VI, 1, 4, a.

**Implied power to issue bills to circulate as currency.**—See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

**Power to issue negotiable securities not implied from implied power to contract loan.**—See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

**Power to issue bonds.**—See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

**Power to subscribe to stock in railroad.**—See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

**Power to issue bonds in payment of stock subscription.**—See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

**Power to license auctioneers.**—See the title AUCTIONS AND AUCTIONEERS, vol. 2, p. 743.

**Power to grant exclusive ferry franchises.**—See the title FERRIES, vol. 6, p. 276.

2. **Power to construct as implying power to manage and operate.**—*Owensboro v. Owensboro Waterworks Co.*, 191 U. S. 358, 368, 48 L. Ed. 217.

3. **Conflict between charter and subsequent legislative authority.**—*Amey v. Allegheny City*, 24 How. 364, 374, 16 L. Ed. 614.

4. **Exercise of power.**—*McDonogh v. Murdoch*, 15 How. 367, 406, 14 L. Ed. 732.

"What may be made a corporate purpose is not always easy to decide, but it has never been supposed that if legislative authority had not been granted to a municipal corporation to do a particular thing, that thing could be a purpose of that corporation." *Ottawa v. Carey*, 108 U. S. 110, 121, 27 L. Ed. 669. See, also, *Weightman v. Clark*, 103 U. S. 256, 26 L. Ed. 392.

5. **Power conferred by two or more acts.**—*Cairo v. Zane*, 149 U. S. 122, 142, 37 L. Ed. 673; *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 37 L. Ed. 93.

6. *Weightman v. Washington*, 1 Black 39, 49, 17 L. Ed. 52.

Where such a duty of general interest is enjoined and it appears from the view of the several provisions of the charter that the burden was imposed in consideration of the privileges granted and accepted, and the means to perform the duty are placed at the disposal of the corporation, or are within their control, they are clearly liable to the public if they unreasonably neglect to comply with the requirements of the charter; and it is equally clear when all the foregoing conditions concur, that, like individuals they are also liable for injuries to persons or property arising from neglect to perform the duty enjoined, or from negligence and

lic corporation or officer is empowered to do for others, and it is beneficial to them to have done, the law holds it ought to do.<sup>7</sup>

3. *MODE OF EXERCISE*.—a. *In General*.—Where powers are granted in general terms, the mode of exercise, subject to constitutional or charter limitations, is within the discretion of the council.<sup>8</sup> The general rule is that a discretion exists in the choice of the means to accomplish the required result of a grant of power to a municipal corporation, unless restricted by the terms of the grant.<sup>9</sup>

b. *Where Mode Designated*.—The powers granted to a municipal corporation must be exercised substantially in the mode designated, and the adoption of the mode to this extent is essential to the validity of any act done.<sup>10</sup> Whenever it is provided that a municipal corporation or officer "may" act in a certain way, or it "shall be lawful" for them to act in a certain way, it may be insisted on as a duty for them to act so, if the matter, as here, is devolved on a public officer, and relates to the public or third persons.<sup>11</sup>

c. *Necessity for Ordinance*.—(1) *In General*.—Where a municipal corporation has authority to do an act, it is not necessary for its council to act by ordinance, to carry its authority into execution, but it may act and make contracts through agents without the formalities which the old rules of law required.<sup>12</sup>

(2) *Exercise by Agents*.—The corporate powers of a municipality are to be exercised by the agents of the corporation under its control.<sup>13</sup>

**Mode of Enforcing Laws.**—Although a municipal corporation can legislate within its prescribed limits, it can carry its laws to execution only by its agents.<sup>14</sup>

d. *Delegation of Power*.—Powers granted by the state to a municipal corporation for the benefit of the public, cannot, as a general rule, be delegated to others without the express authority of the legislature.<sup>15</sup>

unskillfulness in its performance. *Weightman v. Washington*, 1 Black 39, 49, 17 L. Ed. 52.

"But the duties arising under such grants are necessarily undefined, and, in many respects, imperfect in their obligation, and they must not be confounded with the burdens imposed, and the consequent responsibilities arising, under another class of powers usually to be found in such charters, where a specific and clearly-defined duty is enjoined in consideration of the privileges and immunities which the act of incorporation confers and secures." *Weightman v. Washington*, 1 Black 39, 50, 17 L. Ed. 52.

7. *Mason v. Fearson*, 9 How. 248, 13 L. Ed. 125.

8. **Mode of exercise.**—*Paulsen v. Portland*, 149 U. S. 30, 38, 37 L. Ed. 637.

"The city is a miniature state, the council is its legislature, the charter is its constitution; and it is enough if, in that, the power is granted in general terms, for when granted, it must necessarily be exercised subject to all limitations imposed by constitutional provisions, and the power to prescribe the mode of its exercise is, except as restricted, subject to the legislative discretion of the council." *Paulsen v. Portland*, 149 U. S. 30, 38, 37 L. Ed. 637.

9. *Woodruff v. Mississippi*, 162 U. S. 291, 299, 17 L. Ed. 973.

10. **Where mode designated.**—*Rogers v. Burlington*, 3 Wall. 654, 668, 18 L. Ed. 79.

11. *Mason v. Fearson*, 9 How. 248, 259, 13 L. Ed. 125.

12. **Necessity for ordinance.**—*Fanning v. Gregoire*, 16 How. 524, 14 L. Ed. 1043. See the title ORDINANCES.

13. **Exercise by agents.**—*Clark v. Washington*, 12 Wheat. 40, 54, 6 L. Ed. 544. See post, "In General," IX, C, 1.

**Contracting by agent.**—See post, "Persons and Bodies Through Whom Municipality May Contract," VI, B, 3.

**Granting license to conduct a ferry.**—See the title FERRIES, vol. 6, p. 277.

**Power to conduct lottery.**—See the title LOTTERIES, vol. 7, p. 1070.

14. **Mode of enforcing laws.**—*Clark v. Washington*, 12 Wheat. 40, 53, 6 L. Ed. 544.

15. **Delegation of power.**—*People's Railroad v. Memphis Railroad*, 10 Wall. 38, 52, 19 L. Ed. 844. See ante, "Exercise by Agents," V, I, 3, c, (2).

Power granted to a municipal corporation to do an act, cannot be delegated to some other person so as to relieve the corporation of liability. *Clark v. Washington*, 12 Wheat. 40, 6 L. Ed. 544.

The council cannot delegate all the power conferred upon it by the legislature, but, like every other corporation, it can do its ministerial work by agents. *Hitchcock v. Galveston*, 96 U. S. 341, 348, 24 L. Ed. 659.

Where a city council is vested with power to cause sidewalks in the city to be constructed, it may authorize the mayor, and the chairman of the commit-

**The agent of a city**, to whom has been delegated already the power to enter into contracts, has not the power to redelegate that power.<sup>16</sup>

4. **PLACE OF EXERCISE.**—Where it is not necessary to the exercise of a power granted to a municipal corporation that such power be exercised out of the corporation, such power will not be implied.<sup>17</sup>

**J. Abridgment or Divestiture of Its Powers by Municipality.**—Power granted by the state to a municipal corporation for the public benefit cannot, as a general rule, be effectually abridged by any act of the municipal corporation without the express authority of the legislature.<sup>18</sup>

**K. Presumption as to Knowledge of Power.**—Parties dealing with a municipal corporation are bound to know the extent of the powers lawfully confided to the officers with whom they are dealing in behalf of such corporation, and they must guide their conduct accordingly.<sup>19</sup>

**L. Particular Powers and Privileges**—1. **RIGHT TO HAVE NAME.**—See ante, "New Name or New Corporation Made Out of Old," IV, C, 5, c, (1), (d).

2. **POWER TO CONTRACT.**—See post, "Power to Contract," VI, A.

3. **POWER TO BORROW MONEY AND ISSUE EVIDENCE OF INDEBTEDNESS THEREFOR.**—See post, "Power to Incur Debts and Issue Evidence Thereof," VI, I, 4, a.

4. **LOANING OR GIVING CREDIT, BECOMING STOCKHOLDER, ETC.**—A municipal corporation has no general power to give or loan its credit,<sup>20</sup> or to become a stockholder with others in a public corporation.<sup>21</sup> But such corporations are often given the power by the express words of its charter or by statute to subscribe to the stock of a quasi public corporation, such as a railroad company, a gas company, etc.<sup>22</sup>

tee on streets and alleys, to make, in its behalf, and pursuant to its directions, a contract for doing the work. *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659. See the title **STREETS AND HIGHWAYS**.

16. *Shankland v. Washington*, 5 Pet. 390, 396, 8 L. Ed. 166; *United States v. Robertson*, 5 Pet. 641, 665, 8 L. Ed. 257.

17. **Place of exercise.**—*Cohens v. Virginia*, 6 Wheat. 264, 443, 5 L. Ed. 257. And see the title **LOTTERIES**, vol. 7, p. 1070.

18. **Abridgment or divestiture of its powers by municipality.**—*People's Railroad v. Memphis Railroad*, 10 Wall. 38, 52, 19 L. Ed. 844; *Goszler v. Georgetown*, 6 Wheat. 593, 597, 5 L. Ed. 339.

The authorities are all agreed that a municipal corporation, when exerting its functions for the general good, is not to be shorn of its powers by mere implication. If by contract or otherwise it may, in particular circumstances, restrict the exercise of its public powers, the intention to do so must be manifested by words so clear as not to admit of two different or inconsistent meanings. *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 34, 50 L. Ed. 353. See post, "Contracts Concerning or Restricting Governmental Functions or Powers," VI, I, 2.

19. **Presumption as to knowledge of powers.**—*Stone v. Bank*, 174 U. S. 412, 424, 43 L. Ed. 1028; *Thomas v. Richmond*, 12 Wall. 349, 356, 20 L. Ed. 453.

Persons dealing with the officers and agents of municipal corporations are chargeable with notice of the power which the corporation possesses and are

to be held responsible accordingly. *Thomas v. Richmond*, 12 Wall. 349, 356, 20 L. Ed. 453. See the title **MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES**.

20. **Loaning or giving credit, becoming stockholders, etc.**—*Kelley v. Milan*, 127 U. S. 139, 154, 32 L. Ed. 77; *Norton v. Board of Comm'rs*, 129 U. S. 479, 491, 32 L. Ed. 774.

Such power is not conferred by act of Tennessee legislature, Jan. 16, 1871. *Kelley v. Milan*, 127 U. S. 139, 154, 32 L. Ed. 77; *Norton v. Board of Comm'rs*, 129 U. S. 479, 491, 32 L. Ed. 774.

**Loaning credit to railroad of other public service corporation.**—See the title **MUNICIPAL, COUNTY, STATE AND FEDERAL AID**.

21. *Mitchell v. Burlington*, 4 Wall. 270, 18 L. Ed. 350; *Kelley v. Milan*, 127 U. S. 139, 154, 32 L. Ed. 77; *Norton v. Board of Comm'rs*, 129 U. S. 479, 491, 32 L. Ed. 774.

22. *Van Hostrup v. Madison City*, 1 Wall. 291, 17 L. Ed. 538; *Seybert v. Pittsburgh*, 1 Wall. 272, 17 L. Ed. 553. See the title **MUNICIPAL, COUNTY, STATE AND FEDERAL AID**.

An authority to a city to take stock in any chartered company for making "a road or roads to said city," authorizes taking stock in a road between other cities or towns, from the nearest of which to the city subscribing there is a direct road; the road in which the stock is taken being in fact a road in extension and prolongation of one leading into the city. *Van Hostrup v. Madison City*, 1



5. **POWER TO ISSUE CURRENCY.**—See the title **MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES**. See, also, the title **CONSTITUTIONAL LAW**, vol. 4, pp. 301, 305.

6. **POWER TO TAX.**—See the title **TAXATION**.

7. **POWER TO ISSUE NEGOTIABLE PAPER.**—See the title **MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES**.

8. **POWER TO ACQUIRE, HOLD, AND DISPOSE OF PROPERTY.**—Municipal corporations have the power to acquire, hold and dispose of property.<sup>23</sup>

9. **DONATIONS AND GIFTS.**—A municipal corporation has no general power of donation.<sup>24</sup>

10. **POWER TO GRANT FRANCHISE.**—See post, "Grant of Franchise," VI, I, 1.

11. **ARBITRATION AND COMPROMISE.**—A municipal corporation may submit a controversy to arbitration and may compromise a doubtful or disputed claim.<sup>25</sup>

12. **POWER TO SUE OR BE SUED.**—A municipal corporation has the right to

Wall. 291, 17 L. Ed. 538; *Mitchell v. Burlington*, 4 Wall. 270, 18 L. Ed. 350.

**Gas company.**—The city of Memphis had power to subscribe to the stock of a gas company which furnished illuminating gas to the city and to the inhabitants. *Memphis City v. Dean*, 8 Wall. 64, 19 L. Ed. 326.

23. **Power to acquire, hold, and dispose of property.**—*McDonogh v. Murdoch*, 15 How. 367, 406, 14 L. Ed. 732. See post, "Municipal Property," VII.

24. **Donation and gift.**—*Peake v. New Orleans*, 139 U. S. 342, 359, 35 L. Ed. 131. See, also, *Concord v. Portsmouth Sav. Bank*, 92 U. S. 625, 23 L. Ed. 628; *Queensbury v. Culver*, 19 Wall. 83, 22 L. Ed. 100; *Jarrold v. Moberly*, 103 U. S. 580, 26 L. Ed. 492; *Norton v. Board of Comm'rs*, 129 U. S. 479, 491, 32 L. Ed. 774.

A city is not like a private individual, with absolute freedom of donation. It is simply the representative of the citizens and taxpayers, a trustee for their interests; it has no general powers of donation, and its contribution to a fund can never be considered as a donation when there is an indebtedness to that fund to be discharged. Indeed, if there were no indebtedness, the contribution, as a whole, might well be considered as *ultra vires*, and, if by the issue of negotiable securities to that fund, an indefeasible obligation had been assumed by the city, it might in equity hold that fund as debtor to it for such amount. *Peake v. New Orleans*, 139 U. S. 342, 359, 35 L. Ed. 131.

Where a city, as assessee, owing a drainage fund a certain debt, puts into that fund twice the amount of the debt, creditors of that fund cannot thereafter equitably charge the city as debtor to that fund, because when it put its moneys into that fund it did not in express language put them in in discharge of its indebtedness. *Peake v. New Orleans*, 139 U. S. 342, 359, 35 L. Ed. 131.

**Donation to secure reform school under Illinois act of March 5, 1867.**—The provision of the act of the general assembly of Illinois, approved March 5, 1867, establishing the state reform school,

authorizing municipal corporations to donate money to secure the location of the school within their limits, was held not to be in conflict with the constitution of the state, adopted in 1848, there being no settled or uniform decision to the contrary by her supreme court. *County of Livingston v. Darlington*, 101 U. S. 407, 25 L. Ed. 1015.

"If taxation, in the constitutional sense, was for a corporate purpose whenever imposed for a public purpose—we do not perceive upon what just ground it can be held not to be a corporate purpose for a municipality to make, under express legislative authority, a donation to secure the location within its limits of a state reform school, wherein juvenile offenders and vagrants may receive such care, discipline, education, and employment as, while effecting or contributing to their reformation, will protect the community in which they live from the evils and dangers which confessedly result from idleness and vagrancy among the young." *County of Livingston v. Darlington*, 101 U. S. 407, 416, 25 L. Ed. 1015.

**Donation to railroad company.**—See the title **MUNICIPAL, COUNTY, STATE AND FEDERAL AID**.

25. **Arbitration and compromise.**—*Board of Liquidation v. Louisville, etc., R. Co.*, 109 U. S. 221, 27 L. Ed. 916. See the titles **ARBITRATION AND AWARD**, vol. 2, p. 464; **COMPROMISE AND SETTLEMENT**, vol. 3, p. 980.

A municipal corporation may compromise a claim against it arising out of contract with the claimant. *New Albany v. Burke*, 11 Wall. 96, 20 L. Ed. 155.

The city council of New Orleans compromised a dispute with a railroad company, respecting a grant of a right to use certain portions of the riparian estates of the city, known as the *batture* or alluvian, for railroad purposes. It was held that in the absence of fraud, the city council had the right under the statute of Louisiana to make such compromise, and its validity was not affected notwithstanding the grant of power to the board of liquidation of the debt of New Orleans by the

sue in regard to any matter in which, by law, it has rights to be enforced.<sup>26</sup> And as a general rule, municipal corporations, like individuals, may be sued; in other words, they are amenable to judicial process for the purpose of compelling performance of their obligations.<sup>27</sup>

**A levy court** can sue and be sued in regard to any matter in which, by law, it has rights to be enforced, or is under obligations which it refuses to fulfill.<sup>28</sup>

13. **ORDINANCES AND BY-LAWS.**—See the title **ORDINANCES**.

14. **AS TO AUCTIONS AND AUCTIONEERS.**—See the title **AUCTIONS AND AUCTIONEERS**, vol. 2, p. 743.

15. **POWER TO CONDUCT LOTTERIES.**—See the title **LOTTERIES**, vol. 7, p. 1070.

16. **POWER TO ACT AS TRUSTEE AND LIABILITIES AS SUCH**—a. *In General.*—Under the general power “for the suppression of vice and immorality, the advancement of the public health and order, and the promotion of trade, industry, and happiness,” a municipal corporation may execute any trust germane to those objects.<sup>29</sup>

b. *Trusts Connected with Property of Public or Special Character.*—The state may delegate to a municipality its trust connected with public property, or property of a special character, subject to be revoked by it at any time.<sup>30</sup>

c. *Collecting School Taxes.*—A municipal corporation, having acted as trustee for the school board, and collected school taxes and interest imposed thereon for delinquent payment, is liable to the creditors of the school board for the interest, and cannot escape liability therefor on the suggestion that school taxes were not within the terms of the statute inflicting the penalty on “all taxes imposed by the municipality.”<sup>31</sup>

17. **POLICE POWERS AND REGULATIONS OF MUNICIPAL AFFAIRS**—a. *In General.*—In the administration of government the use of the police powers of a state may for a limited period be delegated to a municipality, but there always remains with the state the right to revoke those powers and exercise them in a more direct manner and one more conformable to its wishes.<sup>32</sup> Municipal cor-

state legislature. *Board of Liquidation v. Louisville, etc.*, R. Co., 109 U. S. 221, 27 L. Ed. 916.

The deed of conveyance executed to the United States on the twenty-fifth day of October, 1854, by the city of Carondelet, of a part of the commons of Carondelet upon which Jefferson Barracks are situate, having been based upon an equitable compromise of a long pending and doubtful question of title, is valid. *St. Louis v. United States*, 92 U. S. 462, 23 L. Ed. 731.

26. **Power to sue or be sued.**—*Levy Court v. Coroner*, 2 Wall. 501, 17 L. Ed. 851. See, also, *Andes v. Ely*, 158 U. S. 312, 325, 39 L. Ed. 996.

27. *Workman v. New York City*, 179 U. S. 552, 565, 45 L. Ed. 314; *Levy Court v. Coroner*, 2 Wall. 501, 17 L. Ed. 851. See, also, *Andes v. Ely*, 158 U. S. 312, 325, 39 L. Ed. 996.

**Power to create debt.**—If a municipal corporation has power to create a debt, it becomes subject to suit. *Hancock v. Louisville, etc.*, R. Co., 145 U. S. 409, 36 L. Ed. 755.

**Towns in New York.**—*Andes v. Ely*, 158 U. S. 312, 325, 39 L. Ed. 996. And see the title **TOWNS AND TOWNSHIPS**.

28. *Levy Court v. Coroner*, 2 Wall. 501, 17 L. Ed. 851.

Thus the levy court of Washington County, in the District of Columbia, can

sue and be sued. *Levy Court v. Coroner*, 2 Wall. 501, 17 L. Ed. 851.

29. **Power to act as trustee and liabilities as such.**—*Vidal v. Girard*, 2 How. 126, 11 L. Ed. 205. See post, “Property in Trust,” VII, A, 3, c.

30. **Trusts connected with property of public or special character.**—*Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 36 L. Ed. 1018.

A state may delegate its public trust connected with lands under navigable waters to a municipality subject of course to the authority of the federal government over interstate commerce, and subject to be revoked at any time, as they cannot be placed entirely beyond the direction and control of the state; but in the absence of statutory authority a municipality has no control over navigable waters. *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 36 L. Ed. 1018.

31. **Collecting school taxes.**—*New Orleans v. Fisher*, 180 U. S. 185, 197, 45 L. Ed. 485.

So held as to the city of New Orleans under acts of Louisiana 1871, No. 48, § 9. *New Orleans v. Fisher*, 180 U. S. 185, 197, 45 L. Ed. 485.

32. **Police powers and regulations of municipal affairs.**—*Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 453, 36 L. Ed. 1018.

The police power is one which remains

porations receive power of government extending to all subjects effecting their order, tranquility and improvement.<sup>33</sup>

b. *Business Affairs*.—Municipal corporations are permitted to manage their own business.<sup>34</sup>

18. **POLICE**.—A city council has legislative power in regard to the police of the city.<sup>35</sup>

19. **HEALTH**.—See the titles **DUE PROCESS OF LAW**, vol. 5, pp. 580, 581; **HEALTH**, vol. 6, p. 683; **POLICE POWER**.

20. **DESIGNATING LIMITS FOR PROSTITUTES**.—See the title **DUE PROCESS OF LAW**, vol. 5, p. 584. See, also, the titles **HEALTH**, vol. 6, p. 683; **POLICE POWERS**.

21. **HARBORS AND WHARVES**.—See the titles **INTERSTATE AND FOREIGN COMMERCE**, vol. 7, p. 269; **NAVIGABLE WATER**; **WHARVES AND WHARFINGERS**.

22. **NAVIGABLE WATERS**.—See the titles **NAVIGABLE WATERS**; **RAILROADS**. See, also, the title **INTERSTATE AND FOREIGN COMMERCE**, vol. 7, p. 269.

23. **RAILROADS**.—See the titles **RAILROADS**; **STREETS AND HIGHWAYS**.

24. **STREET RAILWAYS**.—See the title **STREET RAILWAYS**.

25. **DRAINS AND SEWERS**.—See the title **DRAINS AND SEWERS**, vol. 5, p. 492. See, also, ante, "Donation and Gifts," V, L, 9.

26. **FIRE DEPARTMENT**.—A city has power generally by its charter, to establish and organize and suitably maintain fire companies.<sup>36</sup>

27. **EMINENT DOMAIN**.—See the title **EMINENT DOMAIN**, vol. 5, p. 756.

28. **DESTRUCTION OF PROPERTY**.—See post, "Destruction of Property to Prevent Spread of Fire," VIII, J. See the titles **DUE PROCESS OF LAW**, vol. 5, p. 499; **POLICE POWER**.

29. **LIGHT OR ILLUMINATION**.—A municipality may hold such property as is necessary for the erection and maintenance of a plant for the purpose of furnishing light to itself and the inhabitants, where express or implied legislative authority to establish such plant has been conferred upon it.<sup>37</sup>

**Grant of Exclusive Privilege**.—A municipality may, where such authority has been conferred on it, grant an exclusive privilege of supplying light to it and its inhabitants.<sup>38</sup> But there are presumptions against the granting of the

constantly under the control of the legislative authority. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 15, 43 L. Ed. 341. See the title **POLICE POWER**.

The city of Washington is not dependent upon congress for its governmental powers, where such powers are the ordinary police and regulation of its affairs. *Smith v. Washington*, 20 How. 135, 15 L. Ed. 858.

**Contracts abridging police power**.—See post, "Contracts Concerning or Restricting Governmental Functions or Powers," VI, I, 2.

33. *McDonogh v. Murdoch*, 15 How. 367, 406, 14 L. Ed. 732.

So held as to **New Orleans**.—*McDonogh v. Murdoch*, 15 How. 367, 406, 14 L. Ed. 732.

34. **Business affairs**.—*McDonogh v. Murdoch*, 15 How. 367, 406, 14 L. Ed. 732.

35. **Police**.—*Fanning v. Gregoire*, 16 How. 524, 533, 14 L. Ed. 1043.

36. **Fire department**.—*Rogers v. Burlington*, 3 Wall. 654, 18 L. Ed. 79.

37. **Light or illumination**.—*Hamilton Gas Light, etc., Co. v. Hamilton*, 146 U. S. 258, 36 L. Ed. 963. See the titles **GAS**, vol. 6, p. 547; **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 519.

**Power to manage, operate, etc., plant**.—See ante, "Power to Construct as Implying Power to Manage and Operate," V, H, 2, c, (2).

**Gas company**.—A city corporation has power to contract with a gas company for the lighting of its streets. *Memphis City v. Dean*, 8 Wall. 64, 19 L. Ed. 326. See the title **GAS**, vol. 6, p. 547.

In some of the states, perhaps in most, the right to build and maintain gasworks is derived from the state, but subject to municipal control as to the use of the streets and the prices to be charged to consumers. In Ohio this price is regulated for stated periods. *Dobbins v. Los Angeles*, 195 U. S. 223, 240, 49 L. Ed. 169. See the title **GAS**, vol. 6, p. 548.

38. **Grant of exclusive privilege**.—*Memphis City v. Dean*, 8 Wall. 64, 19 L. Ed. 326; *Joplin v. Southwest Missouri Light Co.*, 191 U. S. 150, 156, 48 L. Ed. 127; *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 37, 50 L. Ed. 353.

**Gas company**.—A municipal corporation has power to grant to a gas company an exclusive privilege for a term of years to furnish light to the city and to its inhabitants. *Memphis City v. Dean*, 8 Wall. 64, 19 L. Ed. 326.

A contract by a city corporation with an



exclusive right and against limitations upon the power of government.<sup>39</sup>

**Duty to Illuminate Place in Street Where Obstruction Placed.**—See the title **STREETS AND HIGHWAYS**.

30. **MARKETS.**—See the title **MARKET**, ante, p. 245.

31. **WATER SUPPLY.**—See the title **WATER COMPANIES AND WATERWORKS**.

32. **STREETS, SIDEWALKS AND HIGHWAYS.**—See the title **STREETS AND HIGHWAYS**.

33. **FERRIES.**—See the title **FERRIES**, vol. 6, pp. 276, 277, 281. See, also, ante, "Power to Grant Franchise," V, L, 10.

34. **PUBLIC SCHOOLS.**—See the title **SCHOOLS**.

35. **AS TO BUILDINGS.**—This subject is treated elsewhere.<sup>40</sup>

36. **AS TO NUISANCES.**—See the title **NUISANCES**.

37. **ABANDONMENT OF PUBLIC IMPROVEMENT.**—A municipality which abandons a contemplated and intended work of public improvements, assumes thereby no obligation to any parties who have invested on the faith and expectation of benefit from the completion of the work.<sup>41</sup>

**M. Ultra Vires Acts and Contracts.**—1. **IN GENERAL.**—Beyond their corporate powers the acts of municipal corporations are of no effect.<sup>42</sup> Courts will not give effect to ultra vires contracts of municipal corporations. The party dealing with the corporation is under no obligation to enter into the contract. No force, or restraint, or fraud is practiced on him. The powers of these corporations are matters of public law open to his examination, and he may and must judge for himself as to the power of the corporation to bind itself by the proposed agreement.<sup>43</sup>

2. **UNAUTHORIZED ACTS OF OFFICER OR ATTORNEY.**—A municipality is not bound by a contract made by its officers or attorney when the act of such officers

existing gas company, by which the corporation conferred upon the company the exclusive privilege for a term of years, and till notified to the contrary, of lighting the city with such public lamps as might be agreed on, and also the right to lay down its pipes and extend its apparatus through all the streets, alleys, lanes, or squares of the city, and which declared that "still further to encourage the company, it would take fifty lamps to begin with, to be extended hereafter as the public wants and increase of the city might demand, and such as might be agreed upon by the company and the city corporation," the company, in consideration of these grants, concessions, and privileges, binding itself to furnish to the city gas at half the price they charged their private consumers, does not give a right to the gas company exclusive of the city corporation's right to subscribe to the stock of a new gas company, whose object was to introduce gas into the same city." *Memphis City v. Dean*, 8 Wall. 64, 19 L. Ed. 326.

**Florida.**—The general law of Florida for the incorporation of municipal corporations while empowering a city to provide for lighting its streets, and giving to it the power to regulate and control the use of its public streets, gives the city no power to grant an exclusive use of its streets to any person or corporation for the purpose of lighting the city or for providing light to its citizens. *Capital City Light, etc., Co. v. Tallahassee*, 186 U. S. 401, 407, 46 L. Ed. 1219.

The power to obtain such exclusive use of the streets of a city is not granted by the laws of Florida providing for the incorporation of corporations other than those of a municipal character. *Capital City Light, etc., Co. v. Tallahassee*, 186 U. S. 401, 407, 46 L. Ed. 1219. See the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 801, et seq.

39. *Joplin v. Southwest Missouri Light Co.*, 191 U. S. 150, 156, 48 L. Ed. 127; *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 37, 50 L. Ed. 353. See post, "Power to Grant Exclusive Privilege and Franchise and Create Monopolies," VI, I, 1, c.

40. **As to buildings.**—See the titles **NUISANCES**; **POLICE POWERS**. See, also, post, "Destruction of Property to Prevent Spread of Fire," VIII, J.

**Injunction against further construction.**—See the title **INJUNCTIONS**, vol. 6, p. 1041.

41. **Abandonment of public improvement.**—*Peake v. New Orleans*, 139 U. S. 342, 360, 35 L. Ed. 131.

42. **Ultra vires acts.**—*Ottawa v. Carey*, 108 U. S. 110, 121, 27 L. Ed. 669; *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 13 L. Ed. 518. See post, "Proceedings in Equity," XIV, A.

43. *Salt Lake City v. Hollister*, 118 U. S. 256, 262, 30 L. Ed. 176; *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950; *Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153; *Chapman v. Douglas County*, 107 U. S. 348, 355, 27 L. Ed. 378; *Thomas v. Richmond*, 12 Wall. 349, 20 L. Ed. 453.

or attorney in that respect is unauthorized. By unauthorized is meant an act for which the law will not hold the city answerable.<sup>44</sup>

3. RECOVERY OF MONEY OR PROPERTY AS MONEY HAD AND RECEIVED.—The courts have gone a long way to enable parties who have parted with property or money on the faith of ultra vires contracts with municipal corporations to obtain justice by recovery of the property or the money specifically, or as money had and received to plaintiff's use.<sup>45</sup>

N. **Withdrawal by Change of State Constitution.**—The power of a municipal corporation may also be withdrawn by a change of the state constitution.<sup>46</sup>

## VI. Municipal Contracts.

A. **Power to Contract**—1. IN GENERAL.—Municipal corporations can make only such valid obligations and contracts as are allowed by acts of incorporation

44. *Stone v. Bank*, 174 U. S. 412, 43 L. Ed. 1028, reaffirmed in *Fidelity Trust, etc., Co. v. Louisville*, 174 U. S. 429, 43 L. Ed. 1034; *Louisville v. Bank*, 174 U. S. 439, 43 L. Ed. 1039. See post, "Authority, Powers and Duties," IX, C, 6.

**City attorney.**—A city attorney has no greater power to bind the city before a suit is actually commenced, by an agreement that one suit shall abide the event of another suit involving the same question, than an attorney would have in the case of an individual. Merely as city attorney, he has no larger powers to bind his client before suit was commenced than he would have had in case of an individual in like circumstances. *Stone v. Bank*, 174 U. S. 412, 423, 43 L. Ed. 1028, reaffirmed in *Fidelity Trust, etc., Co. v. Louisville*, 174 U. S. 429, 43 L. Ed. 1034; *Louisville v. Bank*, 174 U. S. 439, 43 L. Ed. 1039.

There must be something in the statute providing for the election or appointment of an attorney for a city that would give such power; otherwise it does not exist. Nothing of the kind is found in § 2909 of the Revised Statutes of Kentucky. *Stone v. Bank*, 174 U. S. 412, 428, 43 L. Ed. 1028, reaffirmed in *Fidelity Trust, etc., Co. v. Louisville*, 174 U. S. 429, 43 L. Ed. 1034; *Louisville v. Bank*, 174 U. S. 439, 43 L. Ed. 1039.

An agreement by the city attorney of the city of Louisville with a bank that its rights with respect to certain limitations of taxation should abide the event of another suit which had not been commenced against the city and for the commencement of which he had no power to provide, is invalid and not binding upon the city. *Stone v. Bank*, 174 U. S. 412, 43 L. Ed. 1028, reaffirmed in *Fidelity Trust, etc., Co. v. Louisville*, 174 U. S. 429, 43 L. Ed. 1034; *Louisville v. Bank*, 174 U. S. 439, 43 L. Ed. 1039.

In *Louisville v. Bank*, 174 U. S. 439, 442, 43 L. Ed. 1039, the court, in speaking of the case of *Stone v. Bank*, 174 U. S. 412, 43 L. Ed. 1028, said: "It was there held that the agreement of the commissioners of the sinking fund of the city of Louisville and the attorney of the city with certain banks, trust companies, etc., including the complainant bank, that the

rights of those institutions should abide the result of test suits to be brought, was de hors the power of the commissioners of the sinking fund and the city attorney, and therefore that the decree in the test suit in question did not constitute *res judicata* as to those not actually parties to the record." See the title *RES ADJUDICATA*.

The commissioners of the sinking fund of a city have no power to make an agreement with a bank that its rights with respect to certain limitations of taxation should abide the event of another suit that had not then been commenced against the city and the commencement of which the board had no power to provide for. Such an agreement is invalid and the city is not estopped from insisting upon its invalidity by the fact that judgment in a suit subsequently brought against another party is against the city. *Stone v. Bank*, 174 U. S. 412, 43 L. Ed. 1028, reaffirmed in *Fidelity Trust, etc., Co. v. Louisville*, 174 U. S. 429, 43 L. Ed. 1034; *Louisville v. Bank*, 174 U. S. 439, 43 L. Ed. 1039.

45. *Salt Lake City v. Hollister*, 118 U. S. 256, 262, 30 L. Ed. 176; *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950; *Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153; *Chapman v. Douglas County*, 107 U. S. 348, 355, 27 L. Ed. 378.

"The obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independently of any statute, will compel restitution or compensation." *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 629, 44 L. Ed. 611; *Marsh v. Fulton County*, 10 Wall. 676, 684, 19 L. Ed. 1040.

**Where there is constitutional debt limit.**—See post, "In General," VI, I, 4, a, (3), (b), aa.

46. **Clause perpetuating laws consistent with new constitution.**—A provision in a new state constitution was designed to keep in force all laws which were not inconsistent with that instrument. A previous law authorized municipal corporations to exercise certain powers, under certain circumstances, the exercise of which the new constitution forbids, except under other circumstances. It was

or special legislative authority.<sup>47</sup> They have not, like private individuals, absolute freedom of contract.<sup>48</sup>

2. **DE FACTO CORPORATIONS.**—A de facto municipal corporation is competent to contract for municipal purposes.<sup>49</sup>

3. **CORPORATIONS VOID AB INITIO.**—A municipal corporation void ab initio is not competent to contract debts for municipal purposes.<sup>50</sup>

4. **AS DEPENDENT UPON PLACE OF PERFORMANCE.**—The power of a municipal corporation to make any contract does not depend upon the place of performance, but upon its scope and object. A city authorized to establish gas works and waterworks, and to gravel its streets, may buy water, coal, and gravel, beyond its limits, and agree to pay where they are found or elsewhere. The principal power, when expressed, draws to it by necessary implication, the means of its execution.<sup>51</sup>

5. **ULTRA VIRES CONTRACTS.**—See ante, "Ultra Vires Acts and Contracts," V, M.

**B. Mode, Requisites and Validity**—1. **FORMALITIES REQUIRED BY OLD RULES OF LAW.**—Municipal corporations can make contracts through their agents, without the formalities which the old rules of law required.<sup>52</sup>

2. **ORDINANCES.**—It is not necessary for the city council to act by ordinance.<sup>53</sup>

3. **PERSONS AND BODIES THROUGH WHOM MUNICIPALITY MAY CONTRACT.**—Municipal corporations, acting within the limits of the powers conferred upon them by legislature, in the exercise of a special franchise granted to them, and the performance of a special duty imposed upon them, are responsible for the acts and contracts of their agents, duly appointed and authorized, within the scope of the authority of such agents, in the same manner as other corporations and private individuals are responsible on their promises, express or implied.<sup>54</sup>

**The authorized body** of a municipal corporation may bind it by an ordinance, which, in favor of private persons interested therein, may, if so intended, operate as a contract, or they may bind it by a resolution, or by vote clothe its officers with power to act for it.<sup>55</sup>

**City Council.**—A municipal corporation may contract through the agency of the city council.<sup>56</sup>

**Mayor or Agent under Sanction of Council.**—Although a city council has

held that such provision does not perpetuate the previous law. *Norton v. Board of Comm'rs*, 129 U. S. 479, 32 L. Ed. 774.

47. **Power to contract.**—*Goszler v. Georgetown*, 6 Wheat. 593, 597, 5 L. Ed. 339; *Peake v. New Orleans*, 139 U. S. 342, 359, 35 L. Ed. 131; *McDonogh v. Murdoch*, 15 Wall. 367, 406, 14 L. Ed. 732.

Contracts may be made by a municipal corporation to the extent of the authority conferred for that purpose by the legislature. *People's Railroad v. Memphis Railroad*, 10 Wall. 38, 51, 19 L. Ed. 841.

**Town under New York laws.**—*Andes v. Ely*, 158 U. S. 312, 325, 39 L. Ed. 996. And see the title **TOWNS AND TOWNSHIPS**.

48. *Peake v. New Orleans*, 139 U. S. 342, 359, 35 L. Ed. 131.

49. **De facto corporations.**—*Shapleigh v. San Angelo*, 167 U. S. 646, 42 L. Ed. 310.

50. **Corporations void ab initio.**—*Shapleigh v. San Angelo*, 167 U. S. 646, 42 L. Ed. 310.

51. **As dependent upon place of performance.**—*Meyer v. Muscatine*, 1 Wall. 384, 391, 17 L. Ed. 564.

52. **Formalities required by old rule of law.**—*Fanning v. Gregoire*, 16 How. 524, 14 L. Ed. 1043.

53. **Ordinances.**—*Fanning v. Gregoire*, 16 How. 524, 14 L. Ed. 1043.

54. **Persons and bodies through whom municipalities may contract.**—*Clark v. Washington*, 12 Wheat. 40, 6 L. Ed. 544. See ante, "Exercise by Agents," V, I, 3, c, (2); post, "Municipal Officers and Agents," IX, C.

55. **County of Moultrie v. Rockingham Ten-Cent Savings-Bank, 92 U. S. 631, 634, 23 L. Ed. 631; *County of Bates v. Winters*, 97 U. S. 83, 98, 24 L. Ed. 933.**

**The board of supervisors**, acting under the authority of an act of legislature, could bind the county by a resolution, which, in favor of private persons interested therein, might, if so intended, operate as a contract. *County of Moultrie v. Rockingham Ten-Cent Savings-Bank*, 92 U. S. 631, 23 L. Ed. 631. See the title **COUNTIES**, vol. 4, pp. 835, 839.

56. **City council.**—*Cincinnati v. Morgan*, 3 Wall. 275, 18 L. Ed. 146; *Fanning v. Gregoire*, 16 How. 524, 14 L. Ed. 1043.



power to act by ordinance in the exercise of its powers, this is not essential, but it may contract by action of the mayor, acting under the sanction of the council; or through agents without the formalities which the old rules of law required.<sup>57</sup>

**Agents Appointed by Legislature.**—A town is bound on contracts made by agents specially appointed by the legislature, and not by the ordinary town authorities.<sup>58</sup>

**City Attorney.**—See ante, "Unauthorized Acts of Officer or Attorney," V, M, 2.

4. **CONSIDERATION.**—The courts will not vacate the contract of a municipal corporation purchasing certain property on the grounds that it paid more than the property was worth.<sup>59</sup>

**A municipal promise to pay for property destroyed** by orders of a city council, made before the property was destroyed, is valid and binding.<sup>60</sup>

5. **MEETING OF MINDS.**—Municipal contracts like those between individuals are based upon the entire meeting of the minds of the parties as to terms and conditions.<sup>61</sup>

6. **WRITING AND SIGNING.**—The agents of a municipal corporation may bind it by parol;<sup>62</sup> but where a statute requires a municipal contract to be in writing, it must be complied with.<sup>63</sup>

7. **SEALING AND FILING.**—The old rule was that a municipal corporation can make no contract which shall bind it except under its seal. That doctrine has long since been overruled.<sup>64</sup>

**Filing.**—See ante, "Writing and Signing," VI, B, 6.

8. **ANTEDATING.**—A municipal officer cannot bind the municipality under powers that have been taken away, by simply antedating his contract.<sup>65</sup>

**57. Mayor or agent under sanction of council.**—*Fanning v. Gregoire*, 16 How. 524, 533, 14 L. Ed. 1043.

**58. Agents appointed by legislature.**—*Queensbury v. Culver*, 19 Wall. 83, 22 L. Ed. 100.

**59. Consideration.**—*New Orleans v. Warner*, 175 U. S. 120, 44 L. Ed. 96.

**60. Richmond v. Smith, 15 Wall. 429, 21 L. Ed. 200.**

**61. Meeting of minds.**—*Moffett, etc., Co. v. Rochester*, 178 U. S. 373, 385, 44 L. Ed. 1108.

**62. Writing and signing.**—*Fanning v. Gregoire*, 16 How. 524, 533, 14 L. Ed. 1043.

**Renewal.**—The action of a city council in adopting the recommendation of the gas committee to renew a contract for street lighting, and making of monthly payment thereafter, operates as an effective renewal of the contract, although such renewal is not evidence of a written contract covering a fixed period of time. *Pollak v. Brush Electric Ass'n*, 128 U. S. 446, 32 L. Ed. 474.

**63. Barnard v. District of Columbia, 127 U. S. 409, 411, 32 L. Ed. 207.**

**Board of public works of the District of Columbia.**—The act of congress of February 21, 1871, "to provide a government for the District of Columbia," required that all contracts by the board of public works should be in writing, be signed by the parties making the same, and a copy thereof filed in the office of the secretary of the district. *Barnard v. District of Columbia*, 127 U. S. 409, 411, 32 L. Ed. 207.

An entry in the journal of the board of

public works of the District of Columbia is no part of the contract with the claimant, nor can it in any respect control the construction or limit the effect of such contract. The board cannot in that way either make a new contract or alter the one previously made, so as to bind the district. *Barnard v. District of Columbia*, 127 U. S. 409, 411, 32 L. Ed. 207.

**64. Sealing.**—*Fanning v. Gregoire*, 16 How. 524, 533, 14 L. Ed. 1043.

"Respecting seals, the same general principles apply to private and to municipal corporations. Thus, a corporation of the latter class would doubtless be bound equally with a private corporation by any seal which has been authoritatively affixed to an instrument requiring it, though it be not the seal regularly adopted." *District of Columbia v. Camden Iron Works*, 181 U. S. 453, 460, 45 L. Ed. 948.

**65. Antedating.**—*Anthony v. County of Jasper*, 101 U. S. 693, 698, 25 L. Ed. 1005; *Coler v. Cleburne*, 131 U. S. 162, 173, 33 L. Ed. 146.

It was said in *Anthony v. County of Jasper*, 101 U. S. 693, 698, 25 L. Ed. 1005: "The public can act only through its authorized agents, and it is not bound until all who are to participate in what is to be done have performed their respective duties. The authority of a public agent depends on the law as it is when he acts. He has only such powers as are specifically granted; and he cannot bind his principal under powers that have been taken away, by simply antedating his contracts. Under such circumstances, a false date is equivalent to a false signature; and the

9. **SUBMISSION OF BIDS**—a. *In General*.—Contracts with a city are frequently authorized by charter to be made on submission of bids, made in writing.<sup>65</sup>

b. *Notice and Advertisement for Proposals*.—A provision requiring a municipal corporation before entering into a contract to publish notice thereof and advertise for sealed proposals or bids is mandatory and the contract is void unless complied with. Such provision should be given a fair interpretation but not extended beyond its clear implication.<sup>67</sup>

c. *Withdrawal of Bids*.—The rule between individuals is that until a proposal be accepted it may be withdrawn, but this principal cannot be applied to bids filed with municipal officers who have no power to permit a bidder to withdraw his bid. But equity will permit such withdrawal where a bill showing the mistake was seasonably filed before the municipality had altered its condition.<sup>68</sup>

d. *Acceptance*.—**When Contract Arises**.—A binding contract does not arise on acceptance of a bid, where there is a distinct provision for a future formal contract.<sup>69</sup>

e. *Fraud and Collusion*.—The most perfect good faith is called for on the part of bidders at these public lettings, so far as concerns their position relating to the bids put in by them or in their interest. The making of fictitious bids or the concealment of the interest which the parties have in each other's bids, thereby keeping up the forms and strengthening the idea of a competition which did not in fact exist, is illegal.<sup>70</sup>

10. **FRAUD AND ILLEGALITY**—a. *Illegality*—(1) *In General*.—**Where money**

public, in the absence of any ratification of its own, is no more estopped by the one than it would be by the other. \* \* \* Antedating, under such circumstances, partakes of the character of a forgery, and is always open to inquiry, no matter who relies on it. The question is one of the authority of him who attempts to bind another." *Coler v. Cleburne*, 131 U. S. 162, 173, 33 L. Ed. 146.

66. **Submission of bids**.—*People's Railroad v. Memphis Railroad*, 10 Wall. 38, 19 L. Ed. 844.

67. **Notice and advertisement for proposals**.—*Worthington v. Boston*, 152 U. S. 695, 38 L. Ed. 603.

The water board of the city of Boston, without previous advertisement for sealed bids, contracted for the exchange of such pumping engines and machinery as were inadequate or of insufficient capacity for those of the capacity required by the plans and estimates of a new high service extension. The expense of such exchange was charged to the appropriation for high service extension. The contract made by the water board was in pursuance of an order prepared by the chairman of the water board, and which had duly passed both branches of the city council and was approved by the mayor, on April 20, 1885, at which time an ordinance of the city provided that no contract or purchase estimated to involve an expenditure of \$—— should be made without an advertisement for sealed proposals, etc. It was held that the city of Boston was bound by such contract since the better interpretation of the ordinance of 1885 is that the exchange authorized to be made was expected to be accomplished without resorting to an advertisement for proposals.

*Worthington v. Boston*, 152 U. S. 695, 38 L. Ed. 603.

68. **Withdrawal of bids**.—*Moffett, etc., Co. v. Rochester*, 178 U. S. 373, 385, 44 L. Ed. 1108.

Where B, in bidding for certain contracts upon a city water works, made errors in his proposals, and the contract was awarded him, the city could not contend that B did not intend to give the executive board of the city an opportunity to correct mistakes in his bid, because B wrote a letter claiming unity in the contracts and demanded the entire contract at the correct price or that he be allowed to withdraw his proposals, and where, before the time in which B was to appear before the executive board to execute a contract or be adjudged in default, he filed a bill in equity for an adjudication of his rights and obligations under the bid, and where the city, by letting out the contract to others, prevented the reformation of the proposals. *Moffett, etc., Co. v. Rochester*, 178 U. S. 373, 44 L. Ed. 1108.

69. **When contract arises**.—*People's Railroad v. Memphis Railroad*, 10 Wall. 38, 19 L. Ed. 844.

70. **Fraud and collusion**.—*McMullen v. Hoffman*, 174 U. S. 639, 652, 43 L. Ed. 1117.

Just how the fraud is to be successfully worked out by the combination, it is not necessary to show. It is enough to see what the natural tendency is. Public policy requires that officers of such corporations, acting in the interest of others, and not using the sharp eye of a practical man engaged in the conduct of his own business, and not controlled by the powerful motive of self-interest, should, so far as possible and for the sake of the public whom they represent, be protected from



is borrowed for an illegal purpose, the municipality may set up such illegality as a defense in an action for the money borrowed.<sup>71</sup>

(2) *Illegality Relating Only to Mode or Time of Performance.*—Where a municipal corporation enters into a contract which is illegal only as to the specific mode of performance, and which has nevertheless been executed by the other contracting party, the corporation having received the money or property of others thereby, the municipality is liable to make restitution or compensation.<sup>72</sup> This rule has been applied where the agreement, so far as it relates to the time and mode of payment, is void.<sup>73</sup>

the dangers arising out of a concealed combination and from fictitious bids. *McMullen v. Hoffman*, 174 U. S. 639, 652, 43 L. Ed. 1117.

Two parties made an agreement that each should put separate known bids in for the construction of a pipe line for a city, and that if either received the contract, the other should share in the profits or losses, each to pay one-half of the expenses of executing the contract. One of them received the contract and performed the same. It was held that the other could not recover his share of the profits, as the contract was illegal, tending to lessen competition, and they had committed a fraud by combining their interests and concealing the same, and submitting different bids as if they were bona fide. *McMullen v. Hoffman*, 174 U. S. 639, 649, 43 L. Ed. 1117.

The fact that neither party would have bid separately, and that by virtue of the combination a bid was made which otherwise would not have been offered, does not alter the significance of the other facts in the case. Those other facts are the concealment of the interest which the parties had in each other's bids, and the making of what were under the circumstances nothing more than fictitious bids for this and the other classes of work for which both parties put in bids, evidently for no other purpose than to endeavor thereby to deceive the committee into believing that there was real competition between them, when in fact there was none. *McMullen v. Hoffman*, 174 U. S. 639, 650, 43 L. Ed. 1117.

The fact that there were other bids even higher than that of the collusive bidder does not alter the tendency of the agreement when carried into effect, to create or to strengthen the belief on the part of the committee in the fact of an active competition and the bona fide character of that competition, and that the lowest bid would be in all probability a reasonable one. It is in truth utterly impossible to accurately or fully predict all the vicious results to be apprehended as the natural effect of this kind of an agreement. *McMullen v. Hoffman*, 174 U. S. 639, 647, 43 L. Ed. 1117.

The parties cannot be heard to say that although their arrangement was fraudulent and illegal, they would nevertheless have obtained the contract even if they had not been guilty of the fraud, because

the bids show they were the lowest bidders. The parties must accept the consequences resulting from entering into the agreement proved in this case, all of which they carried out, and included in which and as a consequence thereof was the agreement with the city and the written agreement of partnership between themselves. *McMullen v. Hoffman*, 174 U. S. 639, 649, 43 L. Ed. 1117.

**That making the fictitious bids a formal matter.**—The reason given for the making of those fictitious bids by the complainant, that it was a formal matter and to keep the name of his company before the public, is entirely inadequate. The bids actually put in by them for the other classes of work had the same tendency to strengthen belief in the reality of the competition which in fact did not exist between these persons. *McMullen v. Hoffman*, 174 U. S. 639, 650, 43 L. Ed. 1117.

**Proof that bid would have been lower if there had been competition.**—If there had been competition, the bid of each for the contract that was obtained might very likely have been lower than the one that was accepted. It is not necessary to prove that fact in order to show the nefarious character of the agreement. *McMullen v. Hoffman*, 174 U. S. 639, 651, 43 L. Ed. 1117.

**No inquiry as to effect of contract necessary.**—Contracts of the nature of this one are illegal in their nature and tendency, and for that reason no inquiry is necessary as to the particular effect of any one contract, because it would not alter the general nature of contracts of this description or the force of the public policy which condemns them. *McMullen v. Hoffman*, 174 U. S. 639, 649, 43 L. Ed. 1117.

**Action on contract let on bid.**—Where contractors combined their interests and concealed the same and submitted fictitious bids in order to obtain a municipal contract, their fraud and collusion would seem to be a defense to an action on a contract let on the bid, even though let to the lowest bidder. *McMullen v. Hoffman*, 174 U. S. 639, 43 L. Ed. 1117. See the title *ILLEGAL CONTRACTS*, vol. 6, p. 737.

**71. Illegality.**—*Mitchell v. Burlington*, 4 Wall. 270, 18 L. Ed. 350.

**72. Illegality relating only to mode or time of performance.**—*Chapman v. Douglas County*, 107 U. S. 348, 27 L. Ed. 378.

**73. Time and mode of payment.**—A mu-



b. *Fraud*—(1) *Motive of Officers*.—The courts will not vacate the contract of a municipal corporation purchasing certain property on the ground that the common council was actuated by improper and sinister motives.<sup>74</sup>

(2) *In Submission of Bids*.—See ante, "Fraud and Collusion," VI, B, 9, c.

**C. Construction or Interpretation.**—If a contract with a municipal corporation is doubtful in its meaning, while it is the duty of the courts not to defeat the intention of the parties to a contract by a strained interpretation of the words employed by them, it is a settled rule of construction, that, "in grants by the public nothing passes by implication;" and, "if, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the state; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the state."<sup>75</sup>

**A contract concerning governmental functions of a municipality** must be construed strictly; such functions cannot be held to have been stipulated away by doubtful or ambiguous provisions.<sup>76</sup>

**Contract of Board of Public Works of District of Columbia.**—An entry in the journal of the board of public works of the District of Columbia cannot in any respect control the construction or limit the effect of a work made by

municipal contract for the purchase of land for a lawful purpose was made by a municipal corporation which agreed to perform its part in a definite time without regard to the condition of the treasury and to give securities by way of notes and mortgages, for the unpaid purchase money. The agreement so far as it relates to the time and mode of payment was void. It was held that the vendee may waive performance of the contract agreeably to its terms and wait a reasonable length of time for the county to make payment in the mode made lawful by the statute, before exerting his power to rescind the contract. *Chapman v. Douglas County*, 107 U. S. 348, 27 L. Ed. 378.

**Time of payment.**—A county purchased land for a poor house under an agreement, in excess of its authority, to pay for the same at a definite time. The vendor conveyed the land to the county, and on default of payment at the fixed time brought suit against the county to rescind the contract or to obtain judgment for the purchase price. It was held that such vendor is entitled to a decree rescinding the contract and ordering a surrender of possession and reconveyance to him, unless payment of the amount due shall be made within a reasonable time to be fixed by the court, within which the necessary amount may be raised by taxation. *Chapman v. Douglas County*, 107 U. S. 348, 27 L. Ed. 378.

**Mode of payment.**—In *Hitchcock v. Galveston*, 96 U. S. 341, 350, 24 L. Ed. 659, a city had contracted with the plaintiffs for the improvement of its sidewalks, and agreed to pay for the same in bonds which it was beyond the power of the city to issue. It was held that the invalidity of that promise was no reason why the city should not pay for the benefit which it had received from the performance of the

contract. The court said: "If payments cannot be made in bonds because their issue is ultra vires, it would be sanctioning rank injustice to hold that payments need not be made at all." *Houston, etc., R. Co. v. Texas*, 177 U. S. 66, 91, 44 L. Ed. 673.

Such a contract is not rendered wholly inoperative because it provides that the work done under it shall be paid for in bonds of the corporation, the issue whereof was not authorized by law. The contract, so far as it is in other respects lawful, remains in force; and for the breach thereof the corporation is liable. *Hitchcock v. Galveston*, 96 U. S. 341, 342, 24 L. Ed. 659.

**74. Motive of officers.**—*New Orleans v. Warner*, 175 U. S. 120, 44 L. Ed. 96.

**Federal courts** cannot inquire into the motives of the council in enacting ordinances which become the basis of a contract and vacate such contract and annul rights acquired thereunder by third parties, because corrupt motives contributed to the passage of the ordinance. *New Orleans v. Warner*, 175 U. S. 120, 145, 44 L. Ed. 96.

**75. Construction or interpretation.**—*Stein v. Bienville Water Supply Co.*, 141 U. S. 67, 80, 35 L. Ed. 622; *The Binghamton Bridge*, 3 Wall. 51, 75, 18 L. Ed. 137.

**Contract for construction of public works.**—If there is an ambiguity in a municipal contract for the construction of a public work it must be resolved in favor of the contractor where the work is done under the supervision of a municipal officer and he adopts that construction according to which the contract has been complied with. *Omaha v. Hammond*, 94 U. S. 98, 24 L. Ed. 70.

**76. Rogers Park Water Co. v. Fergus**, 180 U. S. 624, 628, 45 L. Ed. 702.

the state board.<sup>77</sup>

**D. Operation and Effect**—1. IN GENERAL.—A valid municipal contract is binding upon the municipality although it should afterwards appear that the interest of the public would be promoted by its disaffirmance.<sup>78</sup>

**Place of Performance.**—See ante, "As Dependent upon Place of Performance," VI, A, 4.

2. EFFECT OF CHANGE OF GOVERNMENT.—Where a valid government of a municipality is turned over to another valid government, contracts under which rights have vested, made with a third party by the former city government, cannot be disturbed or set aside by the later city.<sup>79</sup>

**E. Assignability**—1. IN GENERAL.—In the absence of a charter or statutory inhibition, a contract with a municipality may be assigned.<sup>80</sup> An assignee of a contract with a municipality is bound by the provisions of the contract.<sup>81</sup>

2. CONTRACTS RELATING TO CONSTRUCTION OF PUBLIC WORKS.—It is against public policy to permit municipal corporations, in the administration of their affairs relating to the construction of public works, to be embarrassed by sub-contracts between their contractors and third persons, to which they have never assented.<sup>82</sup>

**F. Modification and Abandonment**—1. IN GENERAL.—Into every contract between a municipality and an individual there enters, as between a contract between two private individuals, the right of determining at any time by agreement of parties, and such abandonment creates, as to third parties, no other or higher rights as against either of the contracting parties than existed at the

**77. Contract of board of public works of District of Columbia.**—*Barnard v. District of Columbia*, 127 U. S. 409, 411, 32 L. Ed. 207.

**78. Operation and effect.**—*New Orleans v. Warner*, 175 U. S. 120, 44 L. Ed. 96.

**79. Effect of change of government.**—*New Orleans v. Steamship Co.*, 20 Wall. 387, 22 L. Ed. 354.

A lease made July 8th, 1865, during the military occupation of New Orleans, in the late rebellion, by the army of the United States, by the mayor of New Orleans (appointed by the general commanding the department), pursuant to a resolution of the boards of finance and of street landings (both boards appointed in the same manner), by which a lease of certain water front property in the said city, for ten years—which lease called for large outlays by the lessee, and was deemed by the federal supreme court otherwise a fair one—sustained for its whole term, although in less than one year afterwards (that is to say, on the 18th of March, 1866), the government of the city was handed back to the proper city authorities. *New Orleans v. Steamship Co.*, 20 Wall. 387, 22 L. Ed. 354.

The fact, that on the 9th of February, 1866—seven months after the lease was made—a "general order" from the military department of Louisiana, forbidding the several bureaus of the municipal government of the city, created by military authority, from disposing of any of the city property for a term extending beyond a period when the civil government of the city might be reorganized and re-established, in conformity to the constitution and laws of the state, held not to have

altered the case. *New Orleans v. Steamship Co.*, 20 Wall. 387, 22 L. Ed. 354.

**80. Assignability.**—*Campbell v. District of Columbia*, 117 U. S. 615, 29 L. Ed. 1007.

**Joint contractors.**—One who contracts jointly with another to do certain work for a municipal corporation may assign his contract to the other. *Fitch v. Creighton*, 24 How. 159, 16 L. Ed. 596.

**81. Campbell v. District of Columbia**, 117 U. S. 615, 29 L. Ed. 1007.

**82. Contracts relating to construction of public works.**—*Delaware County Comm'r's v. Diebold Safe, etc., Co.*, 133 U. S. 473, 495, 33 L. Ed. 674.

In *Water Co. v. Ware*, 16 Wall. 566, 21 L. Ed. 485, a contract with a city for the introduction of water pipes to supply the inhabitants with water was assigned or sublet by the contractor.

The cases in which municipal corporations have been held liable to an assignee of a contract, upon notice of the assignment, without proof of their consent, expressed or implied, are distinguishable from and quite consistent with this conclusion. In some of them, the assignments were of the whole or part of money already due, or to become due, to the contractor, in other words, assignments of a fund, and not of any obligation to perform work. In others, the assignments were of entire contracts for the labor of convicts, or for work upon streets, which were held, from the nature of the subject, to imply no personal confidence in the contractor. *Delaware County Comm'r's v. Diebold Safe, etc., Co.*, 133 U. S. 473, 494, 33 L. Ed. 674.



time of the mutually agreed upon abandonment.<sup>83</sup>

2. **MODE OF CONTRACTING PRESCRIBED BY LOCAL LAW.**—A contract made with a city, under a special and restricted authority, and entered into in the mode specifically pointed out by local law, as to advertisement, bids, etc., cannot be modified as if it were an ordinary contract, made under the ordinary municipal authority.<sup>84</sup> Municipal corporations, when authorized by statute to do acts which otherwise they would have no power to do, cannot modify or alter the contracts as authorized by the statute. A compromise does not so modify or alter the contract.<sup>85</sup>

**The board of public works of the District of Columbia** cannot, by an entry in its journal, either make a new contract or alter one previously made, so as to bind the district.<sup>86</sup>

3. **EFFECT OF ILLEGAL MODIFICATION.**—Where a city expressly contracts to pay for paving a street a subsequent modification of the details of the contract in which provision is made for the assessment and collection of certain portions of the expense, which mode of collection was subsequently declared by the courts to be illegal, will not be held to be an abandonment or waiver of the original agreement of the city to pay for the paving.<sup>87</sup>

**G. Renewal.**—See ante, "Writing and Signing," VI, B, 6.

**H. Ratification and Estoppel.**—See post, "Ratification, Estoppel and Laches," XIII.

**I. Particular Contracts**—1. **GRANT OF FRANCHISE**—a. *In General.*—Power of granting franchises may also be exercised indirectly, through the agency of a municipal corporation, clearly invested, for police purposes, with the necessary authority.<sup>88</sup>

**83. Modification and abandonment.**—*Peake v. New Orleans*, 139 U. S. 342, 360, 35 L. Ed. 131.

When a city or state contracts with an individual or company for the doing of certain work, the right remains to the contracting parties, at any time, to abandon that work; no obligation arises to third parties, who become interested in one way or another in the completion of the work; there is no guaranty that the contracting parties may not at any time abandon it; or abandoning it, that any contingent, further, and speculative liability will arise in favor of such third parties. *Peake v. New Orleans*, 139 U. S. 342, 360, 35 L. Ed. 131.

A municipality may, with the consent of its contractor, at any time abandon contracted work. Such abandonment does not make the city liable for the debts of the contractor. So when the city purchases from the contractor his property invested, and his rights existing in the contract, such purchase creates no assumption of his debts. Having purchased, it may abandon the work; and creditors of the contractor cannot charge it as debtor on the theory that if the work had been completed their claims would have become of value. *Peake v. New Orleans*, 139 U. S. 342, 360, 35 L. Ed. 131.

"In the case of *Board of Liquidation v. Louisville, etc., R. Co.*, 109 U. S. 221, 223, 27 L. Ed. 916, a question arose on the presentation of an order made by the authorities of the city of New Orleans to dismiss a suit in this court in which that city was plaintiff in error. The order was

based on a compromise between those authorities and the railroad company, which the board of liquidation intervening here alleged to be without authority and fraudulent. The court here did not disregard the compromise or the order of the city to dismiss the case, but, considering that the question of authority in the mayor and council of the city to make the compromise, and of the alleged fraud in making it, required the power of a court of original jurisdiction to investigate and decide thereon, continued the case in this court until that was done in the proper court. But when this was ascertained in favor of the action of the mayor and council, the suit was dismissed here on the basis of that compromise order." *Dakota County v. Glidden*, 113 U. S. 222, 226, 28 L. Ed. 981.

**84. Mode of contracting prescribed by local law.**—*Memphis v. Brown*, 20 Wall. 289, 320, 22 L. Ed. 264.

**85.** *Bell v. Railroad Co.*, 4 Wall. 598, 18 L. Ed. 338.

So held as to the county boards of police in Mississippi. *Bell v. Railroad Co.*, 4 Wall. 598, 18 L. Ed. 338.

**86.** *Barnard v. District of Columbia*, 127 U. S. 409, 411, 32 L. Ed. 207.

**87. Effect of illegal modification.**—*Memphis v. Brown*, 20 Wall. 289, 22 L. Ed. 264.

**88. Grant of franchise.**—*Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 9, 43 L. Ed. 341. See, also, *Wright v. Nagle*, 101 U. S. 791, 25 L. Ed. 921; *Hamilton Gas Light, etc., Co. v. Hamilton*, 146 U. S. 258, 266, 36 L. Ed. 963; *Bacon v. Texas*, 163 U. S. 207, 216, 41 L. Ed. 132; *New Orleans*



b. *Power to Grant Exclusive Privilege or Franchise and Create Monopolies.*—Exclusive franchises may be bestowed upon corporations by municipal authorities, provided the right to do so is given by their charters,<sup>89</sup> and not prohibited by the constitution of the state.<sup>90</sup> The power of a municipal corporation to grant exclusive privileges must be conferred by explicit terms. If inferred from other powers, it is not enough that the power is convenient to other powers; it must be indispensable to them.<sup>91</sup>

c. *Construction of Grants.*—Grants of franchises and special privileges by municipalities, susceptible of two constructions, must receive the one most favorable to the public.<sup>92</sup> In other words, they must be most strongly construed

*Waterworks Co. v. New Orleans*, 164 U. S. 471, 41 L. Ed. 518; *San Antonio Tract. Co. v. Altgelt*, 200 U. S. 304, 308, 50 L. Ed. 491.

"Conceding the plenary power of the legislature over the subject \* \* \*, and that franchises, broadly speaking, are rights and privileges conferred by the state, and are derived from a grant of the sovereign power, nevertheless the state while exercising its authority might give to the city such measure of right and control in the matter as it saw fit. *Dillon on Munic. Corps.*, 3d. Ed., § 705; *Railroad Co. v. Richmond*, 96 U. S. 521, 24 L. Ed. 734." *Blair v. Chicago*, 201 U. S. 400, 457, 50 L. Ed. 801.

A municipal corporation in granting a franchise is but an agency of the state, to which is delegated the power to regulate municipal franchises, and such grants are subject to the limitations prescribed in the state constitution. *San Antonio Tract. Co. v. Altgelt*, 200 U. S. 304, 308, 50 L. Ed. 491.

In *People's Railroad v. Memphis Railroad*, 10 Wall. 38, 51, 19 L. Ed. 844, it was held: Franchises, it is conceded, cannot, as a general rule, be granted by a municipal corporation, and it is clear that the privilege of making a railway or turnpike, or establishing a ferry and taking tolls for the use of the same, is a franchise, as the public have an interest in the same, and the owners of the privilege are liable to answer in damages if they refuse the use of the same, without any reasonable excuse, upon being paid or tendered the usual fare.

"The granting of a franchise is not the same thing as a contract, and the exercise of such a power cannot be upheld or vindicated as falling within the same rule as the power to make contracts." *People's Railroad v. Memphis Railroad*, 10 Wall. 38, 51, 19 L. Ed. 844.

**Power to grant franchises to establish gas works** may be delegated to municipal corporations. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 9, 43 L. Ed. 341. See the title *GAS*, vol. 6, p. 547.

**89. Power to grant exclusive privilege or franchise and create monopolies.**—*Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 9, 43 L. Ed. 341. See, also, *Wright v. Nagle*, 101 U. S. 791, 25 L. Ed. 921; *Hamilton Gas Light, etc., Co. v. Hamilton*, 146 U. S. 258, 266, 36 L. Ed. 963;

*Bacon v. Texas*, 163 U. S. 207, 216, 41 L. Ed. 132; *New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 471, 41 L. Ed. 518. See the titles *CONSTITUTIONAL LAW*, vol. 4, pp. 407, 412; *CORPORATIONS*, vol. 4, p. 621; *IMPAIRMENT OF OBLIGATION OF CONTRACTS*, vol. 6, p. 758.

**90.** *San Antonit Tract. Co. v. Altgelt*, 200 U. S. 304, 308, 50 L. Ed. 491.

**91.** *Detroit Citizens' St. R. Co. v. Detroit Railway*, 171 U. S. 48, 43 L. Ed. 67; *Freeport Water Co. v. Freeport*, 180 U. S. 587, 598, 45 L. Ed. 679; *Danville Water Co. v. Danville*, 180 U. S. 619, 45 L. Ed. 696; *Rogers Park Water Co. v. Fergus*, 180 U. S. 624, 45 L. Ed. 702. See ante, "Express and Implied Powers," V, H, 2, c.

Power to grant an exclusive franchise must be given to a municipality in language explicit and express, or necessarily to be implied from other powers. There were many reasons which urged to this—reasons which flow from the nature of the municipal trust—even from the nature of the legislative trust, and those which, without the clearest intention explicitly declared, insistently forbid that the future should be committed and bound by the conditions of the present time, and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges. The rule and the reason for it are expressed in *Minturn v. Larue*, 23 How. 435, 16 L. Ed. 574; *Wright v. Nagle*, 101 U. S. 791, 25 L. Ed. 921. As bearing on the rule, see, also, *Oregon R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 1, 32 L. Ed. 837; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. Ed. 55; *Detroit Citizens' St. R. Co. v. Detroit Railway*, 171 U. S. 48, 53, 43 L. Ed. 67.

**Ferries and bridges.**—See the titles *BRIDGES*, vol. 3, pp. 520, 521; *FERRIES*, vol. 6, p. 275.

**Lighting or illumination.**—See ante, "Light or Illumination," V, L, 29.

**92. Construction of grants.**—*Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 50 L. Ed. 1102; *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 36, 50 L. Ed. 353; *Hamilton Gas Light, etc., Co. v. Hamilton*, 146 U. S. 258, 266, 36 L. Ed. 963; *Skaneateles Waterworks Co. v. Skaneateles*, 184 U. S. 354, 363, 46 L. Ed. 585. See, also, *Proprietors of Charles River Bridge v. Proprietors of Warren*

in favor of the public, and where the privilege claimed is doubtful, nothing is to be taken by mere implication as against public rights. This rule has been applied to a series of contracts in waterworks and lighting cases.<sup>93</sup> Grants of a privilege are not ordinarily to be taken as grants of an exclusive privilege.<sup>94</sup>

d. *Power of Municipality to Exclude Itself from Competition.*—Where a municipality has a general power to make a particular contract, although there is an express provision against making an exclusive contract, the municipality may, for the period mentioned in the contract, and as incident to the protection of the rights of the contractor, exclude itself from competition, but unless the city has excluded itself in plain and explicit terms from competition with the contractor during the period of the contract, it cannot be held to have done so by mere implication.<sup>95</sup>

2. **CONTRACTS CONCERNING OR RESTRICTING GOVERNMENTAL FUNCTIONS OR POWERS.—Contracts Abrogating Police Power.**—A city council can neither

Bridge, 11 Pet. 420, 544, 547, 9 L. Ed. 773; Turnpike Co. v. Illinois, 96 U. S. 63, 68, 24 L. Ed. 651; Oregon R., etc., Co. v. Oregonian R. Co., 130 U. S. 1, 26, 32 L. Ed. 837; Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 562, 36 L. Ed. 537; Slidell v. Grandjean, 111 U. S. 412, 438, 28 L. Ed. 321; Joplin v. Southwest Missouri Light Co., 191 U. S. 150, 156, 43 L. Ed. 127; Helena Waterworks Co. v. Helena, 195 U. S. 383, 392, 49 L. Ed. 245; Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 43 L. Ed. 341; Turnpike Co. v. State, 3 Wall. 210, 213, 18 L. Ed. 180; Stein v. Bienville Water Supply Co., 141 U. S. 67, 81, 35 L. Ed. 622; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. Ed. 1165.

93. *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 50 L. Ed. 1102. See, also, *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 50 L. Ed. 353. See ante, "Light or Illumination," V, L, 29. See the titles GAS, vol. 6, p. 545; WATER COMPANIES AND WATERWORKS.

The courts should adhere firmly to the salutary doctrine underlying the whole law of municipal corporations and the doctrines of the adjudged cases, that grants of special privileges affecting the general interests are to be liberally construed in favor of the public, and that no public body, charged with public duties, be held upon mere implication or presumption to have divested itself of its powers. *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 37, 50 L. Ed. 353.

The grant of a franchise by a municipal corporation does not of itself raise an implied contract that the grantor will not do any act to interfere with the rights granted to the grantee, and in the absence of the grant of an exclusive privilege, none will be implied against the public, but must arise, if at all, from some specific contract binding upon the municipality. *Helena Waterworks Co. v. Helena*, 195 U. S. 383, 388, 49 L. Ed. 245; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 41 L. Ed. 1165; *Joplin v. Southwest Missouri Light Co.*, 191 U. S. 150, 48 L. Ed. 127; *Skaneateles Waterworks Co. v. Skaneateles*, 184 U. S. 354, 46 L. Ed. 585; *Knoxville Water Co. v. Knoxville*, 200 U.

S. 22, 37, 50 L. Ed. 353. See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 758.

94. *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 696, 41 L. Ed. 1165; *Stein v. Bienville Water Supply Co.*, 141 U. S. 67, 35 L. Ed. 622. See, also, *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773; *Turnpike Co. v. State*, 3 Wall. 210, 18 L. Ed. 180.

95. **Power of municipality to exclude itself from competition.**—*Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 50 L. Ed. 1102; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. Ed. 341; *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 50 L. Ed. 353.

Cases are not infrequent where, under a general power granted to a city, to cause the streets to be lighted or to furnish its inhabitants with a supply of water, without limitation as to time, it has been held that the city has no right to grant an exclusive franchise for a period of years; but these cases do not touch upon a question how far the city in the exercise of an undoubted power to make a particular contract, can hedge it about with limitations designed to do little more than bind the city to carry out the contract in good faith and with decent regard for the rights of the other party. *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 50 L. Ed. 1102; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. Ed. 341, distinguishing *Minturn v. Larue*, 23 How. 435, 16 L. Ed. 574, and *Wright v. Nagle*, 101 U. S. 791, 25 L. Ed. 921.

"On February 21, 1899, appellant brought in the circuit court of the United States a suit in equity against the city. In the bill was set forth the contracts of appellant with the city, and it was contended that there was an implied agreement by the latter not to enter into competition. This suit was dismissed by the circuit court, and its decree was affirmed by this court. *Bienville Water Supply Co. v. Mobile*, 175 U. S. 109, 44 L. Ed. 92." *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 214, 46 L. Ed. 1132.



bind itself, nor its successors, to contracts prejudicial to the peace, good order, health or morals of its inhabitants. The police power is one which remains constantly under the control of the legislative authority.<sup>96</sup>

**Contracts Abridging Legislative Powers.**—See the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 812.

3. **CONTRACTS OF GUARANTY.**—**Guaranteeing Municipal Securities.**—See the titles **GUARANTY**, vol. 6, pp. 580, 584; **MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES**.

**Guaranteeing Payment of Assessments for Paving Streets.**—See the titles **SPECIAL ASSESSMENTS; STREETS AND HIGHWAYS**.

4. **CONTRACTS CREATING INDEBTEDNESS**—a. *Power to Incur Debts and Issue Evidence Thereof*—(1) *In General.*—**A Necessary Incident to Express Powers.**—A municipal corporation which is expressly authorized to make expenditures for certain purposes may, unless prohibited by law, make contracts for the accomplishment of the authorized purposes, and thereby incur indebtedness, and issue proper vouchers therefor. This is a necessary incident to the express power granted.<sup>97</sup>

**Not a Taking of Private Property for Public Purposes.**—A law authorizing a public corporation to contract a debt, and pay it by means of a tax, is not liable to the objection that it takes private property for public purposes without compensation; for that clause of the constitution is a limitation, not on the taxing power, but on the right of eminent domain.<sup>98</sup>

**Private Objects.**—The legislature cannot authorize counties, cities or towns to contract, for private objects, debts which must be paid by taxes.<sup>99</sup>

**In the Territories.**—Under U. S. Rev. Stat., § 1889, as amended by the act of June 8, 1878, c. 168, 20 Stat. 10, the legislative assemblies of the territories are prohibited from authorizing municipal corporations to incur any debt or obligation other than such as shall be necessary to the administration of its internal affairs.<sup>1</sup>

**96. Contracts abrogating police power.**—*Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 15, 43 L. Ed. 341.

If a contract be objectionable in itself upon these grounds, or if it become so in its execution, the municipality may, in the exercise of its police power, regulate the manner in which it may be carried out, or may abrogate it entirely, upon the principle that it cannot bind itself to any course of action which shall prove deleterious to the health or morals of its inhabitants. In such case an appeal to the contract clause of the constitution is ineffectual. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 15, 43 L. Ed. 341.

**97. A necessary incident to express powers.**—*Police Jury v. Britton*, 15 Wall. 566, 570, 21 L. Ed. 251. See the title **MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES**.

"But such contracts, as long as they remain executory, are always liable to any equitable considerations that may exist or arise between the parties, and to any modification, abatement, or rescission in whole or in part that may be just and proper in consequence of illegalities, or disregard or betrayal of the public interests." *Police Jury v. Britton*, 15 Wall. 566, 570, 21 L. Ed. 251.

**98. Not a taking of private property for public purposes.**—*Gilman v. Sheboygan*, 2 Black 510, 17 L. Ed. 305. See the title **EMINENT DOMAIN**, vol. 5, p. 751.

**99. Private objects.**—*Cole v. La Grange*, 113 U. S. 1, 6, 28 L. Ed. 896.

If municipal corporations have a fund or other property out of which they can pay the debts which they contract, without resort to taxation, it may be within the power of the legislature of the state to authorize them to use it in aid of projects strictly private or personal, but which would in a secondary manner contribute to the public good; or where there is property or money vested in a corporation of the kind for a particular use, as public worship or charity, the legislature may pass laws authorizing them to make contracts in reference to this property, and incur payable from that source. *Loan Ass'n v. Topeka*, 20 Wall. 655, 659, 22 L. Ed. 455.

**1. In the territories.**—*Lewis v. Pima County*, 155 U. S. 54, 39 L. Ed. 67.

By the "internal affairs" of a municipal corporation, in the administration of which the legislature could alone authorize it to incur a debt, was undoubtedly intended such business as municipalities of like character are usually required to engage in to fulfill their proper functions, and to effectuate the objects of their charters. In the case of counties these are ordinarily to provide a courthouse for the administration of justice; a jail for the confinement of prisoners; a poor house for the sustenance of paupers (where by local law they are made chargeable upon the



(2) *Power to Borrow Money*—(a) *In General*.—The state may confer authority upon a municipal corporation to borrow money;<sup>2</sup> but such corporations have not such power, without legislative authority expressly or clearly implied.<sup>3</sup>

**Construction.**—A charter power to borrow money for general purposes on the credit of the city, limits it to the power to borrow money for ordinary governmental purposes, such as are generally carried out with revenues derived from taxation; and the presumption is that the grant of the power was intended to confer the right to borrow money in anticipation of the receipt of revenue taxes, and not to plunge the municipality into a debt on which interest must be paid for a number of years.<sup>4</sup> The rule is well settled that any doubt as to the existence of any such power ought to be determined against its existence.<sup>5</sup>

county); offices for the various officials of the county; and, under certain circumstances, highways and bridges. It could never include obligations incurred in aid of a railroad. *Lewis v. Pima County*, 155 U. S. 54, 57, 39 L. Ed. 67. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID.

An act of the legislature of Arizona of Feb. 21, 1883, authorized and required the board of supervisors of Pima County to issue its bonds in aid of the construction of a railroad. Rev. Stat., U. S., 1889, as amended act of June 8, 1878, c. 168, restricted the legislatures of the territories from authorizing any municipal corporation to incur any debt or obligation not necessary to the administration of its internal affairs. It was held that the bonds in question create no obligation against the county which a court of law can enforce. *Lewis v. Pima County*, 155 U. S. 54, 37 L. Ed. 67.

**2. Power to borrow money.**—*Gelpcke v. Dubuque*, 1 Wall. 221, 17 L. Ed. 531; *Rogers v. Burlington*, 3 Wall. 654, 664, 18 L. Ed. 79; *United States v. Railroad Co.*, 17 Wall. 322, 330, 21 L. Ed. 597.

A provision in the charter of a city corporation authorizing it to borrow money for any public purpose, whenever, in the opinion of the city council, it shall be expedient to exercise it, is a valid power. *Rogers v. Burlington*, 3 Wall. 654, 18 L. Ed. 79; *Mitchell v. Burlington*, 4 Wall. 270, 18 L. Ed. 350; *Larned v. Burlington*, 4 Wall. 275, 18 L. Ed. 353.

Money borrowed by such a corporation to construct a plank road, if the road leads from, extends to, or passes through the limits of the corporation, is borrowed for a public purpose within the meaning of the provision. *Mitchell v. Burlington*, 4 Wall. 270, 18 L. Ed. 350; *Larned v. Burlington*, 4 Wall. 275, 18 L. Ed. 353.

The city of Burlington, Iowa, has power by charter to borrow money for any public purposes. *Rogers v. Burlington*, 3 Wall. 654, 655, 18 L. Ed. 79.

A corporate purpose is one which promotes the general prosperity and welfare of the municipality. *Hackett v. Ottawa*, 99 U. S. 86, 94, 25 L. Ed. 363.

Semble, that the borrowing of money by a city for the development of its nat-

ural resources for manufacturing purposes is within the provision of the Illinois Constitution of 1848, that corporate authorities may be empowered "to assess and collect taxes for corporate purposes," as interpreted by the supreme court of the state. *Hackett v. Ottawa*, 99 U. S. 86, 25 L. Ed. 363.

**3.** *The Mayor v. Ray*, 19 Wall. 468, 22 L. Ed. 164; *The Mayor v. Lindsey*, 19 Wall. 485, 22 L. Ed. 180; *Brenham v. German American Bank*, 144 U. S. 173, 36 L. Ed. 390.

**Indiana.**—It is the settled doctrine in Indiana that corporations take, by implication, all the reasonable modes of executing their express or substantive powers which a natural person may adopt; and that, in the absence of positive restrictions, a corporation has the power to borrow money as an incident to such power. Section 119, *Dillon on Munic. Corp.*, 3d. Ed., lays down the Indiana law, on this subject, substantially as is contended for by the plaintiff in error. That section is as follows: "In Indiana, the doctrine is that corporations, along with the express and substantive powers conferred by their charters, take by implication all the reasonable modes of executing such powers which a natural person may adopt. It is a power incident to corporations, in the absence of positive restriction, to borrow money as means of executing the power." A large number of cases from the supreme court of Indiana are cited in a note to support the doctrine of the text. The proposition that, under the law of Indiana, a town has an implied authority to borrow money, or contract a loan, under the conditions, and in the manner expressly prescribed, cannot be controverted. *Merrill v. Monticello*, 138 U. S. 673, 685, 34 L. Ed. 1069.

**Mississippi.**—According to the ruling of the highest court of Mississippi, the financial powers conferred by the general law upon boards of supervisors of counties in that state do not include that of borrowing money. *Wells v. Supervisors*, 102 U. S. 625, 26 L. Ed. 122.

**4. Construction.**—*Brenham v. German American Bank*, 144 U. S. 173, 182, 36 L. Ed. 390.

**5.** *Brenham v. German American Bank*, 144 U. S. 173, 182, 36 L. Ed. 390.

**Effect of Refunding on Power to Borrow Money to Pay Bonds.**—See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

(b) *Manner of Exercise.*—The legislature may prescribe the manner in which a municipality shall exercise the power to borrow money.<sup>6</sup>

**Election.**—The act incorporating a municipality may provide that when it desired to borrow money, the question shall be submitted to the citizens, the nature and object of the loan stated, and a day fixed for the electors of the said municipality to express their wishes and for like notice to be given as in case of an election, and that the loan shall not be made unless two-thirds of all the votes polled at such election shall be given in the affirmative.<sup>7</sup>

**Issuances of Bonds.**—The state possessed the power to confer authority upon the city, to borrow money, by issuances of bonds.<sup>8</sup>

(3) *Limitation of Amount of Indebtedness*—(a) *Statutory Limitations*—aa. *In General.*—Ordinarily, in granting a charter to a municipal corporation, the legislature limits its rights to incur indebtedness beyond a certain amount.<sup>9</sup>

**Effect.**—A debt created in excess of such limitations is void.<sup>10</sup>

**Construction.**—A provision in the charter, that the city council shall not borrow for general purposes more than a named amount, does not limit the debt of the city, nor prohibit the council from entering into a contract involving an expenditure exceeding that amount, for special improvements, such as the grading and paving of streets and the construction of sidewalks, which are authorized by the charter.<sup>11</sup>

**6. Manner of exercise.**—*Bissell v. Jeffersonville*, 24 How. 287, 16 L. Ed. 664.

**Petition of voters.**—By the fifty-sixth section of the general act of the legislature of Indiana for the incorporation of cities, it was provided, that no incorporated city, under this act, shall have power to borrow money, or incur any debt or liability, unless three-fourths of the legal voters shall petition the common council to contract such debt or loan. *Bissell v. Jeffersonville*, 24 How. 287, 294, 16 L. Ed. 664.

Where a city is given authority to incur indebtedness, provided the act be on the petition of two-thirds of the citizens, the proviso will be presumed to have been complied with where the proceedings are otherwise regular. *Van Hostrup v. Madison City*, 1 Wall. 291, 17 L. Ed. 538.

**7. Election.**—*Rogers v. Burlington*, 3 Wall. 654, 18 L. Ed. 79; *Gelpcke v. Dubuque*, 1 Wall. 175, 177, 17 L. Ed. 520.

So provided by the act incorporating Burlington. *Rogers v. Burlington*, 3 Wall. 654, 18 L. Ed. 79.

So provided by the Iowa<sup>a</sup> act of Feb. 24, 1847, incorporating the city of Dubuque. *Gelpcke v. Dubuque*, 1 Wall. 175, 177, 17 L. Ed. 520.

**8. Issuance of bonds.**—*Gelpcke v. Dubuque*, 1 Wall. 175, 202, 17 L. Ed. 520; *Rogers v. Burlington*, 3 Wall. 654, 664, 18 L. Ed. 79; *United States v. Railroad Co.*, 17 Wall. 322, 330, 21 L. Ed. 597. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

**9. Statutory limitation.**—*Amey v. Allegheny City*, 24 How. 364, 16 L. Ed. 614.

**Purpose.**—The obvious purpose of limitations of this kind in municipal charters is to prevent the improvident contracting of debts for other than the ordinary current expenses of the municipality. *Walla*

*Walla v. Walla Walla Water Co.*, 172 U. S. 1, 20, 43 L. Ed. 341.

It certainly has no reference to debts incurred for the salaries of municipal officers, members of the fire and police departments, school teachers or other salaried employees to whom the city necessarily becomes indebted in the ordinary conduct of municipal affairs, and for the discharge of which money is annually raised by taxation. For all purposes necessary to the exercise of their corporate powers, they are at liberty to make contracts regardless of the statutory limitation, provided, at least, that the amount to be raised each year does not exceed the indebtedness allowed by the charter. Among these purposes is the prevention of fires, the purchase of fire engines, the pay of firemen and the supply of water by the payment of annual rentals therefor. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 20, 43 L. Ed. 341.

**10. Effect.**—*Read v. Plattsburgh*, 107 U. S. 568, 27 L. Ed. 414.

A city having authority to issue bonds under a general power conferred upon it as a municipal body, "to borrow money for any purpose within its discretion," cannot lawfully borrow money or issue bonds to build a school house without reference to the limit, as to the amount, imposed by the act, expressly authorizing it to build school houses. Whatever implications of power as to school buildings might have been admissible, if the law conferring municipal powers had stood alone, must give place to the express declarations, with the accompanying qualifications, contained in the statute that dealt by name with the very subject. *Read v. Plattsburgh*, 107 U. S. 568, 574, 27 L. Ed. 414.

**11. Construction.**—*Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659.



bb. *Not Binding on Legislature*.—A statutory limitation of the amount of the indebtedness of a municipality applies only to the city, acting on its own authority, and means that the council shall not go into debt to a greater sum than that amount. Such restriction is not binding on the legislature, therefore a subsequent legislature may authorize it to increase its indebtedness beyond that amount.<sup>12</sup> Such limitation does not apply to debts and expenses incurred by special legislative authority.<sup>13</sup>

(b) *Constitutional Limitations*—aa. *In General*.—A state may provide against excessive municipal indebtedness by a constitutional provision.<sup>14</sup> Such a prohibition in a state constitution is as effectual against the implied as the express promise and is as binding in a court of chancery as a court of law.<sup>15</sup>

**12. Not binding on legislature.**—*Amey v. Allegheny City*, 24 How. 364, 16 L. Ed. 614; *Cincinnati v. Morgan*, 3 Wall. 275, 18 L. Ed. 146; *United States v. New Orleans*, 98 U. S. 381, 25 L. Ed. 225; *Wolff v. New Orleans*, 103 U. S. 358, 360, 26 L. Ed. 395.

**13.** *Amey v. Allegheny City*, 24 How. 364, 16 L. Ed. 614; *United States v. New Orleans*, 98 U. S. 381, 25 L. Ed. 225; *Wolff v. New Orleans*, 103 U. S. 358, 360, 26 L. Ed. 395.

A provision in a city charter that "the city council of said city shall have power to levy and collect annual taxes, \* \* \* of all real and personal property within the limits of said city, to pay the debts and meet the general expenses of such city, not exceeding 50c on each \$100 per annum on the annual assessed value thereof;" imposes a limitation upon the city's power of taxation with reference to its ordinary municipal debts and expenses and does not apply to debts and expenses which can only be incurred by special legislative authority. *Quincy v. Jackson*, 113 U. S. 332, 28 L. Ed. 1001.

**14. Constitutional limitations.**—*Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 275, 43 L. Ed. 689. See, also, the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

The constitution of Colorado of 1876, art. 11, § 6, provides that the indebtedness contracted in any one year, by any county having a valuation of not less than one million of dollars, shall not exceed a certain per cent on its assessed valuation, and that "the aggregate amount of indebtedness of any county, for all purposes; exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed twice the amount above herein limited." It was held that this provision limited the power of the county to contract debts for any purpose whatever; including "county warrants issued for the ordinary county expenses, such as witnesses' and jurors' fees, election costs, charges for the board of prisoners; county treasurer's commissions, etc.," the expression "and the aggregate amount of indebtedness of any county, for all purposes," etc., is not to be read as if it were written "and the aggregate amount of such indebtedness." *Lake County v. Rollins*, 130 U. S. 662, 673, 32 L. Ed. 1060; *Lake*

*County v. Graham*, 130 U. S. 674, 32 L. Ed. 1065; *Doon Tp. v. Cummins*, 142 U. S. 366, 375, 35 L. Ed. 1044. See, also, *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 21, 43 L. Ed. 341, distinguishing this case. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

**15.** *Litchfield v. Ballou*, 114 U. S. 190, 192, 29 L. Ed. 132; *Doon Tp. v. Cummins*, 142 U. S. 366, 373, 35 L. Ed. 1044; *Hedges v. Dixon County*, 150 U. S. 182, 190, 37 L. Ed. 1044. See, to the same effect, *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138.

So held as to a provision in a state constitution that no city, etc., "shall be allowed to become indebted for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum of the value of its taxable property." *Litchfield v. Ballou*, 114 U. S. 190, 192, 29 L. Ed. 132; *Doon Tp. v. Cummins*, 142 U. S. 366, 373, 35 L. Ed. 1044.

Such prohibition forbids implied as well as express liability for the amount or amounts received on bonds issued contrary to such provisions, and a court of equity could not afford relief in such a case either on an express or implied obligation; the transaction being invalid at law, was equally invalid in equity. *Hedges v. Dixon County*, 150 U. S. 182, 190, 37 L. Ed. 1044; *Litchfield v. Ballou*, 114 U. S. 190, 29 L. Ed. 132.

In *Litchfield v. Ballou*, 114 U. S. 190, 29 L. Ed. 132, it was held that a creditor who had loaned to a municipal corporation, in excess of the amount of the indebtedness authorized by the constitution, money which had been used in part for the construction of public works, was not entitled to a decree in equity for the return of his money, because the municipality had parted with the specific money and it could not be identified; that a bill in equity praying for the return of specific and identical moneys borrowed by a municipal corporation from complainant in violation of law would not support a general decree that there was due from the municipality to him a sum named, which was equal to the amount borrowed; and further, that a constitutional provision forbidding the municipality from borrowing money operated equally to prevent moneys



**Cannot Be Dispensed with by the Legislature.**—A constitutional limitation upon the power of a municipality to contract indebtedness cannot be dispensed with by the state legislature either directly or indirectly.<sup>16</sup> Such limitation cannot be dispensed with by the creation of a ministerial commission whose finding shall be taken in lieu of the facts.<sup>17</sup>

*bb. Amendment of Constitution.*—The power of a city to incur indebtedness may be limited by an amendment to the state constitution.<sup>18</sup>

loaned to it in violation of this provision and used in the construction of a public work, from becoming a lien upon the works constructed with it. *O'Brien v. Wheelock*, 184 U. S. 450, 496, 46 L. Ed. 636.

**16. Constitutional limitation.**—*Lake County v. Graham*, 130 U. S. 674, 32 L. Ed. 1065; *Lake County v. Rollins*, 130 U. S. 662, 674, 32 L. Ed. 1060; *Buchanan v. Litchfield*, 102 U. S. 278, 288, 26 L. Ed. 138.

Under the constitution of Iowa, art. 11, § 3, no municipal corporation "shall be allowed" to contract debts beyond the constitutional limit. When that limit has been reached, no debt can be contracted "in any manner, or for any purpose." The limit of the aggregate debt of the municipality is fixed at five per cent of the value of the taxable property within it; and that value is to be ascertained "by the last state and county tax lists," which are public records, open to all, and of the contents of which all are bound to take notice. The prohibition is addressed to the legislature, as well as to all municipal boards and officers, and to the people, and forbids any and all of them to create, or to give binding force to, any debts of the corporation in excess of the limit prescribed. The prohibition extending to debts contracted "in any manner, or for any purpose," it matters not whether they are in every sense new debts, or are debts contracted for the purpose of paying old ones, so long as the aggregate of all debts, old and new, outstanding at one time, and on which the corporation is liable to be sued, exceeds the constitutional limit. The power of the legislature in this respect being restricted and controlled by the constitution, any statute which purports to authorize a municipal corporation to contract debts in any manner or for any purpose whatever in excess of that limit is to that extent unconstitutional and void. *Doon Tp. v. Cummins*, 142 U. S. 366, 371, 35 L. Ed. 1044.

In construing a prohibition of the constitution of Illinois of 1870, art. 9, § 12, the court, speaking by Mr. Justice Harlan, said: "The words employed are too explicit to leave any doubt as to the object of the constitutional restriction upon municipal indebtedness. The purpose of its framers, beyond all question, was to withhold from the legislative department the power to confer upon municipal corporations authority to incur indebtedness in excess of a prescribed amount." "No legislation could confer upon a municipal corporation authority to contract indebted-

ness which the constitution expressly declared it should not be allowed to incur." *Doon Tp. v. Cummins*, 142 U. S. 366, 373, 35 L. Ed. 1044; *Buchanan v. Litchfield*, 102 U. S. 278, 287, 288, 26 L. Ed. 138.

**17. Lake County v. Graham**, 130 U. S. 674, 32 L. Ed. 1065; *Doon Tp. v. Cummins*, 142 U. S. 366, 375, 35 L. Ed. 1044, distinguishing *Sherman County v. Simons*, 109 U. S. 735, 27 L. Ed. 1093.

"In the case of *Sherman County v. Simons*, 109 U. S. 735, 27 L. Ed. 1093, and others like it, the question was one of estoppel as against an exaction imposed by the legislature; and the holding was that the legislature, being the source of exaction, had created a board authorized to determine whether its exaction had been complied with, and that its finding was conclusive to a bona fide purchaser." *Doon Tp. v. Cummins*, 142 U. S. 366, 375, 35 L. Ed. 1044. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

**18. Amendment of constitution.**—*New Orleans v. Warner*, 175 U. S. 120, 144, 44 L. Ed. 96.

The amendment of the constitution of Louisiana of 1874 (Laws of 1874, p. 56), limiting the power of the city of New Orleans to contract debts, was intended to validate the issue of drainage warrants to the transferee of the contract, not only for the work done but for the property purchased by the city, in case it should elect to do the work itself. *New Orleans v. Warner*, 175 U. S. 120, 144, 44 L. Ed. 96.

A constitutional amendment to the Louisiana constitution, prohibiting New Orleans from "increasing its debt in any manner or under any pretext" and providing that this shall not be construed to prevent the issuance of drainage warrants to the transferee of the drainage contract, payable only from drainage taxes, should receive a construction commensurate with the object intended to be accomplished, the drainage of the city, and an act authorizing the purchase of the drainage plant by the city is not void because it tends to increase the debt of the city, where the debt had been made and put in judgment before the amendment, for the amendment recognized the existence of the debt and validated the issue of drainage warrants to the transferee of the contract, not only for the work done, but for the property purchased by the city, in case it should elect to perform the work itself. *New Orleans v. Warner*, 175 U. S. 120, 44 L. Ed. 96.

cc. *Adoption of New Constitution.*—A limitation upon the power of a city to incur indebtedness may be removed by the adoption of a new constitution.<sup>19</sup>

(c) *Limitation to Percentage of Taxable Property.*—In many states, when a municipal corporation is by legislature authorized to incur indebtedness, a limitation of the amount of indebtedness to a certain percentage of the taxable property of the corporation is made.<sup>20</sup>

(d) *Provision for Payment Required.*—Where it is provided that a municipal corporation shall not contract any indebtedness, unless making at the same time provision for its payment, contracts made in the absence of such provision are void.<sup>21</sup>

(e) *What Constitutes Indebtedness and Computation of Amount*—aa. *In General.*—What constitutes indebtedness within the meaning of a limitation upon the power of a municipality to incur indebtedness depends upon the language of the prohibition.<sup>22</sup>

**An obligation assumed by a municipality** is a debt within a prohibition against the creation of a debt beyond a certain amount.<sup>23</sup>

**A contract for payment of a debt** does not fall within a prohibition against borrowing money except on certain terms.<sup>24</sup>

bb. *Aggregation of Payments.*—There are a number of respectable authorities to the effect that the limitation covers a case where the city agrees to pay a certain sum per annum, if the aggregate amount payable under such agreement exceeds the amount limited by the charter the weight of authority, as well as of reason, favors the more liberal construction that a municipal corporation may contract for a supply of water or gas or like necessary, and may stipulate for the

**19. Adoption of new constitution.**—*East St. Louis v. Amy*, 120 U. S. 600, 602, 30 L. Ed. 798.

The limitation upon the power of the city council of East St. Louis to tax for the payment of any bonded indebtedness which might thereafter be incurred, was removed by the constitution of Illinois of 1870; and authority to levy and collect enough to meet the interest as it fell due, and the principal within twenty years was given by that instrument. *East St. Louis v. Amy*, 120 U. S. 600, 602, 30 L. Ed. 798.

**20. Limitation to percentage of taxable property.**—*Marcy v. Oswego Tp.*, 92 U. S. 637, 23 L. Ed. 748.

**21. Provision for payment required.**—*Wade v. Travis County*, 174 U. S. 499, 43 L. Ed. 1060.

"In this case the constitution limited the power of the legislature of Illinois in respect to the grant of authority to municipal corporations to incur debts, but it declared in express terms that, if a debt was incurred under such authority, the corporation should provide for its payment by the levy and collection of a direct annual tax sufficient for that purpose. Under this provision of the constitution, no municipal corporation could incur a debt without legislative authority, express or implied, but the grant of authority carried with it the constitutional obligation to levy and collect a sufficient annual tax to pay the interest as it matured and the principal within twenty years. This provision for the tax was written by the constitution into every law passed thereafter by the legislature allow-

ing a debt to be incurred; and, in our opinion, it took the place in existing laws of all provisions for taxation to pay debts thereafter incurred under old authority which were inconsistent with its requirements. It was made by the people a part of the fundamental law of the state that every debt incurred thereafter by a municipal corporation, under the authority of law, should carry with it the constitutional obligation of the municipality to levy and collect all the necessary taxes required for its payment." *East St. Louis v. Amy*, 120 U. S. 600, 603, 30 L. Ed. 798.

**22. What constitutes indebtedness and computation of amount.**—See ante, "In General," VI, I, 4, a, (3), (a), aa.

**Debts incurred in ordinary conduct of municipal affairs.**—See ante, "In General," VI, I, 4, a, 3, (b), aa.

**23. Quære,** the words "outstanding indebtedness, evidenced by bonds and warrants thereof," embraced bonds executed by a water company, although not executed by the city where the city had assumed to pay them. The city's assumption of the bonds imposed as much obligation upon it to pay as if it had itself directly executed and issued them. *Waite v. Santa Cruz*, 184 U. S. 302, 313, 46 L. Ed. 552.

**24. A contract** made by a city to pay a sum of money with interest to a person who has assumed the payment of interest on some of the city's debt—as well interest to become due, as interest already due—is not a "borrowing of money," but is a contract for the payment of a debt; and, as the last, will be sustained,



payment of an annual rental for the gas or water furnished each year, notwithstanding the aggregate of its rentals during the life of the contract may exceed the amount of the indebtedness limited by the charter.<sup>25</sup>

cc. *Limitation Based upon Amount of Taxable Property.*—In determining whether the constitutional limit of indebtedness has been exceeded by a municipal corporation, an inquiry would always be necessary as to the amount of taxable property within its boundaries. Such inquiry would be solved, not by information derived from individual officers of the municipality, but only in the mode prescribed in the constitution; that is, by reference to the last assessment for state and county taxes for the year preceding the issuing of the bonds.<sup>26</sup>

when, if the former, it might fall within prohibitions against the city's borrowing money except on certain terms. *Gelpcke v. Dubuque*, 1 Wall. 175, 221, 17 L. Ed. 520.

**25. Aggregation of payments.**—*Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19, 43 L. Ed. 341.

There is a distinction between a debt and a contract for a future indebtedness to be incurred, provided the contracting party perform the agreement out of which the debt may arise. There is also a distinction between the latter case and one where an absolute debt is created at once, as by the issue of railway bonds, or for the erection of a public improvement, though such debt be payable in the future by installments. In the one case the indebtedness is not created until the consideration has been furnished; in the other the debt is created at once, the time of payment being only postponed. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 20, 43 L. Ed. 341.

There can be no doubt that if the city proposed to purchase outright, or establish a system of water works of its own, the section would apply, though bonds were issued therefor made payable in the future. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19, 43 L. Ed. 341; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138.

Section 105 of the city charter enacts "that the limit of indebtedness of the city of Walla Walla is hereby fixed at fifty thousand dollars." At a date when the city was indebted in a sum exceeding \$16,000, it contracted with a water company to pay a rental of \$1,500 per annum for twenty five years, or an aggregate amount of \$37,500, which, added to the existing indebtedness of \$16,000, would create a debt exceeding the limited amount of \$50,000. It was held that the debt limit was not exceeded. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19, 43 L. Ed. 341.

In the case under consideration the annual rental did not become an indebtedness within the meaning of the charter until the water appropriate to that year had been furnished. If the company had failed to furnish it, the rental would not have been payable at all, and while the original contract provided for the creation

of an indebtedness, it was only upon condition that the company performed its own obligation. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 20, 43 L. Ed. 341.

The case of *Lake County v. Rollins*, 130 U. S. 662, 32 L. Ed. 1060, is readily distinguishable from the one under consideration. That was a suit against a county upon a large number of warrants for current expenses, the defense being a want of authority on the part of the county commissioners to issue warrants which had been put forth after the limit of indebtedness had been reached and even exceeded. They were held to be void. The case is authority for the proposition that if the annual rentals, payable in this case, with the other expenses, exceeded the limit of indebtedness, the transaction would be void; but, as it appears that the limit of indebtedness was \$50,000 and the amount of the city debt but \$16,000, it is clear that the payment of an annual rental of but \$1,500 would be unobjectionable upon this ground. If such annual rentals exceeded the limit of indebtedness, a different question would be presented. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 21, 43 L. Ed. 341.

**26. Limitation based upon amount of taxable property.**—*Buchanan v. Litchfield*, 102 U. S. 278, 288, 26 L. Ed. 138.

In determining whether the constitutional limit of the indebtedness of the city had been exceeded by the issue of the bonds, the court permitted—there having been no separate assessment of the property within the city for the preceding year made or required by law—the introduction of the assessments for state and county taxes embracing all taxable property within the county and townships of which the city formed a part, from which, in connection with a map, the location and taxable value of all the property within the limits of the city for that year could be readily ascertained. Held, that the evidence, being the best which the law afforded, was properly admitted. *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138.

Had there been, under or by competent legal authority, an assessment for that year of taxable property within the city, separately from all other property in the



(f) *Return of Money or Recovery on Quantum Meruit*.—See ante, "In General," VI, I, 4, a, (3), (b), aa.

b. *Place of Payment*.—A city having power to borrow money, may make the principal and interest payable where it pleases.<sup>27</sup>

c. *Source of Payment*.—Debts contracted by municipal corporations must be paid, if paid at all, out of taxes which they may lawfully levy, and all contracts creating debts to be paid in future, not limited to payment from some other source, imply an obligation to pay by taxation.<sup>28</sup>

d. *Duty to Levy Tax*.—A statute which authorizes towns to contract debts or other obligations payable in money implies the duty to levy taxes to pay them, unless some other fund or source of payment is provided.<sup>29</sup>

5. **CONTRACTS WITH REFERENCE TO PUBLIC WORKS**—a. *Power of Municipality*.—A municipal corporation has power to contract with reference to public improvements.<sup>30</sup>

b. *Construction*.—See ante, "Construction or Interpretation," VI, C.

c. *Change of Plans, Extra Work, etc.*—Extra work done by order of the proper municipal officer or in pursuance of an alteration in the plan of the work must be paid for by the municipality.<sup>31</sup>

county or township to which the city belonged, such assessment would undoubtedly have been controlling. But there was no such official assessment, in fact, or required by law. There were, however, official assessments for state and county taxes for 1873, embracing all taxable property within the county and townships of which the city formed a part, and from which, in connection with the map of the city, could be readily ascertained the location and taxable value of all property within the corporate limits of the city for that year. *Buchanan v. Litchfield*, 102 U. S. 278, 288, 26 L. Ed. 138.

27. **Place of payment**.—*Commissioners v. Clark*, 94 U. S. 278, 284, 24 L. Ed. 59; *Meyer v. Muscatine*, 1 Wall. 384, 17 L. Ed. 564.

28. **Source of payment**.—*Loan Ass'n v. Topeka*, 20 Wall. 655, 659, 22 L. Ed. 455.

"When authority to borrow money or incur an obligation, in order to execute a public work, is conferred upon a municipal corporation, the power to levy a tax for its payment, or the discharge of the obligation, accompanies it; and this, too, without any special mention that such power is granted. This arises from the fact that such corporations seldom possess—so seldom, indeed, as to be exceptional—any means to discharge their pecuniary obligations except by taxation." *Quincy v. Jackson*, 113 U. S. 332, 337, 28 L. Ed. 1001; *United States v. New Orleans*, 98 U. S. 381, 393, 25 L. Ed. 225. See, also, *Parkersburg v. Brown*, 106 U. S. 487, 501, 27 L. Ed. 238; *United States v. County of Macon*, 99 U. S. 582, 25 L. Ed. 331; *Ralls County Court v. United States*, 105 U. S. 733, 735, 26 L. Ed. 1220. See the title **TAXATION**.

29. **Duty to levy tax**.—*Loan Ass'n v. Topeka*, 20 Wall. 655, 22 L. Ed. 455. See the titles **MANDAMUS**, ante, p. 1; **TAXATION**.

30. **Power of municipality**.—*Fitch v. Creighton*, 24 How. 159, 16 L. Ed. 596.

31. **Change of plans, extra work**.—*Wood v. Fort Wayne*, 119 U. S. 312, 30 L. Ed. 416.

**Change of plans**.—Where the trustee changed the plan of crossing a river with a pipe line, after the commencement of the work and thereby largely increased the expenses, the contractor may recover for the additional cost of crossing there although the change of plan was made without a written order. *Wood v. Fort Wayne*, 119 U. S. 312, 30 L. Ed. 416.

Clauses in a contract for the construction of a public work which provided that no claim for extra work shall be made or entertained, unless such extra work shall have been done in obedience to a written order of the engineer or trustees is an independent clause from one which provides that the trustee shall have the right to make any alteration in the plan of the work either before or after its commencement. *Wood v. Fort Wayne*, 119 U. S. 312, 30 L. Ed. 416.

The extra work referred to in the former clause does not embrace work done in pursuance of the alteration made by the trustee in the plan. *Wood v. Fort Wayne*, 119 U. S. 312, 30 L. Ed. 416.

Where the size of the valve boxes is not mentioned in the contract, nor their cost, they were to be of the usual size and cost; and where the trustee afterwards required the valve boxes to be of a size which made them cost \$3 more each than those of the usual size would have cost, this was a change of plan, and the increased work caused by it must be paid for by the city. *Wood v. Fort Wayne*, 119 U. S. 312, 30 L. Ed. 416.

A clause in a contract by a municipality for the construction of a public work, which provides that the contractors "shall have no claim upon the city for any delay in the delivery of pipes or other material from the manufacturers," does not throw the loss from defects in the casting furnished, which were of such character

d. *Approval of Officer*.—Where a contract, entered into by a city for the construction of certain public works, provided that they shall be completed under the supervision and to the satisfaction of an officer of the city, his action, in finally accepting them, is an announcement of his decision that the terms of the contract have been complied with, and is binding upon the city.<sup>32</sup>

e. *Stipulations as to Delays, Obstructions, etc.*—A stipulation in a contract by a municipality for public work, to the effect that the contractor shall have no claim against the city for delay in delivering the materials does not apply to delays caused by the city's furnishing defective material.<sup>33</sup> A provision in a municipal contract for a public work that all loss or damage arising "from any unforeseen obstructions, or any difficulties that may be encountered in the prosecution of the" work, "shall be incurred by the contractor without extra charge" to the city, cannot fairly apply to obstructions and difficulties at the changed place of crossing the river, resulting from increased depth of water and quicksand.<sup>34</sup>

f. *Exaction of Hard Conditions*.—Before a court will sanction the exaction of hard conditions made by a city with its contractors, who have been reduced to necessities by the omission of the city itself to keep with strictness its promises to them, it will be careful to know that every stipulation on the part of the city, under any new agreement, has been fully performed by it.<sup>35</sup>

## VII. Municipal Property.

A. *Acquisition and Title*.—1. *IN GENERAL*.—The power to acquire and dispose of property, both real and personal, for themselves and their successors, belonged to municipal corporations at the common law,<sup>36</sup> but the Roman jurisprudence upon which that of Louisiana is founded seems to have denied to cities a capacity to inherit or even take by donation or legacy.<sup>37</sup> This power is usually conferred by the charter of the corporation.<sup>38</sup>

2. *MODES OF ACQUISITION*.—a. *In General*.—The corporation of Philadelphia has power under its charter to take real and personal property by deed,<sup>39</sup> devise,<sup>40</sup> or by grant from the state.<sup>41</sup>

as could not be detected until the castings were being put in place, under the head of such extra work as required a written order. *Wood v. Fort Wayne*, 119 U. S. 312, 30 L. Ed. 416.

32. *Approval of officer*.—*Omaha v. Hammond*, 94 U. S. 98, 24 L. Ed. 70.

33. *Stipulations as to delays, obstructions, etc.*—*Wood v. Fort Wayne*, 119 U. S. 312, 30 L. Ed. 416.

34. *Wood v. Fort Wayne*, 119 U. S. 312, 30 L. Ed. 416.

35. *Exaction of hard conditions*.—*Memphis v. Brown*, 20 Wall. 289, 22 L. Ed. 264.

Where a city agreed to issue a certain amount of bonds to a contractor who was embarrassed in carrying on his contract with it, the embarrassment being produced in part through the city's own non-payment to the contractor of what it owed him, the contractor agreeing on his part in the new agreement, to release the city from certain obligations under which by the original contract it was bound; held, that the city, not having carried out its new agreement completely, could not avail itself of the release; that what was done was not an accord and satisfaction, but an executory agreement for a release, upon the performance of certain conditions, which, not having been performed, left the release without obligatory force.

*Memphis v. Brown*, 20 Wall. 289, 22 L. Ed. 264.

36. *Municipal property*.—*Perin v. Carey*, 24 How. 465, 16 L. Ed. 701; *McDonogh v. Murdoch*, 15 How. 367, 14 L. Ed. 732.

*English statutes of mortmain*.—*McDonogh v. Murdoch*, 15 How. 367, 405, 14 L. Ed. 732.

37. They were treated as composed of uncertain persons, who could not perform the acts of volition and personality involved in the acceptance of a succession. *McDonogh v. Murdoch*, 15 How. 367, 404, 14 L. Ed. 732.

38. *Vidal v. Girard*, 2 How. 126, 11 L. Ed. 205.

39. *Modes of acquisition*.—*Vidal v. Girard*, 2 How. 126, 11 L. Ed. 205; *McDonogh v. Murdoch*, 15 How. 367, 406, 14 L. Ed. 732.

40. *Devise*.—*Vidal v. Girard*, 2 How. 126, 11 L. Ed. 205; *McDonogh v. Murdoch*, 15 How. 367, 406, 14 L. Ed. 732.

*The act of 32 and 34 Henry 8*, which excepts corporations from taking by devise, is not in force in Pennsylvania. *Vidal v. Girard*, 2 How. 126, 11 L. Ed. 205.

41. *Grant from to state*.—A municipal corporation may acquire real property in its public capacity, by grant from the state, by act of legislature. *Mumford v. Wardwell*, 6 Wall. 423, 18 L. Ed. 756.

**Donations, Gifts, Legacies, etc.**—Municipal corporations are permitted to receive donations and legacies.<sup>42</sup>

**The exchange of stock** in a gas company for certificates of a municipal loan does not vest in the city an interest in the corporate property.<sup>43</sup>

b. *Dedication*.—See the title *DEDICATION*, vol. 5, p. 235.

c. *Alluvion*.—See the title *ACCESSION, ACCRETION AND RELICTION*, vol. 1, p. 53.

d. *Confirmation of Pueblo Titles*.—See the title *PUBLIC LANDS*.

3. **PROPERTY ACQUIRABLE AND PURPOSES OF ACQUISITION**—a. *In General*.—A municipal corporation is the trustee of the inhabitants of that corporation, and it holds all its property in a general and substantial, although not in a strict technical, sense in trust for them. The property which a municipal corporation holds is for their use, and is held for their benefit.<sup>44</sup> Municipal corporations are allowed to hold property only for public purposes.<sup>45</sup>

b. *Private Property Not of a Governmental Nature*.—A municipal corporation may acquire property in its private or proprietary character, with respect to which it may be entitled to constitutional protection.<sup>46</sup>

c. *Property in Trust*—(a) *In General*.—In general it may be said that a municipal corporation has power to receive property by devise, and hold complete title thereto as trustee,<sup>47</sup> in the same manner and to the same extent as private persons.<sup>48</sup> Neither is there any positive objection in point of law, to a corporation taking property upon a trust not strictly within the scope of the direct purposes of its institution, but collateral to them.<sup>49</sup> If the trust be repugnant to,

42. **Donations, gifts, legacies, etc.**—McDonogh v. Murdoch, 15 How. 367, 406, 14 L. Ed. 732.

43. **Exchange of stock**.—Philadelphia v. Collector, 5 Wall. 720, 736, 18 L. Ed. 614.

44. **Property acquirable and purposes of acquisition**.—Werlein v. New Orleans, 177 U. S. 390, 402, 44 L. Ed. 817.

"It must as to all its property be the representative or trustee of somebody or of some aggregation of persons, and it must, therefore, hold its property for the same use, call that use either public or private. It is a use for the benefit of individuals." Werlein v. New Orleans, 177 U. S. 390, 402, 44 L. Ed. 817.

Any of the property held by a city does not belong to the mayor, or to any or all of the members of the common council, nor to the common people as individual property. If any of those functionaries should appropriate the property or its avails to his own use, he would be guilty of embezzlement, and if one of the people not clothed with official station should do the like, he would be guilty of larceny. Werlein v. New Orleans, 177 U. S. 390, 402, 44 L. Ed. 817.

**Lands held by pueblos or towns**, under the Mexican government, are not held by them in absolute property, but in trust for the benefit of their inhabitants; and are held subject to a similar trust by municipal bodies, created by legislation since the conquest, which have succeeded to the possession of such property. Townsend v. Greeley, 5 Wall. 326, 18 L. Ed. 547. See the title *PUBLIC LANDS*.

**County property**.—See Maryland v. Baltimore, etc., R. Co., 3 How. 534, 550, 11 L. Ed. 714. See the title *COUNTIES*, vol. 4, p. 832.

**Acquiring property for school purposes**.—McDonogh v. Murdoch, 15 How. 367, 406, 14 L. Ed. 732. See the title *SCHOOLS*.

45. **Public purposes**.—East Hartford v. Hartford Bridge Co., 10 How. 511, 534, 13 L. Ed. 518.

46. **Private property not of a governmental nature**.—New Orleans v. New Orleans Waterworks Co., 142 U. S. 79, 91, 35 L. Ed. 943; Worcester v. Worcester Consolidated St. R. Co., 196 U. S. 539, 551, 49 L. Ed. 591.

47. **Property in trust**.—United States v. Railroad Co., 17 Wall. 322, 335, 21 L. Ed. 597; Girard v. Philadelphia, 7 Wall. 1, 19 L. Ed. 53; McDonogh v. Murdoch, 15 How. 367, 14 L. Ed. 732 (dissenting opinion); Vidal v. Girard, 2 How. 126, 11 L. Ed. 205.

**In Ohio**.—Perin v. Carey, 24 How. 465, 16 L. Ed. 701.

**The charter of the city of Philadelphia** invests the corporation with powers and rights to take property upon trust, for charitable purpose, which are not otherwise obnoxious to legal animadversion. Vidal v. Girard, 2 How. 126, 11 L. Ed. 205.

48. **United States v. Railroad Co.**, 17 Wall. 322, 335, 21 L. Ed. 597, citing Vidal v. Girard, 2 How. 126, 127, 11 L. Ed. 205; McDonogh v. Murdoch, 15 How. 367, 14 L. Ed. 732, dissenting opinion of Clifford, J.

49. **Collateral trusts**.—Vidal v. Girard, 2 How. 126, 11 L. Ed. 205.

A municipal corporation may be made a trustee or agent to receive and distribute funds, in aid of or to take and hold property in trust for, public purposes not foreign to the corporation. South Caro-



or inconsistent with, the proper purpose for which the corporation was created, it may not be compellable to execute it, but the trust (if otherwise unexceptionable) will not be void, and a court of equity will appoint a new trustee to enforce and perfect the objects of the trust.<sup>50</sup>

**Amended Charter.**—A municipal corporation, having power to hold property in trust and administer the same, has the same power to hold and administer under an amended charter, greatly enlarging its limits.<sup>51</sup>

(b) *Divesting Title.*—Where a municipal corporation holds property in trust, the legislature may divest the municipality of the power to administer the trust and transfer it to another trustee.<sup>52</sup> If such corporation is incompetent to administer a valid trust, its inability may be taken advantage of only by the state in its sovereign capacity, by a quo warranto, or other judicial proceeding.<sup>53</sup>

4. **LITTORAL LAND.**—A city has the same rights in its littoral lands as a private proprietor has.<sup>54</sup>

**B. Disposal.**—1. **IN GENERAL.**—Municipal corporations have not the power to sell the lands belonging to them without special authority.<sup>55</sup> Such corporations frequently have the power, either by charter or legislative sanction, to sell property which it holds, to private individuals.<sup>56</sup> It is questioned whether a town or county, although it have the direct authority of the legislature, can give away its property, without consideration.<sup>57</sup>

**Sale of Lands Granted by State.**—A city may sell lands, granted to it by the state for its own use, to individuals.<sup>58</sup>

**Conveyance Not Prohibiting Alienation.**—A city which has a general power of alienation in its charter can sell and convey lands held by it under a grant or conveyance which did not make the land inalienable.<sup>59</sup>

**A municipal corporation may proceed by ordinance** to relinquish and grant its right to lands within its borders to individuals.<sup>60</sup>

**Sufficiency of Vote of Council.**—A vote by the city council, adopting the report of a committee recommending that a sale be made, is a sufficient vote to sell.<sup>61</sup>

2. **REVOCATION AND RESULT**—a. *In General.*—Where a city revokes a sale of municipal property, and sells to another, it must be shown affirmatively that title to the property was revested in the city, in order to pass good title to the subsequent alienee.<sup>62</sup>

*lina v. United States*, 190 U. S. 437, 460. 50 L. Ed. 261; *United States v. Railroad Co.*, 17 Wall. 322, 21 L. Ed. 597.

Under the general power "for the suppression of vice and immorality, the advancement of the public health and order, and the promotion of trade, industry, and happiness," the corporation may execute any trust germane to those objects. *Vidal v. Girard*, 2 How. 126, 11 L. Ed. 205.

50. *Vidal v. Girard*, 2 How. 126, 11 L. Ed. 205.

51. **Amended charter.**—*Girard v. Philadelphia*, 7 Wall. 1, 16, 19 L. Ed. 53.

52. **Divesting title.**—*Girard v. Philadelphia*, 7 Wall. 1, 19 L. Ed. 53.

53. **Taking advantage of inability to administer.**—*Vidal v. Girard*, 2 How. 126, 11 L. Ed. 205.

54. **Littoral land.**—*Boston v. Lecraw*, 17 How. 426, 15 L. Ed. 118. See the titles **BOUNDARIES**, vol. 3, p. 461; **NAVIGABLE WATERS**; **WATERS AND WATERCOURSES**.

55. **Disposal.**—*Kenicott v. Supervisors*, 16 Wall. 452, 469, 21 L. Ed. 319; *St. Joseph Tp. v. Rogers*, 16 Wall. 644, 21 L. Ed. 328.

56. **Charter or legislative power.**—*Anderson v. Bock*, 15 How. 323, 14 L. Ed. 714.

**Grants of lands by the city of Boston.**—*Boston v. Lecraw*, 17 How. 426, 433, 15 L. Ed. 118.

**Conveyance of land purchased for cemetery.**—See the title **CEMETERIES**, vol. 3, p. 648.

57. **Power to give property away without consideration.**—*Kenicott v. Supervisors*, 16 Wall. 452, 470, 21 L. Ed. 319.

58. **Lands granted by state.**—*Mumford v. Wardwell*, 6 Wall. 423, 18 L. Ed. 756.

59. **Alienation not prohibited.**—*Wright v. Morgan*, 191 U. S. 55, 58, 48 L. Ed. 89.

Where property is donated in fee simple, in trust for the establishment of a city, it is subject to alteration for municipal purposes, such as the widening of streets, or variation of established uses, or to sale or other disposition for public benefit. *Van Ness v. Washington*, 4 Pet. 232, 7 L. Ed. 842.

60. **Proceeding by ordinance.**—*Townsend v. Greeley*, 5 Wall. 326, 18 L. Ed. 547.

61. **Vote of council.**—*Wright v. Morgan*, 191 U. S. 55, 48 L. Ed. 89. See post, "Governing Bodies," IX, A.

62. **Revocation and resale.**—*Anderson v. Bock*, 15 How. 323, 14 L. Ed. 714.

b. *Resale of Land in Default of Payment*.—The act of assembly of Maryland, which authorized the commissioners of the city of Washington to resell lots for default of payment by the first purchaser, contemplates a single resale only; and by that resale the power given by the act is executed.<sup>63</sup> By selling and conveying the property to a third purchaser, the commissioners precluded themselves from setting up the second sale, and the second purchaser, by making this defense, affirmed the title of the third purchaser.<sup>64</sup>

3. *CORRECTION OF INFORMALITY IN EXECUTION OF SALE*.—Informality in the execution of the sale by the mayor rather than by a special commissioner will be corrected by equity if necessary. After the price had been received by the city and the land had been occupied by purchasers for nearly twenty years, the city would not now be allowed to profit by a merely technical mistake.<sup>65</sup>

4. *MORTGAGE OR DEED OF TRUST*.—Municipal corporations have not the power, to mortgage the lands belonging to them without special authority.<sup>66</sup>

**C. Individual Interest of Inhabitants**—1. *INTEREST IN CORPORATE PROPERTY*.—The members of a municipal corporation are not shareholders, nor joint partners in any corporate estate, which they can sell or devise to others, or which can be attached and levied on for their debts.<sup>67</sup>

2. *LIABILITY OF INDIVIDUAL PROPERTY FOR CORPORATE DEBTS*.—In general, it may be said that the private property of individuals within the city's limits cannot be subjected to the creditors of the city except through means of taxation,<sup>68</sup> except in some of the New England states where by common law or immemorial usage, the property of any inhabitant may be taken on execution upon a judgment against the town.<sup>69</sup>

**63. Resale of land in default of payment.**—*O'Neale v. Thornton*, 6 Cranch 52, 53, 3 L. Ed. 150.

**64. Effect of second sale.**—*O'Neale v. Thornton*, 6 Cranch 52, 53, 3 L. Ed. 150.

**65. Correction of informality in execution of sale.**—*Wright v. Morgan*, 191 U. S. 55, 59, 48 L. Ed. 89.

Where an act of congress authorized the city of Denver to purchase certain lands in Colorado for a cemetery at the minimum price, "to be held and used for a burial place for said city and vicinity" and the city council granted a portion of said lands to a Roman Catholic bishop, "the mayor making the grant" to him and his heirs and assigns for the purposes aforesaid" and the city brought an action in ejectment against alienees of part of the land which the bishop had sold, it was held that the city council having authorized the sale, the question of informality in the execution of the deed by the mayor rather than by a special commissioner was not open after the price had been received by the city and the land had been occupied by purchasers for twenty years. *Wright v. Morgan*, 191 U. S. 55, 48 L. Ed. 89.

**66. Special authority to mortgage necessary.**—*Kenicott v. Supervisors*, 16 Wall. 452, 464, 21 L. Ed. 319; *St. Josephs Tp. v. Rogers*, 16 Wall. 644, 21 L. Ed. 328. See, also, the title *MORTGAGES AND DEEDS OF TRUST*, ante, p. 452.

**Register of mortgaged swamp lands.**—A statute providing for the mortgage of the swamp lands of a county to secure its bond issue in payment of a subscription for stock in a railroad company, required a mortgage to be made by the county

judge and countersigned by the clerk of the court of the county. The bond recited all the proceedings necessary to authorize the execution of the mortgage; the mortgage as executed was not signed by the clerk of the court but was confirmed as the act of the court by an order entered in its minutes. It was held that the mortgage is not void by reason of the failure of the clerk to sign the same. *Kenicott v. Supervisors*, 16 Wall. 452, 21 L. Ed. 319. See, also, the titles *MUNICIPAL, COUNTY, STATE AND FEDERAL AID; PUBLIC LANDS*.

**67. Interest in corporate property.**—*East Hartford v. Hartford Bridge Co.*, 10 How. 511, 534, 13 L. Ed. 518.

**68. Liability of individual property for corporate debts.**—*Meriwether v. Garrett*, 102 U. S. 472, 516, 26 L. Ed. 197.

The court has no more authority, in point of law, to seize the property of citizens for the debt of a municipal corporation in which they reside, than it has to seize the property of another corporation. *Barkley v. Levee Comm'rs*, 93 U. S. 258, 265, 23 L. Ed. 893.

**Charter provision.**—*Rees v. Watertown*, 19 Wall. 107, 120, 22 L. Ed. 72.

**Statute in Iowa.**—*Butz v. Muscatine*, 8 Wall. 575, 19 L. Ed. 490; *Riggs v. Johnson County*, 6 Wall. 166, 192, 18 L. Ed. 768; *Weber v. Lee County*, 6 Wall. 210, 18 L. Ed. 781; *Supervisors v. United States*, 18 Wall. 71, 21 L. Ed. 771.

**69. Bloomfield v. Charter Oak Bank**, 121 U. S. 121, 129, 30 L. Ed. 923; *Barkley v. Levee Comm'rs*, 93 U. S. 258, 265, 23 L. Ed. 893.

"Judgments against a territorial and municipal corporation have been enforced



**D. Liability of Property for Debts**—1. **IN GENERAL**.—The property of a municipal corporation held in trust by it for public uses cannot be seized and sold on execution for the debts of the city;<sup>70</sup> but the private property of a municipal corporation not so held is liable to be seized and sold on execution to satisfy a judgment against the municipality.<sup>71</sup>

**Garnishment**.—Under § 916, Rev. Stat., United States, money, other than taxes, due to a municipal corporation is subject to garnishment proceeding if

against its inhabitants, either by direct levy of execution on their property, according to common law or ancient usage, as in New England." *Wilson v. Seligman*, 144 U. S. 41, 47, 36 L. Ed. 338.

**70. Liability of property for debts**.—*New Orleans v. Louisiana Const. Co.*, 140 U. S. 654, 35 L. Ed. 556; *Workman v. New York City*, 179 U. S. 552, 565, 45 L. Ed. 314; *Meriwether v. Garrett*, 102 U. S. 472, 513, 26 L. Ed. 197; *South Dakota v. North Carolina*, 192 U. S. 286, 318, 48 L. Ed. 448; *Klein v. New Orleans*, 99 U. S. 149, 150, 25 L. Ed. 430; *Werlein v. New Orleans*, 177 U. S. 390, 403, 44 L. Ed. 817.

**Statute in Iowa**.—*Butz v. Muscatine*, 8 Wall. 575, 19 L. Ed. 490; *Supervisors v. United States*, 18 Wall. 71, 21 L. Ed. 771; *Weber v. Lee County*, 6 Wall. 210, 212, 18 L. Ed. 781; *Riggs v. Johnson County*, 6 Wall. 166, 18 L. Ed. 768.

Judgments or decrees entered against municipal corporations may not, as a matter of public policy, be enforced by the levy on property held by the corporation for public uses. *Meriwether v. Garrett* (1880), 102 U. S. 472, 26 L. Ed. 197; *Workman v. New York City*, 179 U. S. 552, 565, 45 L. Ed. 314.

The municipal lands held by the city of San Francisco, as successor to the former pueblo existing there, being held in trust for its inhabitants, are not the subject of seizure and sale under judgment and execution against the city. *Townsend v. Greeley*, 5 Wall. 326, 18 L. Ed. 547.

**Lands and ground rents**.—Lands held by a municipal corporation for public purposes, and the ground rents forming a part of the public revenues, cannot be levied on or sold. Property and revenues necessary for the exercise of these powers become part of the machinery of government, and to permit a creditor to seize and sell them to collect his debt would be to permit him in some degree to destroy the government itself. *Klein v. New Orleans*, 99 U. S. 149, 150, 25 L. Ed. 430.

**Waterworks not subject to sale**.—*New Orleans v. Morris*, 105 U. S. 600, 26 L. Ed. 1184.

**Public parks and buildings**.—*New Orleans v. Morris*, 105 U. S. 600, 602, 26 L. Ed. 1184; *Meriwether v. Garrett*, 102 U. S. 472, 501, 26 L. Ed. 197; *New Orleans v. United States*, 10 Pet. 662, 731, 736, 9 L. Ed. 573; *Werlein v. New Orleans*, 177 U. S. 390, 398, 44 L. Ed. 817.

**Public wharf**.—*Klein v. New Orleans*, 99 U. S. 149, 151, 25 L. Ed. 430; *Meri-*

*wether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197.

**Streets and squares and promenades**.—*Meriwether v. Garrett*, 102 U. S. 472, 501, 26 L. Ed. 197.

**Lands dedicated as a quay**.—The interest of the city of New Orleans in lands dedicated to it as a public quay and used as a landing place for sugar and molasses in the course of commerce, is not made subject to the execution as property of a city under an ordinance leasing such property for the erection of sheds, the dues for the use of which were to be divided between the lessee and the city, and where such property at the end of twenty-five years was to revert to the city. *New Orleans v. Louisiana Const. Co.*, 140 U. S. 654, 664, 35 L. Ed. 556.

**Fire engines, carriages, hose and fire houses**.—*Meriwether v. Garrett*, 102 U. S. 472, 501, 26 L. Ed. 197.

**Louisiana**.—This rule applies to property characterized as *locus publicus* in the phrase of the law of Louisiana. *New Orleans v. Louisiana Const. Co.*, 140 U. S. 654, 35 L. Ed. 556.

The land in a public quay or levee, dedicated to public use as *locus publicus*, in the city of New Orleans, is not made subject to levy and sale under execution against the city as private property by an ordinance, in the nature of the lease, which granted the lessee a right to erect certain sheds for the protection of sugar, etc., and imposed upon him the quasi public duty of accommodating the public, as a wharfinger. *New Orleans v. Louisiana Const. Co.*, 140 U. S. 654, 664, 35 L. Ed. 556.

**71. New Orleans v. Louisiana Const. Co.**, 140 U. S. 654, 35 L. Ed. 556; *Werlein v. New Orleans*, 177 U. S. 390, 401, 44 L. Ed. 817.

A city has no proprietary rights, distinct from the trust of the public, in its streets, wharves, cemeteries, hospitals, courthouses and other public buildings, which cannot be subject to execution by its creditors. *Meriwether v. Garrett*, 102 U. S. 472, 513, 26 L. Ed. 197.

It seems that if a city has become invested with a title in fee simple to the lands held by it, not subject to a trust for the benefit of the inhabitants, at the time when a judgment is docketed against it and execution issued, that title to such lands would pass under sheriff's sale pursuant to the execution. *Townsend v. Greeley*, 5 Wall. 326, 334, 18 L. Ed. 547.



such proceedings were authorized by the state law when said section was enacted.<sup>72</sup>

**In Admiralty.**—There is contrariety of opinion in the lower admiralty courts of the United States as to whether the rule of the courts of common law which exempts from seizure the property of a municipality devoted to its municipal uses obtains in a court of admiralty of the United States.<sup>73</sup>

2. **PROPERTY HELD IN TRUST FOR PRIVATE CHARITY.**—The interest of a city in property, which it holds in trust for private charity, is not subject to execution by its creditors.<sup>74</sup>

3. **EFFECT OF DISSOLUTION**—a. *In General.*—The dissolution of a city's charter does not change the nature of the property held by it for a public trust so as to render it subject to execution, where previously exempt.<sup>75</sup>

b. *Taxes Levied but Not Collected.*—Taxes previously levied, but not collected on the dissolution of the corporation, do not constitute its property; and in the absence of statutory authority they cannot be subsequently collected by a court of equity through officers of its own appointment, and applied to the payment of the creditors of the corporation.<sup>76</sup>

4. **CONTINUING EXEMPTION TO CONVERTED PROPERTY.**—See the titles CONSTITUTIONAL LAW, vol. 4, p. 438; IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 866.

5. **FAILURE TO PLEAD EXEMPTION.**—Where the city of New Orleans allowed an execution creditor to levy upon and sell property of the city, by failure to plead that the property was exempt from execution on the trial of a suit to enjoin such levy and sale, the city cannot afterwards bring a suit to recover such land; the defense which was open to it in the former action is not now.<sup>77</sup>

6. **BILL IN EQUITY TO RESTRAIN EXECUTION.**—A municipal corporation may, by a suit in equity, restrain its execution creditors from selling its shares of stock in a water company, to which the exemption from execution is continued by a constitutional statute.<sup>78</sup>

**E. Legislative Control**—1. *IN GENERAL.*—Public property of a municipal corporation is within the control of the legislature.<sup>79</sup> The legislative power is not so transcendent that it may at its will do that which amounts to an arbitrary divestiture of the private property of a municipal corporation.<sup>80</sup>

2. **DIVERSION OF PROPERTY.**—Property, derived from the state for specific public purposes, or obtained for such purposes through means which the state alone can authorize—that is, taxation—is so far subject to the control of the legislature, that it may be applied to other public uses of the municipality than those

**72. Garnishment.**—Canal, etc., St. R. Co. v. Hart, 114 U. S. 654, 661, 29 L. Ed. 226.

Section 916, Rev. Stat. U. S., did not adopt § 2 of the act of the legislature of Louisiana, passed March 17, 1870, Sess. Laws of 1870, Extra Session, Act No. 5, p. 10, making it unlawful to issue any writ of execution or fieri facias, from any of the courts in Louisiana, against the city of New Orleans, to enforce the payment of any judgment for money against that city, said act being passed subsequent to the enactment of said § 916, Rev. Stat., U. S. Canal, etc., St. R. Co. v. Hart, 114 U. S. 654, 661, 29 L. Ed. 226.

**73. In admiralty.**—Workman v. New York City, 179 U. S. 552, 572, 45 L. Ed. 314.

**74. Property held in trust for private charity.**—Meriwether v. Garrett, 102 U. S. 472, 513, 26 L. Ed. 197.

**75. Effect of dissolution.**—Meriwether v. Garrett, 102 U. S. 472, 513, 26 L. Ed. 197.

**76. Taxes levied but not collected.**—Meriwether v. Garrett, 102 U. S. 472, 513, 26 L. Ed. 197.

**77. Failure to plead exemption.**—Werlein v. New Orleans, 177 U. S. 390, 44 L. Ed. 817.

**78. Bill in equity to restrain execution.**—New Orleans v. Morris, 105 U. S. 600, 26 L. Ed. 1184.

**79. Legislature control.**—Mount Pleasant v. Beckwith, 100 U. S. 514, 532, 25 L. Ed. 699.

**Property of public road board created by New Jersey act, March 31, 1882.**—Essex Public Road Board v. Skinkle, 140 U. S. 334, 339, 35 L. Ed. 446. See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 845.

**Counties.**—See the title COUNTIES, vol. 4, p. 833.

**Private or proprietary rights.**—See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 852.

**80. Essex Public Road Board v.**

originally designated. This follows from the nature of such bodies, and the dependent character of their existence.<sup>81</sup> Property, derived by municipal corporations from other sources, is often held, by the terms of its grant, for special uses, from which it cannot be diverted by the legislature. In such cases, the property is protected by all the guards against legislative interference possessed by individuals and private corporations for their property.<sup>82</sup> Where property is held by a municipality only for the profit or convenience of its people collectively, it is held in its proprietary as distinguished from its governmental character; but where property held by a city is diverted to public purposes, it is held in its governmental or public character.<sup>83</sup> The legislative power of control does not exist with regard to property in which the municipality has a private interest.<sup>84</sup>

#### **F. Taxation of Municipal Property.—Federal Taxation of Revenues.**

—As a portion of the state in the exercise of a limited portion of the powers of the state, the revenues of a municipal corporation, like those of the state, are not subject to taxation by congress.<sup>85</sup>

**Legality of Business as Affecting Liability to Taxation.**—A municipal corporation cannot, any more than any other corporation or private person, escape the taxes due on its property, whether acquired legally or illegally, and it cannot make its want of legal authority to engage in a particular transaction or business a shelter from the taxation imposed by the government on such business or transaction by whomsoever conducted.<sup>86</sup>

**Impairment of Obligations of Contracts.**—See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 852.

**G. Effect of Repeal of Charter.**—Upon the repeal of the charter of a municipal corporation, property held by it in trust for public purposes passes under the immediate control of the state, the power once delegated to the city in that behalf having been withdrawn.<sup>87</sup>

### **VIII. Municipal Torts.**

**A. In General.**—Municipal corporations are not wholly exempt from liability for wrongful acts done, with all the evidences of their being acts of the corporation, to the injury of other, or in evasion of legal obligations to the state or the public. This is the case although the rule that corporations are liable for the tortious acts of their officers and agents may require a more careful scrutiny in its application to municipal corporations than to corporations for pecuniary profit.<sup>88</sup> At one time it was held that an action on the case for a

Skinkle, 140 U. S. 334, 342, 35 L. Ed. 446. See the titles CONSTITUTIONAL LAW, vol. 4, p. 413; DUE PROCESS OF LAW, vol. 5, p. 520.

**81. Division of property.**—Board of Commissioners *v.* Lucas, 93 U. S. 108, 114, 23 L. Ed. 822.

A grant by the legislature to a county of a sum forfeited could be dispensed with by the legislature afterwards, as it was made for public, not private purposes, and to a public body. Maryland *v.* Baltimore, etc., R. Co., 3 How. 534, 551, 11 L. Ed. 714; East Hartford *v.* Hartford Bridge Co., 10 How. 511, 535, 13 L. Ed. 518.

The words "public purposes," are held in Kentucky to mean "governmental purposes." Covington *v.* Kentucky, 173 U. S. 231, 43 L. Ed. 679.

**82. Board of Commissioners *v.* Lucas,** 93 U. S. 108, 115, 23 L. Ed. 822. See Dartmouth College *v.* Woodward, 4 Wheat. 518, 595, 4 L. Ed. 629.

**83. Covington *v.* Kentucky,** 173 U. S. 231, 240, 43 L. Ed. 679.

**84. Von Hoffman *v.* Quincy,** 4 Wall. 535, 18 L. Ed. 403. See Dartmouth College *v.* Woodward, 4 Wheat. 518, 695, 4 L. Ed. 629.

**85. Federal taxation of revenues.**—United States *v.* Railroad Co., 17 Wall. 322, 329, 21 L. Ed. 597; Worcester *v.* Worcester Consolidated St. R. Co., 196 U. S. 539, 549, 49 L. Ed. 591. See the title CONSTITUTIONAL LAW, vol. 4, p. 210.

**86. Legality of business as affecting liability to taxation.**—Salt Lake City *v.* Hollister, 118 U. S. 256, 262, 30 L. Ed. 176.

A municipal corporation engaging in the business of distilling liquors is liable to pay the internal revenue tax under the laws of the United States, whether its acts in that respect are ultra vires or not. Salt Lake City *v.* Hollister, 118 U. S. 256, 30 L. Ed. 176. See, generally, the title REVENUE LAWS.

**87. Repeal of charter.**—Meriwether *v.* Garrett, 102 U. S. 472, 501, 26 L. Ed. 197.

**88. Municipal torts.**—Salt Lake City *v.* Hollister, 118 U. S. 256, 262, 30 L. Ed. 176.



tort could not be maintained against a municipal corporation.<sup>89</sup> In most states statutes give to a person injured through the negligence of a municipal corporation a remedy by action on the case for compensation.<sup>90</sup>

**B. Performance of Public Duty.**—As a general proposition there is a substantial distinction between the acts of a municipality as the agent of the state for the preservation of peace and the protection of persons and property, and its acts as the agent of its citizens for the care and improvement of the public property and the adaptation of the city for the purposes of residence and business. Questions respecting this distinction have usually arisen in actions against the municipality for the negligence of its officers, in which its liability has been held to turn upon the question whether the duties of such officers were performed in the exercise of public functions or merely proprietary powers.<sup>91</sup> To render municipal corporations liable to private actions for omission or neglect to perform a corporate duty imposed by general law on all towns and cities alike, and from the performance of which they derive no compensation or benefit in their corporate capacity, an express statute is doubtless necessary. But this rule does not exempt towns and cities from the liability to which other corporations are subject, for negligence in managing or dealing with property or rights held by them for their own advantage or emolument.<sup>92</sup>

**Liability for Negligence.**—See post, "Negligence," VIII, F.

**C. Legislative and Discretionary Functions.**—Municipal corporations are invested with certain powers which, from their nature are discretionary, and although it is the duty of such corporations to carry out such powers and make them beneficial, still it has never been held that an action on the case would lie against the corporation, at the suit of an individual, for the failure on their part to perform such a duty.<sup>93</sup>

**D. Lawful Exercise of Proper Power.**—If, in the exercise of the lawful powers and authority of a city, in a lawful way, an individual proprietor suffers inconvenience or is put to expense, the corporation is not liable for damages.<sup>94</sup> A municipal corporation, authorized by law to improve a street by building on the line thereof, a bridge over, or a tunnel under a navigable river, where it crosses the street, incurs no liability for the damages unavoidably caused to adjoining property by obstructing the street or the river, unless such liability be imposed by statute.<sup>95</sup> A sewer, constructed for the public good by a city to drain its own dock, without negligence, lawful in itself, and in the performance of a duty imposed by law, although it damages the property of an ad-

89. *Weightman v. Washington*, 1 Black 39, 50, 17 L. Ed. 52.

90. *Robbins v. Chicago*, 4 Wall. 657, 670, 18 L. Ed. 427.

91. **Performance of public duty.**—*Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 8, 43 L. Ed. 341; *South Carolina v. United States*, 199 U. S. 437, 461, 50 L. Ed. 261. See on this subject, *Weightman v. Washington*, 1 Black 39, 17 L. Ed. 52; *Barnes v. District of Columbia* (1875), 91 U. S. 540, 23 L. Ed. 440; *District of Columbia v. Woodbury* (1890), 136 U. S. 450, 480, 34 L. Ed. 472. But see *Workman v. New York City*, 179 U. S. 552, 573, 45 L. Ed. 314.

92. *South Carolina v. United States*, 199 U. S. 437, 461, 50 L. Ed. 261.

93. **Legislative and discretionary functions.**—*Weightman v. Washington*, 1 Black 39, 49, 17 L. Ed. 52.

Such as the power to adopt regulations or by-laws for the management of their own affairs, or for the preservation of the public health, or to pass ordinances pre-

scribing and regulating the duties of policemen and firemen, and for many other useful and important objects within the scope of their charters. *Weightman v. Washington*, 1 Black 39, 49, 17 L. Ed. 52.

94. **Lawful exercise of proper power.**—*Smith v. Washington*, 20 How. 135, 15 L. Ed. 858; *Transportation Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336.

95. *Transportation Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336.

It is undeniable that in making the improvement of which the plaintiffs complain, the city was the agent of the state, and performing a public duty imposed upon it by the legislature; and that persons appointed or authorized by law to make or improve a highway are not answerable for consequential damages, if they act within their jurisdiction and with care and skill, is a doctrine almost universally accepted alike in England and in this country. *Transportation Co. v. Chicago*, 99 U. S. 635, 641, 25 L. Ed. 336.



joining private proprietor, is *damnum absque injuria*.<sup>96</sup>

**E. Omission to Observe Its Own Laws—Injury Resulting.**—A legislative corporation, established as a part of the government of the country, is not liable for losses sustained by a nonfeasance, by an omission of the corporate body to observe a law of its own, in which no penalty is provided.<sup>97</sup> Thus it is not liable for losses consequent on its having misconstrued the extent of its powers, in granting a license, which it had no authority to grant, without taking that security for the conduct of the person obtaining the license, which its own ordinances had been supposed to require, and which might protect third parties.<sup>98</sup>

**F. Negligence.—In General.**—The authorities establishing the doctrine that a city is responsible for its mere negligence, are so numerous and so well considered, that the law must be deemed to be settled in accordance with them.<sup>99</sup> Where a municipal corporation has exclusive care and control of a certain duty, it is bound to a careful exercise of the duty, and is liable to any person injured in consequence of its negligence,<sup>1</sup> and if the duty is imposed in consideration of privileges granted, and if the means to perform it are within the control of the corporation, such corporation is liable to the public for an unreasonable neglect to comply with the requirement, as it is also liable for injuries to the persons or property of individuals.<sup>2</sup> This liability extends to injuries arising from neglect to perform the duty enjoined, or from negligence and unskillfulness in its performance.<sup>3</sup> A municipality is liable for damages resulting from negligence of its servants or agents in constructing and maintaining public works and improvements.<sup>4</sup> The law of Michigan is against any liability on the part of the city for injuries. Such adjudication as to the liability of a city for injuries caused, is not in harmony with the general rule in this country, nor in accord with the views expressed by the supreme court.<sup>5</sup> But failure of a municipal corporation in a duty which it owes to the public, or the negligent performance of such duty, does not render it liable to suit by an individual, solely on the ground of such negligence.<sup>6</sup>

**Voluntary Corporations Distinguished from Involuntary Quasi Corporations.**—A distinction is to be noted between the liability of a municipal

96. *Boston v. Lecraw*, 17 How. 426, 15 L. Ed. 118.

97. **Omission to observe its own laws—Injury resulting.**—*Fowle v. Alexandria*, 3 Pet. 398, 7 L. Ed. 719.

98. *Fowle v. Alexandria*, 3 Pet. 398, 7 L. Ed. 719. See the titles AUCTIONS AND AUCTIONEERS, vol. 2, p. 743; LICENSES, vol. 7, p. 869.

99. **Negligence.**—*Barnes v. District of Columbia*, 91 U. S. 540, 551, 23 L. Ed. 440, citing *Maxwell v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 445; *Dant v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 446; *Weightman v. Washington*, 1 Black 39, 17 L. Ed. 52; *Nebraska v. Campbell*, 2 Black 590, 17 L. Ed. 271; *Robbins v. Chicago*, 4 Wall. 657, 658, 18 L. Ed. 427; *Supervisors v. United States*, 4 Wall. 435, 18 L. Ed. 419; *Mayor v. Sheffield*, 4 Wall. 189, 194, 18 L. Ed. 416; *Detroit v. Osborne*, 135 U. S. 492, 34 L. Ed. 260.

1. *Chicago v. Robbins*, 2 Black 418, 17 L. Ed. 298.

2. *Weightman v. Washington*, 1 Black 39, 17 L. Ed. 52.

Municipal corporations upon which the duty is imposed to construct and repair, or to keep in repair streets and bridges, and upon which is also conferred the means of accomplishing such duty, are liable for any special damage arising from

their neglect to perform it. *Nebraska v. Campbell*, 2 Black 590, 17 L. Ed. 271, citing *Weightman v. Washington*, 1 Black 39, 17 L. Ed. 52.

3. *Weightman v. Washington*, 1 Black 39, 17 L. Ed. 52.

4. *District of Columbia v. Woodbury*, 136 U. S. 450, 457, 34 L. Ed. 472; *Water Co. v. Ware*, 16 Wall. 566, 574, 21 L. Ed. 485. See the titles BRIDGES, vol. 3, p. 516; STREETS AND HIGHWAYS.

**Neglect of gas company to repair gas box.**—See the titles GAS, vol. 6, p. 548.

**Rhode Island statute—Repair of highways and bridges.**—*Providence v. Clapp*, 17 How. 160, 15 L. Ed. 72. See the titles BRIDGES, vol. 3, p. 527; STREETS AND HIGHWAYS.

5. *Detroit v. Osborne*, 135 U. S. 492, 497, 34 L. Ed. 260. See *Barnes v. District of Columbia*, 91 U. S. 540, 552, 23 L. Ed. 440, citing *Maxwell v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 445; *Dant v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 446.

6. *Weightman v. Washington*, 1 Black 39, 17 L. Ed. 52.

Where the injury suffered is only in common with the rest of the public, an individual cannot maintain an action against a municipal corporation. In such cases the remedy is by indictment. *Weight-*

corporation, made such by acceptance of a village or city charter, and the involuntary quasi corporations known as counties, towns, school districts, and especially the townships of New England. The liability of the former is greater than that of the latter, even when invested with corporate capacity and the power of taxation. The latter are auxiliaries of the state merely, and, when corporations, are of the very lowest grade, and invested with the smallest amount of power. Whether this distinction is based upon sound principle or not, it is so well settled that it cannot be disturbed. Decisions or analogies derived from this source are of little value in fixing the liability of a city or a village.<sup>7</sup>

**Notice of Defect.**—A city is not liable for an injury caused by an obstruction in a street unless after notice thereof it fails in its duty to remedy the same.<sup>8</sup>

**Exemption from Liability.**—Where a corporation is sued for an injury growing out of negligence of the corporate authorities, in their care of the streets of the corporation, they cannot defend themselves on the ground that the formalities of the statute were not pursued in establishing the street originally.<sup>9</sup> Nor can it claim exemption from liability on the ground that the place where the tort was committed was not in proper form made a part of the city.<sup>10</sup>

**The usual rules apply as to proving or disproving negligence,** in cases where a municipality is sued to recover damages resulting from the negligence of its agents.<sup>11</sup> In considering whether due diligence was required of the city in a particular case, the jury ought to take into consideration the ordinances enacted by the city, not as prescribing a rule binding on the city, but as evidence on the question of negligence on its part.<sup>12</sup>

**G. Acts of Officers, Agents, etc.**—Whether the act of an agent is the act of and binding on the city depends upon his powers under the charter to act for the city, and whether he has acted in pursuance of them.<sup>13</sup> A municipal corporation is liable in tort, provided the act is done by the authority and order of the corporation or those branches of the government invested with authority to act for the corporation; but it must appear that the act was done by the express authority of the city, or bona fide in pursuance of a general authority on the subject.<sup>14</sup> A municipal corporation is responsible for acts done by its agents

man *v.* Washington, 1 Black 39, 17 L. Ed. 52.

**7. Voluntary corporations distinguished from involuntary quasi corporations.**—*Barnes v. District of Columbia*, 91 U. S. 540, 552, 23 L. Ed. 440; *Maxwell v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 445; *Dant v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 446.

**8. Notice of defect.**—*Mayor v. Sheffield*, 4 Wall. 189, 18 L. Ed. 416.

In a suit against a municipal corporation for injury by negligence, an instruction should charge notice to the city of the defect causing the injury, unless the evidence in the case is such as to establish such notice as matter of law. *Mayor v. Sheffield*, 4 Wall. 189, 18 L. Ed. 416.

**9. Exemption from liability.**—*Mayor v. Sheffield*, 4 Wall. 189, 18 L. Ed. 416.

**10.** *Mayor v. Sheffield*, 4 Wall. 189, 18 L. Ed. 416.

**11.** *District of Columbia v. Woodbury*, 136 U. S. 450, 457, 34 L. Ed. 472. See the title NEGLIGENCE.

**12.** *Providence v. Clapp*, 17 How. 160, 15 L. Ed. 72; *Lincoln v. Power*, 151 U. S. 436, 38 L. Ed. 224.

**13. Acts of officers, agents, etc.**—*Barnes v. District of Columbia*, 91 U. S. 540, 546,

23 L. Ed. 440, citing *Maxwell v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 445; *Dant v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 446.

**14.** *Barnes v. District of Columbia*, 91 U. S. 540, 555, 23 L. Ed. 440, citing *Maxwell v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 445; *Dant v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 446.

The act of congress of Feb. 21, 1871 (16 Stat. 419), creates a "municipal corporation" called "The District of Columbia." It provides for the appointment of an executive officer called a governor, and for a legislative assembly. It creates a board of public works, which is invested with the entire control of the streets of the district, their regulation and repair; and is composed of the governor of the district and four other persons appointed by the president of the United States, by and with the advice and consent of the senate, to hold their offices for the term of four years, unless sooner removed by the president. The board is empowered to disburse all moneys appropriated by congress or the district, or collected from property holders in pursuance of law, for the improvement of streets, avenues, etc.; and is required to make a report to the



in delicto, in the course of its business and of their employment, as an individual is responsible under similar circumstances; and actions against such corporations for injuries caused by the tortious acts of its agents in the course of its business and of their employment may be maintained.<sup>15</sup> A municipal corporation is liable for the acts of its officers, although such officers are appointed and paid by the legislative power, and not by the election of the municipality.<sup>16</sup>

**Ratification of unauthorized acts** may act as an estoppel where third persons are concerned, and if the act was within the power of the corporation, the defense of ultra vires cannot be raised on account of the absence of some proper formality.<sup>17</sup>

**H. Nuisance.**—Under the laws of Massachusetts, a city may be indicted for a public nuisance, and on conviction sentenced to pay a fine.<sup>18</sup> A city is liable to indictment for nuisance, where it fails in the discharge of its duties to the public so as to result in injuries to the citizens.<sup>19</sup> In a case where a city was sued for a nuisance caused by the discharge of mud and other obstructions from a sewer, and the claims for damages from that cause was abandoned, the plaintiff was left without any case to be submitted to the jury.<sup>20</sup>

**I. Collision Due to Negligence of Municipal Fire Boat.**—See the title COLLISION, vol. 3, p. 883.

**J. Destruction of Property to Prevent Spread of Fire.**—Property both real and personal may be destroyed if necessary, to avert or stay a general conflagration, and that, too, without recourse for the trespass.<sup>21</sup>

**K. Mob Violence.**—Municipal corporations are invested with authority to establish a police to guard against disturbance, and to prevent violence from any cause, and particularly from mobs and riotous assemblages. It is considered as a just burden cast upon them to require them to make good any loss sustained from the acts of such assemblages which they should have repressed. The imposition has been supposed to create, in the holders of property liable to taxation within their limits, an interest to discourage and prevent any movements tending to such violent proceedings.<sup>22</sup> The right to reimbursement for damages caused by a mob or riotous assemblage of people is not founded upon any contract between the city and the sufferers. Its liability for the damages is created by a law of the legislature, and can be withdrawn or limited at its pleasure.<sup>23</sup>

**The relators have no such vested right in the taxing power** of the city as to render its diminution by the state to a degree affecting the present col-

legislative assembly of the district, and to the governor, who is directed to lay the same before the president for transmission to congress. Held, that the board of public works is not an independent body acting for itself, but is a part of the municipal corporation; and that the District of Columbia is responsible to an individual who has suffered injury from the defective and negligent condition of its streets. *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. Ed. 440, citing *Maxwell v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 445; *Dant v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 446.

15. *Salt Lake City v. Hollister*, 118 U. S. 256, 30 L. Ed. 176.

16. *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. Ed. 440.

17. *Mayor v. Sheffield*, 4 Wall. 189, 18 L. Ed. 416.

18. **Nuisance.**—*Boston v. Lecraw*, 17 How. 426, 433, 15 L. Ed. 118. See the title NUISANCES.

19. *Richardson v. Boston*, 24 How. 188, 16 L. Ed. 625.

A city constructing a drain in such manner as to become a nuisance is liable for resulting injury to anyone injured thereby. *Richardson v. Boston*, 19 How. 263, 15 L. Ed. 639.

Although it may be the duty of a city to make drains along or under the streets, yet it cannot construct them so as to hinder the public use of them as streets, without being guilty of a nuisance. *Richardson v. Boston*, 19 How. 263, 15 L. Ed. 639. See the title DRAINS AND SEWERS, vol. 5, pp. 493, 494.

20. *Richardson v. Boston*, 24 How. 188, 16 L. Ed. 625.

21. **Right to destroy property to prevent spread of fire.**—*Sentell v. New Orleans, etc., R. Co.*, 166 U. S. 698, 705, 41 L. Ed. 1169. See the title FIRES, vol. 6, p. 290.

22. **Mob violence.**—*Louisiana v. New Orleans*, 109 U. S. 285, 287, 27 L. Ed. 936.

23. *Louisiana v. New Orleans*, 109 U. S. 285, 287, 27 L. Ed. 936.

The character is not at all changed by the fact that the amount of loss, in pe-



lection of their judgments a deprivation of their property in the sense of the constitutional prohibition.<sup>24</sup>

**L. Contribution as between Municipality and Joint Tort Feasor.**—Where a municipal corporation is held liable to an individual for injuries caused by its negligence, the city has a remedy over against a third person whose wrongdoing has caused the injury, unless the city concurred in the wrong.<sup>25</sup>

**M. Question of Law or Fact.**—Whether a city is liable for want of ordinary care and diligence in regard to a discharge of its municipal functions is a question of fact for the jury.<sup>26</sup>

## **IX. Governing Bodies, Administrative Boards and Officers and Agents.**

**A. Governing Bodies.**—In every municipal corporation the sovereign power is necessarily exercised by some person, body, or board or separate boards, etc., and the name, powers, and duties of these boards, etc., depend upon the charter of the corporation and the circumstances of the particular case.<sup>27</sup>

**Common Council.**—Whenever a power of any kind is conferred on a municipal corporation in any manner and no body, board, etc., is clothed with the right to exercise such power, the exercise thereof lies with the common council as the general agent of the corporation.<sup>28</sup>

**The appointment of committees** to superintend and consider the business of municipal corporations, lies with the city council unless such power is placed in other hands by the law governing the corporation.<sup>29</sup> There is no doubt that matters coming before a municipal board may be referred to a committee of its members to investigate more fully the subject matter under investigation.<sup>30</sup>

cuniary estimation, has been ascertained and established by the judgments rendered. The obligation to make indemnity created by the statute has no more element of contract in it because merged in the judgments than it had previously. *Louisiana v. New Orleans*, 109 U. S. 285, 27 L. Ed. 936.

**24.** *Louisiana v. New Orleans*, 109 U. S. 285, 289, 27 L. Ed. 936. See the title CONSTITUTIONAL LAW, vol. 4, p. 445.

**25. Contribution as between municipality and joint tort feasor.**—*Chicago v. Robbins*, 2 Black 418, 17 L. Ed. 298.

**26. Question of law and fact.**—*Providence v. Clapp*, 17 How. 160, 161, 15 L. Ed. 72. And see the title STREETS AND HIGHWAYS.

**27.** For an instructive case on this phase of municipal corporate control, see *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. Ed. 440.

Under some city charters, the city is governed by a board of trustees. *Sacramento v. Fowle*, 21 Wall. 119, 22 L. Ed. 592.

In *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. Ed. 440, the court held that, under the act then in question, the board of public works was not an independent body, acting for itself, but was a part of the municipal corporation of the District of Columbia, to which was given the exclusive control of the streets and alleys; that in those matters the board acts as the representative of the corporation, or is "like an ordinary agent of the corporation." *Brown v. District of Columbia*, 127 U. S. 579, 586, 32 L. Ed. 262.

In many of the boroughs and other municipal corporations in England, known as quasi corporations, the whole powers rest in a select body, or in select bodies, with powers to perpetuate their own corporate existing, by filling up vacancies in their own body; and such body or bodies constitute the corporation itself, and the meetings and acts done thereat are the meetings and acts of the corporation itself. In short, they constitute the corporation, so far as it has life or organization exclusively. *United States Bank v. Dandridge*, 12 Wheat. 64, 75, 6 L. Ed. 552.

There are corporations of another sort, where the aggregate body of corporators meet and assemble to discharge corporate functions, and have authority also to perform certain acts and duties, by means of different agents, sometimes designated in the statutes creating them, and sometimes left to their own choice. "Of this nature are the townships in New England, where the inhabitants are corporators, and assemble to exercise corporate powers, and have authority to appoint various officers to perform public duties, under the guidance and direction of the corporation. Such are the selectmen, for the ordinary municipal concerns; overseers of the poor, school committees, assessors of taxes, and various other functionaries." *United States Bank v. Dandridge*, 12 Wheat. 64, 76, 6 L. Ed. 552.

**28. Common council.**—*Quincy v. Cooke*, 107 U. S. 549, 27 L. Ed. 549.

**29.** *Bissell v. Jeffersonville*, 24 How. 287, 16 L. Ed. 664.

**30.** *Bissell v. Jeffersonville*, 24 How. 287, 209, 16 L. Ed. 664.

**Mode of Action.**—The mode of action of the governing body must conform to the charter of the corporation, and if action by ordinance is not required they may act by motion, resolution or order.<sup>31</sup>

**Delegation of Powers.**—The governing body of a municipal corporation cannot delegate to the government legislative or discretionary functions delegated to it by the legislature of the state unless expressly authorized to do so.<sup>32</sup> But such body, unless expressly restrained, may delegate those functions of a purely ministerial, executive or administrative character.<sup>33</sup>

**Power of Majority and Minority.**—As a general rule, it may be stated, that not only where the corporate power resides in a select body, as a city council, but where it has been delegated to a committee or agents, then, in the absence of special provisions otherwise, a minority of the select body, or of the committee or agents, are powerless to bind the majority or do any valid act. If all the members of the select body or committee, or if all of the agents are assembled, or if all have been duly notified, and the minority refuse or neglect to meet with the others, a majority of those present may act, provided those present constitute a majority of the whole number. In other words, in such a case, a major part of the whole is necessary to constitute a quorum, and a majority of the quorum may act. If the major part withdraw, so as to leave no quorum, the power of the minority to act is, in general, considered to cease.<sup>34</sup>

**B. Administrative Boards.**—When to a board having general administrative supervision of the affairs of a community, and with plenary power in the matter of appointment and removal of subordinates, is added the control of another department, and no express words of limitation are found in the act making the transfer, it is to be presumed that such board has the same plenary power in respect to this new department, and is not hampered by limitations attached to the board which theretofore had control of it. The presumption against implied repeal obtaining in the construction of ordinary statutes yields to the inferences arising from the subject matter of legislation. Plenary powers having been found by experience valuable in the management of affairs already under the control of the board, the transfer of another department to the same control carries with it a strong implication that the added department is subject to the same plenary powers. The primary thought is not a mere transfer of authority, but the bringing of the added department within the control of the general supervising board. It is unity of administration and not change of commission.<sup>35</sup>

**C. Municipal Officers and Agents**—1. **IN GENERAL.**—A municipal corporation can act only by its agents or servants.<sup>36</sup> This obvious truth does not imply that the acts must be done by inferior or subordinate agents, but, on the contrary, the higher the authority of the agent, the more evident is the responsibility of the principal.<sup>37</sup> The officers of municipal corporations are nothing more than local agents of the state.<sup>38</sup> However, a board, department or subordinate agency of a municipality, having only municipal and corporate duties to perform, acts in these matters as the agent of the municipality and not as a

31. **Mode of action.**—Atchison Board of Education *v.* DeKay, 148 U. S. 591, 37 L. Ed. 573.

32. **Delegation of powers.**—Hitchcock *v.* Galveston, 96 U. S. 341, 24 L. Ed. 659.

33. Hitchcock *v.* Galveston, 96 U. S. 341, 24 L. Ed. 659.

34. **Power of majority and minority.**—Brown *v.* District of Columbia, 127 U. S. 579, 586, 32 L. Ed. 262; United States *v.* Ballin, 144 U. S. 1, 7, 36 L. Ed. 321.

35. **Administrative boards.**—Eckloff *v.* District of Columbia, 135 U. S. 240, 243, 34 L. Ed. 120.

36. **Municipal officers and agents.**—

Barnes *v.* District of Columbia, 91 U. S. 540, 545, 23 L. Ed. 440; Maxwell *v.* District of Columbia, 91 U. S. 557, 23 L. Ed. 445; Dant *v.* District of Columbia, 91 U. S. 557, 23 L. Ed. 446. See, also, Clark *v.* Washington, 12 Wheat. 40, 54, 6 L. Ed. 541.

37. Barnes *v.* District of Columbia, 91 U. S. 540, 23 L. Ed. 440; Maxwell *v.* District of Columbia, 91 U. S. 557, 23 L. Ed. 445; Dant *v.* District of Columbia, 91 U. S. 557, 23 L. Ed. 446.

38. Commissioners *v.* Commissioners, 92 U. S. 307, 312, 23 L. Ed. 552.



public officer, although it may have full and exclusive power in the matters entrusted to it.<sup>39</sup>

**The office of mayor** of a city is one of personal confidence, as distinguished from one ministerial.<sup>40</sup>

2. **LEGISLATIVE CONTROL.**—The whole municipal authority emanates from the legislature, and its legislative charter indicates its extent, and regulates the distribution of its powers as well as the manner of selecting and compensating its agents.<sup>41</sup>

**The number, character and duties** of the various officers of municipal corporations are matters of legislative control.<sup>42</sup>

**The mode of appointing** officers to execute the powers with which municipal corporations are invested, are matters of legislative discretion.<sup>43</sup>

3. **APPOINTMENT OR ELECTION.**—The legislative charter of a municipal corporation regulates the manner of selecting and compensating its agents.<sup>44</sup> It is not necessary to a municipal government, or to municipal responsibility, that the officers should be elected by the people.<sup>45</sup> The officers of municipal corporations are either appointed by the proper authorities or elected by the people.<sup>46</sup> Officers appointed represent the municipality as fully as officers elected. When the legislature has declared how an officer is to be selected, and the officer is selected in accordance with that declaration, his acts, within the scope of the powers given him by the legislature, bind the municipality.<sup>47</sup>

39. *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. Ed. 440; *District of Columbia v. Woodbury*, 136 U. S. 450, 34 L. Ed. 472.

So held as to the board of public works of the District of Columbia. *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. Ed. 440; *District of Columbia v. Woodbury*, 136 U. S. 450, 34 L. Ed. 472.

40. *United States v. Addison*, 6 Wall. 291, 18 L. Ed. 919.

41. **Legislative control.**—*Barnes v. District of Columbia*, 91 U. S. 540, 23 L. Ed. 440; *Maxwell v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 445; *Dant v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 446.

42. *Bernards Tp. v. Morrison*, 133 U. S. 523, 33 L. Ed. 726.

It is competent for the legislature to determine by what agents a municipal corporation shall exert its powers. *Queensbury v. Culver*, 19 Wall. 83, 22 L. Ed. 100.

43. *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 33 L. Ed. 231. See post, "Appointment or Election," IX, C, 3.

44. **Appointment or election.**—*Barnes v. District of Columbia*, 91 U. S. 540, 23 L. Ed. 440; *Maxwell v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 445; *Dant v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 446.

45. *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 33 L. Ed. 231.

46. *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. Ed. 440; *Maxwell v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 445; *Dant v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 446.

The mayor of a city may be elected by the people, or he may be appointed by the

proper authorities. *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. Ed. 440; *Maxwell v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 445; *Dant v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 446.

47. *Bernards Tp. v. Morrison*, 133 U. S. 523, 33 L. Ed. 726; *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. Ed. 440; *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 33 L. Ed. 231.

Commissioners are not unfrequently appointed by the legislature or executive of a state for the administration of municipal affairs, or some portion thereof, sometimes temporarily, sometimes permanently. It may be demanded by motives of expediency or the exigencies of the situation; by the boldness of corruption, the absence of public order and security, or the necessity of high executive ability in dealing with particular populations. Such unusual constitutions do not release the people from the duty of obedience or from taxation, or the municipal body from those liabilities to which such bodies are ordinarily subject. Protection of life and property are enjoyed, perhaps in greater degree, than they could be, in such cases, under elective magistracies; and the government of the whole people is preserved in the legislative representation of the state or general government. *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 33 L. Ed. 231.

The mode of appointing the officers of the District of Columbia does not abrogate its character as a municipal body politic; the corporate capacity and corporate liabilities remain as before, and its character as a mere municipal corporation has not been changed by the change in the mode of selecting its officers. *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 33 L. Ed. 231.



4. **CONTEST OF ELECTION—OUSTER OF INTRUDER.**—An intruder into the office of mayor may be removed by quo warranto proceedings, and judgment of ouster in such proceedings.<sup>48</sup>

5. **REMOVAL FROM OFFICE.**—A general power to remove carries with it the right to remove at any time or in any manner deemed best, with or without notice.<sup>50</sup>

6. **AUTHORITY, POWERS AND DUTIES.**—Municipal officers are but agents clothed with a temporary authority.<sup>51</sup>

**The duties of city attorney** are to give legal advice to city officers and boards, and to prosecute and defend suit for the city.<sup>52</sup>

**Revocation or Enlargement of Powers.**—The officers being nothing more than local agents of the state, their powers may be revoked or enlarged and their acts may be set aside or confirmed at the pleasure of the paramount authority so long as private rights are not thereby violated.<sup>53</sup>

7. **OPERATION AND EFFECT OF ACTS OF OFFICERS AND AGENTS.**—Whether the act of an agent is the act of and binding on the city depends alone upon his powers under the charter to act for the city, and whether he has acted in pursuance of them.<sup>54</sup> The properly constituted authorities of a municipal corporation may bind the corporation whenever they have power to act in the premises.<sup>55</sup> Nor can it in principle be of the slightest consequences by what means the officer is placed in his position—whether elected by the people of the municipality, or appointed by the proper authority.<sup>56</sup> It is equally unimportant from what source he receives his compensation or whether he serves without any.<sup>57</sup>

**48. Contest of election—Ouster of intruder.**—United States *v.* Addison, 6 Wall. 291, 18 L. Ed. 919. See the title **QUO WARRANTO**.

C. being already duly in office as mayor, under a charter which prescribed that a mayor in office should "continue in office two years, and until a successor is duly elected," was returned by the judges of election as again elected. Upon the counting of the votes cast for the different candidates, the city councils (who had a power to elect where the candidates had an equal number of votes) declared that one A., a rival candidate, was elected; and A. was accordingly installed into office. In a proceeding by quo warranto, taken by the United States on the relation of C., judgment of ouster was rendered against A. Held, that C. thereupon became entitled to the office, either by virtue of the declaration of the judges who had returned him elected, or by virtue of that provision of the charter which enacted that the mayor shall hold over until his successor was elected. United States *v.* Addison, 6 Wall. 291, 18 L. Ed. 919.

**50. Removal from office.**—Eckloff *v.* District of Columbia, 135 U. S. 240, 34 L. Ed. 120.

The commissioners of the District of Columbia have power to remove a police officer without charges, notice or hearing, under the act of June 11, 1878, 20 Stat. 102, c. 180, by which the police force was placed under the control of the commissioners of the district. Eckloff *v.* District of Columbia, 135 U. S. 240, 34 L. Ed. 120.

**51. Authority, powers and duties.**—McDonogh *v.* Murdoch, 15 How. 367, 403, 14 L. Ed. 732.

"Nor do the officers perform their executive duties, except by the interposition of agents subordinate to their control and subject to their supervision." McDonogh *v.* Murdoch, 15 How. 367, 403, 14 L. Ed. 732.

**52.** Stone *v.* Bank, 174 U. S. 412, 43 L. Ed. 1028, reaffirmed in Fidelity Trust, etc., Co. *v.* Louisville, 174 U. S. 429, 43 L. Ed. 1034; Louisville *v.* Bank, 174 U. S. 439, 43 L. Ed. 1039.

**53. Revocation or enlargement of powers.**—Commissioners *v.* Commissioners, 92 U. S. 307, 312, 23 L. Ed. 552.

**54. Operation and effect of acts of officers and agents.**—Barnes *v.* District of Columbia, 91 U. S. 540, 546, 23 L. Ed. 440, citing Maxell *v.* District of Columbia, 91 U. S. 557, 23 L. Ed. 445; Dant *v.* District of Columbia, 91 U. S. 557, 23 L. Ed. 446; Rogers *v.* Burlington, 3 Wall. 654, 668, 18 L. Ed. 79, dissenting opinion.

**55.** Cincinnati *v.* Morgan, 3 Wall. 275, 18 L. Ed. 146. See, also, Anthony *v.* County of Jasper, 101 U. S. 693, 698, 25 L. Ed. 1005; Coler *v.* Cleburne, 131 U. S. 162, 173, 33 L. Ed. 146.

"To the extent of their authority they can bind the people and the property subject to their regulation and governmental control by what they do, but beyond their corporate powers their acts are of no effect." Ottawa *v.* Carey, 108 U. S. 110, 121, 27 L. Ed. 669.

**56.** Barnes *v.* District of Columbia, 91 U. S. 540, 545, 23 L. Ed. 440; Maxwell *v.* District of Columbia, 91 U. S. 557, 23 L. Ed. 445; Dant *v.* District of Columbia, 91 U. S. 557, 23 L. Ed. 446.

**57.** Barnes *v.* District of Columbia, 91 U. S. 540, 545, 23 L. Ed. 440, citing Max-

The protection of public corporation from unauthorized acts of their officers and agents is a matter of public policy in which the whole community is concerned, and those who aid in such transactions must do so at their peril.<sup>58</sup>

8. **TERMINATION OF OFFICE—HOLDING OVER.**—If a municipal corporation is created with limited existence, and no provision is made for the continuance or new election of the officers of such corporation, the functions of the existing officers will cease when their respective terms expire, and the corporation will be *de facto* extinct.<sup>59</sup> Although in ordinary cases, where an election has been omitted, officers may continue to act as officers *de facto* beyond their regular term (though not compellable to do so), and their acts will bind the corporation which they represent.<sup>60</sup>

9. **RESIGNATION.**—At common law the resignation of a municipal officer is not complete until the corporation manifest their acceptance of the offer to resign, which may be done by entry on the public books or by treating the office as vacated, as where they proceed to elect a successor.<sup>61</sup>

**A supervisor, town clerk, or justice of the peace**, although his resignation is tendered to and accepted by the proper authority, continues in office, and is not relieved from his duties, and responsibilities as a member of the board of auditors, under the township organization laws of the state of Illinois, until his successor is appointed, or chosen and qualified.<sup>62</sup>

**Resignation by Acceptance of Incompatible Offices.**—Where a person holding office accepts an office incompatible therewith, his acceptance operates *ipso facto* as a resignation of the former.<sup>63</sup>

10. **COMPENSATION.**—Services rendered by the officers of municipal corporations do not partake of the nature of contracts. The compensation depends upon the will of the municipal body empowered to make laws for the corporation, in the absence of charter or constitutional provision.<sup>64</sup>

## X. Legislative Control.

**A. In General.**—A municipal corporation is subject to the control of the legislature.<sup>65</sup>

**B. Local Government.**—1. **IN GENERAL.**—A state can regulate the local government of its municipal corporations or political subdivisions.<sup>66</sup>

2. **FORM OF GOVERNMENT.**—The form of municipal government is a matter of legislative discretion.<sup>67</sup>

**C. Territory.**—See ante, "Territory and Subdivisions," IV.

**D. Public Matters.**—1. **IN GENERAL.**—One of the highest attributes and

well *v.* District of Columbia, 91 U. S. 557, 23 L. Ed. 445; *Dant v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 446.

58. *Thomas v. Richmond*, 12 Wall. 349, 357, 20 L. Ed. 453.

59. **Termination of office—Holding over.**—*Barkley v. Levee Comm'rs*, 93 U. S. 258, 23 L. Ed. 893.

60. *Barkley v. Levee Comm'rs*, 93 U. S. 258, 263, 23 L. Ed. 893, construing Louisiana act of 1858, with reference to state and parish officers.

**California towns.**—In the interval between the qualification and entering into office of the new mayor of a California town, the outgoing may continue to hold office. *Waite v. Sante Cruz*, 184 U. S. 302, 46 L. Ed. 552.

61. **Resignation.**—*Edwards v. United States*, 103 U. S. 471, 26 L. Ed. 314. See the title **PUBLIC OFFICERS**.

**The common law exists in Michigan.**—*Edwards v. United States*, 103 U. S. 471, 26 L. Ed. 314.

62. *Badger v. United States*, 93 U. S. 599, 23 L. Ed. 991.

63. **Resignation by acceptance of incompatible officers.**—*United States v. Saunders*, 120 U. S. 126, 30 L. Ed. 594.

64. **Compensation.**—*Butler v. Pennsylvania*, 10 How. 402, 418, 13 L. Ed. 479.

65. **Legislative control.**—*Williams v. Eggleston*, 170 U. S. 304, 210, 42 L. Ed. 1047; *Atkin v. Kansas*, 191 U. S. 207, 220, 48 L. Ed. 148; *Dartmouth College v. Woodward*, 4 Wheat. 518, 695, 4 L. Ed. 629; *Commissioners v. Commissioners*, 92 U. S. 307, 310, 23 L. Ed. 552.

66. **Local government.**—*Gardner v. Michigan*, 199 U. S. 325, 334, 50 L. Ed. 212; *Missouri v. Lewis*, 101 U. S. 22, 30, 25 L. Ed. 989.

67. **Form of government.**—*Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 8, 33 L. Ed. 231.

duties of a legislature is to regulate public matters with all public bodies, no less than the community, from time to time, in the manner which the public welfare may appear to demand.<sup>68</sup>

2. **PUBLIC WORKS.**—It belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on behalf of its municipalities. No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern.<sup>69</sup>

**E. Powers.**—See ante, "Legislative Control and Regulation," V, F.

**F. Officers and Agents.**—See ante, "Legislative Control," X.

**G. Contracts and Indebtedness.—Impairment of Obligation.**—See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 758.

**H. Property.**—See ante, "Legislative Control," VII, E.

1. **Power of Taxation and Revenues**—1. **IN GENERAL.**—The legislature has plenary power over the revenues of a municipal corporation and may prescribe or alter their source at will.<sup>70</sup>

2. **DIRECTING PAYMENT OF INVALID CLAIM.**—The legislature may direct a municipal corporation to assume and pay a particular claim or obligation not legally binding for want of some formality in its creation and which could not be enforced in the courts of law or equity, but for which the corporation has received an equivalent.<sup>71</sup>

The state has plenary power to modify the method of internal government of its municipal corporation. *Amy v. Watertown*, No. 1, 130 U. S. 301, 319, 32 L. Ed. 946. See, also, *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197.

**68. Public matters.**—*East Hartford v. Hartford Bridge Co.*, 10 How. 511, 534, 13 L. Ed. 518.

"The work being of a public character, absolutely under the control of the state and its municipal agents acting by its authority, it is for the state to prescribe the conditions under which it will permit work of that kind to be done. Its action touching such a matter is final so long as it does not, by its regulations, infringe the personal rights of others." *Atkin v. Kansas*, 191 U. S. 207, 224, 48 L. Ed. 148.

**69. Public works.**—*Atkin v. Kansas*, 191 U. S. 207, 222, 48 L. Ed. 148.

**70. Power of taxation and revenues.**—*Essex Public Road Board v. Skinkle*, 140 U. S. 334, 35 L. Ed. 446.

The power of taxation which the legislature of a state possesses may be exercised to any extent upon property within its jurisdiction, except as specially restrained by its own or the federal constitution; and its power of appropriation of the moneys raised is equally unlimited. It may appropriate them for any purpose which it may regard as calculated to promote the public good. Of the expediency of the taxation or the wisdom of the appropriation it is the sole judge. The power which it may thus exercise over the revenues of the state it may exercise over the revenues of a city, for any purpose connected with its present or past condition, except as such revenues may, by the law creating them, be devoted to

special uses; and, in imposing a tax, it may prescribe the municipal purpose to which the moneys raised shall be applied. *New Orleans v. Clark*, 95 U. S. 644, 654, 24 L. Ed. 521.

Generally, as to legislative control of power of taxation conferred upon municipalities, see the titles CONSTITUTIONAL LAW, vol. 4, p. 413; IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 758; TAXATION.

**Counties.**—See the title COUNTIES, vol. 4, p. 833.

**Police benefit fund.**—See the title CONSTITUTIONAL LAW, vol. 4, p. 430.

**71. Directing payment of invalid claim.**—*Worcester v. Worcester Consolidated St. R. Co.*, 196 U. S. 539, 549, 49 L. Ed. 591; *New Orleans v. Clark*, 95 U. S. 644, 654, 24 L. Ed. 521; *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528, 43 L. Ed. 796; *Utter v. Franklin*, 172 U. S. 416, 43 L. Ed. 498. See the titles MUNICIPAL, COUNTY, STATE AND FEDERAL AID; MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

In the exercise of this jurisdiction over municipal corporations by the state or by the territorial legislature no constitutional principle is violated. It is a jurisdiction which has been customarily exercised ever since the foundation of the government, and is based upon the power of the state, as sovereign, to itself recognize or to compel any of its political subdivisions to recognize those obligations which, while not cognizable in any court of law, are yet based upon considerations so thoroughly equitable and moral as to deserve and compel legislative recognition. *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528, 537, 43 L. Ed. 796. See *New Orleans v. Clark*, 95



3. **LEVYING TAX TO PAY CLAIM.**—The legislature has power to levy a tax upon the taxable property of a town, and appropriate the same to the payment of a claim made by an individual against the town.<sup>72</sup>

**J. Power to Impose Burdens.**—The legislature may not impose additional burdens on a municipal corporation, in excess of those imposed in its charter, without its consent, but when it has consented, such imposition is valid.<sup>73</sup>

**K. Curative Statutes**—1. **IN GENERAL.**—A municipal act, invalid when

U. S. 644, 24 L. Ed. 521, where it is held not to violate a constitutional prohibition against retroactive laws.

"In directing, therefore, a particular tax by such corporation, and the appropriation of the proceeds to some special municipal purpose, the legislature only exercise a power through its subordinate agent which it could exercise directly; and it does this only in another way when it directs such corporation to assume and pay a particular claim not legally binding for want of some formality in its creation, but for which the corporation has received an equivalent." *New Orleans v. Clark*, 95 U. S. 644, 654, 24 L. Ed. 521; *Worcester v. Worcester Consolidated St. R. Co.*, 196 U. S. 539, 549, 49 L. Ed. 591; *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528, 534, 43 L. Ed. 796.

"The books are full of cases where claims, just in themselves, but which, from some irregularity or omission in the proceedings by which they were created, could not be enforced in the courts of law, have been thus recognized and their payment secured." *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528, 534, 43 L. Ed. 796; *New Orleans v. Clark*, 95 U. S. 644, 24 L. Ed. 521; *Read v. Plattsouth*, 107 U. S. 568, 27 L. Ed. 414.

**De facto or de jure officers.**—The fact that the claims were not incurred by officers of either a *de jure* or *de facto* government, is immaterial. *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528, 538, 43 L. Ed. 796.

**The territorial legislature of Oklahoma had power to create a special tribunal for hearing and deciding upon claims against a municipal corporation, which have no legal obligation, and which, therefore, could not be enforced in a court, but which the legislature thinks have sufficient equity and are based upon a sufficiently strong moral obligation to make it proper for it to provide for their investigation and for the payment of such as are decided to be proper, by taxation upon the property situated in the city.** *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528, 534, 43 L. Ed. 796.

If the claims were without merit or fraudulent there was opportunity to show such fact before the commission and also before the district court upon the hearing provided for by the act. *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528, 538, 43 L. Ed. 796.

It would be immaterial if by the act there was no opportunity provided for any investigation of these claims by the district court after the commission has re-

ported the claims to that court, but the statute referred to provides in § 4 that the commission shall make a report to the district court, showing the names of the claimants and the amounts allowed by the commission, and also all the claims and the names of persons and amounts disallowed by them, and this report the statute directs shall be made "for the approval or disapproval of the district court." The report need contain nothing but what has just been stated. *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528, 538, 43 L. Ed. 796.

As the report of the commission is to be made to the district court for its approval or disapproval, it follows as of necessity that the court has power to investigate for itself the facts upon which the claims were founded in order that it may intelligently approve or disapprove of the decisions of the commission. The court must have power, in the necessary discharge of its duty to approve or disapprove, to ascertain the facts necessary to an intelligent discharge of that duty. These facts may be found by the court without a jury. As the statute does not provide for a report of the facts found by the commission upon which it based the allowance or disallowance of the claims or any of them, the court must itself find them, in order to approve or disapprove. *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528, 538, 43 L. Ed. 796.

**72. Levying tax to pay claim.**—*United States v. Railroad Co.*, 17 Wall. 322, 332, 21 L. Ed. 597.

"It is not a valid objection to the exercise of such power, that the claim to satisfy which the tax is levied is not recoverable by action against the town." *United States v. Railroad Co.*, 17 Wall. 322, 332, 21 L. Ed. 597.

"It does not alter the case that the claim has been rejected by the voters of the town, when submitted to them at a town meeting, under an act of the legislature authorizing such submission and declaring that their decision should be final and conclusive." *United States v. Railroad Co.*, 17 Wall. 322, 332, 21 L. Ed. 597.

**73. Power to impose burdens.**—*Girard v. Philadelphia*, 7 Wall. 1, 14, 19 L. Ed. 53.

"In this case the corporation has assented to accept the changes, assume the burdens, and perform the duties imposed upon it; and it is difficult to conceive how they can have forfeited their right to the charities which the law makes it their duty to administer." *Girard v. Philadelphia*, 7 Wall. 1, 14, 19 L. Ed. 53.

made, may be ratified and validated by subsequent legislation.<sup>74</sup> Generally legislative recognition of an act of a municipal corporation validates the act, although it may not have had full prior legal authority.<sup>75</sup>

**Ratification Left to Council.**—The legislature may leave the matter entirely optional with the common council, as the representatives of the city, to ratify and affirm the contract and by so doing give the same effect to it and to all the proceedings that led to it, as if the authority to make it had been coeval with the attempt to do so.<sup>76</sup>

2. **STATUTE PASSED IN AID OF CONFEDERATE GOVERNMENT.**—A power exercised by a municipal corporation, not within the usual powers, express or implied, of such a corporation, and not within its charter powers, cannot be made of any effect by a state statute, passed in aid of the Confederate government.<sup>77</sup>

### XI. Judicial Control.

The courts cannot inquire into the motives of the legislative body of a municipality in passing ordinances, except as they may be disclosed on their face, or enforceable from their operation, considered with reference to the conditions of the municipality and existing legislation. The motives of the legislators considered as the purpose they had in view will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducement for their votes, will vary with the different members of the legislative body. The difference in character of such motives and the impossibility of penetrating into the hearts of men and ascertaining the truth precludes all such inquiries as impracticable and futile.<sup>78</sup>

### XII. Presentation and Allowance of Claims.

See the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 870.

### XIII. Ratification, Estoppel and Laches.

**A. Ratification and Waiver**—1. **POWER, MODE AND REQUISITES.**—A municipal corporation may ratify an act or contract previously unauthorized by it or irregularly made,<sup>79</sup> and, like an individual, it may ratify an act or contract, within the scope of its authority, but it was done or made without or in excess of authority by its officers or agents;<sup>80</sup> and such ratification may, in many cases be inferred from acquiescence in those acts, as well as from express adoption.<sup>81</sup> Such ratification may be by express consent, or by acts and conduct of the principal inconsistent with any other hypothesis than that he approved, and in-

**74. Curative statutes.**—*Campbell v. Kenosha*, 5 Wall. 194, 18 L. Ed. 610; *Bissell v. Jeffersonville*, 24 How. 287, 295, 16 L. Ed. 664; *Beloit v. Morgan*, 7 Wall. 619, 627, 19 L. Ed. 205; *Lee County v. Rogers*, 7 Wall. 181, 188, 19 L. Ed. 160. See the title **CONSTITUTIONAL LAW**, vol. 4, pp. 452, 459. See, also, the titles **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 758; **MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES**.

The subsequent act entirely obviates all the mistakes and irregularities in the prior proceedings. *St. Joseph Tp. v. Rogers*, 16 Wall. 644, 664, 21 L. Ed. 328; *Bissell v. Jeffersonville*, 24 How. 287, 295, 16 L. Ed. 664.

**Elections.**—See the title **CONSTITUTIONAL LAW**, vol. 4, p. 458.

**75. Street v. United States**, 133 U. S. 299, 307, 33 L. Ed. 631; *Beloit v. Morgan*, 7 Wall. 619, 624, 19 L. Ed. 205.

**76. Ratification left to council.**—*Bissell*

*v. Jeffersonville*, 24 How. 287, 295, 16 L. Ed. 664.

**77. Statute passed in aid of confederate government.**—*Thomas v. Richmond*, 12 Wall. 349, 20 L. Ed. 453. See the title **ILLEGAL CONTRACTS**, vol. 6, p. 737.

**78. Judicial control.**—*Soon Hing v. Crowley*, 113 U. S. 703, 28 L. Ed. 1145.

**79. Power, mode and requisites.**—*Bloomfield v. Charter Oak Bank*, 121 U. S. 121, 135, 30 L. Ed. 923.

**80. Supervisors v. Schenck**, 5 Wall. 772, 782, 18 L. Ed. 556; *Bloomfield v. Charter Oak Bank*, 121 U. S. 121, 135, 30 L. Ed. 923.

**81. Supervisors v. Schenck**, 5 Wall. 772, 782, 18 L. Ed. 556.

**Preliminary proceeding to subscription to railroad stock.**—See the title **MUNICIPAL, COUNTY, STATE AND FEDERAL AID**. See, also, the title **MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES**.



tended to adopt, what had been done in his name.<sup>82</sup>

**Conditions.**—It may be fairly said that, while a municipal corporation may not ratify a contract into which it had no power to enter, and may not waive a condition put by the legislature upon the exercise of a given power, yet it may well waive a condition made by itself and not a condition upon the exercise of the power. Such a waiver is not an attempt to ratify a void contract, but is rather an admission that the condition has been complied with in an equitable sense.<sup>83</sup>

**Act or Contract without Scope of Corporate Powers.**—A municipality cannot estop itself to set up as a defense that any particular act or contract was not within the scope of its corporate powers.<sup>84</sup>

**Ultra Vires Contracts.**—A municipal corporation cannot ratify a contract into which it had no power to enter.<sup>85</sup>

**Conditions Imposed by Legislature.**—A municipal corporation cannot waive a condition put by the legislature upon the exercise of a given power.<sup>86</sup>

**Charter or Statutory Requirement as to Mode of Contracting.**—A municipal corporation cannot by means of a subsequent ratification nullify a municipal requirement of a statute or its charter as to the mode of entering into contracts.<sup>87</sup>

**Knowledge of Facts.**—Any ratification of an act previously unauthorized must, in order to bind the municipality, be with full knowledge of all the material facts.<sup>88</sup>

2. **EFFECT.**—A subsequent ratification is as good as a previous authority,<sup>89</sup> and can have no greater force than a previous authority.<sup>90</sup>

**B. Estoppel.**—A municipal corporation may equitably estop itself.<sup>91</sup>

**Asquiescence** by a town in legislative control over a public franchise, will estop the town to deny that it is a public franchise.<sup>92</sup>

**C. Laches.**—See the titles *ESTOPPEL*, vol. 5, p. 1000; *LACHES*, vol. 7, p. 822.

#### XIV. Remedies.

**A. Proceedings in Equity.—Extinguished Corporation.**—The remedy of

82. *Supervisors v. Schenck*, 5 Wall. 772, 782, 18 L. Ed. 556.

Where the officers of the corporation openly exercise powers affecting the interests of third persons, which presuppose a delegated authority for the purpose, and other corporate acts subsequently performed show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. *Supervisors v. Schenck*, 5 Wall. 772, 783, 18 L. Ed. 556; *United States Bank v. Dandridge*, 12 Wheat. 64, 70, 6 L. Ed. 552.

83. **Conditions.**—*Graves v. Saline County*, 161 U. S. 359, 374, 40 L. Ed. 732. See the title *ESTOPPEL*, vol. 5, p. 1000.

84. **Act or contract without scope of corporate powers.**—*Lake County v. Graham*, 130 U. S. 674, 32 L. Ed. 1065. See, also, the title *CORPORATIONS*, vol. 4, p. 747.

Where the act of an agent of a municipal corporation is beyond his authority, such act cannot be ratified by the city where the city had no power in itself to do the act ratified. *Marsh v. Fulton County*, 10 Wall. 676, 19 L. Ed. 1040.

85. **Ultra vires contracts.**—*Graves v. Saline County*, 161 U. S. 359, 374, 40 L. Ed. 732.

86. **Conditions imposed by legislature.**—*Graves v. Saline County*, 161 U. S. 359, 374, 40 L. Ed. 732.

87. **Charter or statutory requirement as to mode of contracting.**—*Bloomfield v. Charter Oak Bank*, 121 U. S. 121, 135, 30 L. Ed. 923.

88. **Knowledge of facts.**—*Bloomfield v. Charter Oak Bank*, 121 U. S. 121, 135, 30 L. Ed. 923.

Where a municipal corporation acts in ignorance of its rights, it shall not be prejudiced by such acts. *New Orleans v. United States*, 10 Pet. 662, 9 L. Ed. 573.

89. **Subsequent ratification.**—*Supervisors v. Schenck*, 5 Wall. 772, 782, 18 L. Ed. 556.

90. *Daviess County v. Dickinson*, 117 U. S. 657, 29 L. Ed. 1026.

91. **Equitable estoppel.**—See the titles *CORPORATIONS*, vol. 4, pp. 747, 748; *ESTOPPEL*, vol. 6, p. 1000.

**Extension of franchise of street railway.**—See the title *STREET RAILWAYS*.

**To assess taxes by withholding title.**—See the titles *ESTOPPEL*, vol. 6, p. 971; *TAXATION*.

**Estoppel with respect to validity of municipal securities.**—See the title *MUNICIPAL COUNTY STATE AND FEDERAL SECURITIES*.

92. **Asquiescence.**—*East Hartford v.*



the creditors of the extinguished corporation is, in equity, against the corporations succeeding to its property and powers.<sup>93</sup>

**Apportionment of Liabilities.**—Where the legislature divides a municipal corporation and apportions the liabilities of the same between the old and the new corporations, a court of equity has jurisdiction to enforce such apportionment.<sup>94</sup>

**Injunction—Ultra Vires Acts.**—A municipal corporation may be restrained by injunction from exercising functions that are ultra vires at the suit of one injured, or about to be injured by their action.<sup>95</sup>

**B. Form of Action—Parties.**—In Pennsylvania it seems that it is proper to sue “the mayor, aldermen, and citizens,” of a city—and if the suit is for a sum certain of money due on contract, the form of the action is debt.<sup>96</sup>

**C. Process against Municipal Corporations.**—See the title SUMMONS AND PROCESS.

**D. Pleading.**—Where suit is brought on a contract made by a city, where the laws regulating it require the consent of two-thirds of its electors to validate debt for borrowed money, such consent need not be averred on the plaintiff's part. If with such sanction the debt would be obligatory, the sanction will, primarily, be presumed. Its nonexistence, if it does not exist, is matter of defense, to be shown by the defendant.<sup>97</sup>

**E. Satisfaction of Judgment.**—In some states, statutory provision is made that a tax must be levied to pay the claim of a judgment creditor,<sup>98</sup> and that a judgment creditor is entitled to the amount of his judgment and costs in the ordinary evidences of indebtedness issued by that corporation.<sup>99</sup>

**Mandamus is the remedy to enforce levy and collection** of a tax to satisfy judgment against a city.<sup>1</sup> The courts cannot issue a writ to the marshal commanding him to levy a tax upon the inhabitants of a municipal corporation, or upon their private property. The court has no more authority, in point of law, to seize the property of citizens for the debt of the corporation in which

Hartford Bridge Co., 10 How. 511, 537, 13 L. Ed. 518.

**93. Extinguished corporation.**—Mount Pleasant v. Beckwith, 100 U. S. 514, 25 L. Ed. 699.

“If a municipal corporation upon the surrender, or extinction in other ways, of its charter, is possessed of any property, a court of equity will equally take possession of it for the benefit of the creditors of the corporations.” Broughton v. Pensacola, 93 U. S. 266, 269, 23 L. Ed. 896.

**94. Apportionment of liabilities.**—Where the legislature creates a city, carving it out of a region previously a town only, and enacts that all bonds which had been previously issued by the town should be paid when the same fell due, by the city and town, in the same proportions as if said town and city were not dissolved, and that if either at any time pays more than its proportion, the other shall be liable therefor, a bill will lie in equity to enforce payment by the two bodies respectively, in the proportion which the assessment rolls show that the property in one bears to the property in the other. A bondholder is not confined to mandamus or other legal remedies, if such exist. Morgan v. Beloit, 7 Wall. 613, 19 L. Ed. 203. See ante, “Apportionment of Property and Burdens,” IV, C, 4, c.

**95. Ultra vires acts.**—East Hartford v. Hartford Bridge Co., 10 How. 511, 13 L.

Ed. 518. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

Unless otherwise provided by legislative enactment, a resident taxpayer has the right to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt which he in common with other property holders may otherwise be compelled to pay. Crampton v. Zabriskie, 101 U. S. 601, 25 L. Ed. 1070. See, generally, the title INJUNCTIONS, vol. 6, p. 1022.

**96. Form of action—Parties.**—Amey v. Allegheny City, 24 How. 364, 16 L. Ed. 614.

**97. Pleading.**—Gelpcke v. Dubuque, 1 Wall. 221, 17 L. Ed. 531. See the title PLEADING.

Generally, as to a declaration on a contract, see the title CONTRACTS, vol. 4, p. 593.

**98. Satisfaction of judgment.**—Supervisors v. United States, 18 Wall. 71, 21 L. Ed. 771.

**99. Supervisors v. United States,** 18 Wall. 71, 21 L. Ed. 771.

**1. Morgan v. Beloit,** 7 Wall. 613, 618, 19 L. Ed. 203; Rees v. Watertown, 19 Wall. 107, 23 L. Ed. 72; Barkley v. Levee Comm'rs, 93 U. S. 258, 265, 23 L. Ed. 893. See the title MANDAMUS, ante, p. 67, et seq.

they reside (except in some of the Eastern States, where a different system prevails) than it has to seize the property of another corporation.<sup>2</sup>

**Remedies a Part of Contract.**—A debt incurred by a municipal corporation cannot be collected by a remedy which is directly in violation of a statute in existence and known to the creditor when the debt was incurred.<sup>3</sup>

**F. Conclusiveness of Judgment.**—See the title RES ADJUDICATA.

2. *Barkley v. Levee Comm'rs*, 93 U. S. 258, 265, 23 L. Ed. 893; *Rees v. Watertown*, 19 Wall. 107, 22 L. Ed. 72. See ante, "Liability of Property for Debts," VII, D. See the title MANDAMUS, ante, p. 67, et seq.

3. **Remedies a part of contract.**—*Rees v. Watertown*, 19 Wall. 107, 22 L. Ed. 72.

**Tax to pay judgment.**—Although a mandamus, and alias mandamus, and pluries mandamus, commanding a city to levy and collect a tax upon the taxable property of its citizens in it, to pay judgments which the relator in the mandamus has obtained against it, have all, in con-

sequence of the devices of the city authorities, such as resignation of their offices, etc., proved unavailing to compel the levy and collection of the tax, and though "the prospect of future success" by the same writ "is perhaps not flattering," the federal courts sitting in equity do not possess power to appoint the marshal to levy and collect the tax, nor to subject the taxable property situate within the corporate limits of the city in any way to an assessment in order to pay the judgment, *Rees v. Watertown*, 19 Wall. 107, 22 L. Ed. 72.

# MUNICIPAL, COUNTY, STATE AND FEDERAL AID.

BY CHAS. W. FOURL.

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As to United States supreme court following state court decisions as to constitutionality of statutes authorizing municipal aid, see the title **COURTS**, vol. 4, p. 1053. As to issue of stock directly to individual taxpayers, see the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 854. As to power of legislature to pass a law imposing a tax on personalty to pay municipal aid bonds when original act provided for tax on real estate only, see the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 851. As to withdrawal of power of taxation to pay municipal aid bonds, see the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 850. As to impairment of municipal aid contracts generally, see the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, pp. 813, 847, 877.

As to constitutional restriction taking away authority to issue bonds in payment of subscription previously voted, see the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 814. As to payment of municipal aid bonds in gold, see the titles **MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES; PAYMENT**. As to effect of recitals in municipal aid bonds, see the title **MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES**. As to whether municipal aid bonds issued without a seal are binding, see the title **MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES**. As to public land granted to aid railroads, see the title **PUBLIC LANDS**. As to lien of municipality on railroad, see the title **RAILROADS**. As to the power of a nonresident bondholder to remove a suit for an injunction to restrain the levy and collection of a tax to the United States circuit court, see the title **REMOVAL OF CAUSES**.

### I. Legislative Power to Authorize Municipal Aid.

**A. Independent of Express Constitutional Limitations**—1. **IN GENERAL**.—The legislature of a state, unless restrained by constitutional limitations, has the right to authorize a municipal corporation to take stock in a railroad or other work of internal improvement, to borrow money to pay for it, and to levy a tax to repay the loan,<sup>1</sup> but since debts contracted by municipal corporations must be paid, if paid at all, out of taxes which they may lawfully levy, it follows that the right of the legislature to authorize municipal corporations to issue bonds to aid various enterprises depends on the power to levy a tax for that purpose;<sup>2</sup> and since there can be no lawful tax which is not laid for a public purpose,<sup>3</sup> it follows that it cannot be exercised in aid of enterprises strictly private, for the benefit of individuals, though in a remote or collateral way the local public may be benefited thereby.<sup>4</sup> Whether a use is public or private is not a question of constitutional construction, but is a question of general law.<sup>5</sup>

2. **AID TO TURNPIKES AND CANALS**.—Aid given for the construction of a turnpike or canal, is for a public purpose and is a legitimate exercise of legislative power, unless the power be expressly denied.<sup>6</sup>

1. **Legislature may authorize municipal aid unless restricted by constitution**.—*Thompson v. Perrine*, 103 U. S. 806, 812, 26 L. Ed. 612; *Otoe County v. Baldwin*, 111 U. S. 1, 15, 28 L. Ed. 331; *Thompson v. Lee County*, 3 Wall. 327, 18 L. Ed. 177; *Campbell v. Kenosha*, 5 Wall. 194, 18 L. Ed. 610. See post, "Aid to Railroads," I, A, 7.

**Federal aid to the Pacific railroads**.—Under the limited powers conferred by the federal constitution, congress has frequently given aid in such cases. The Pacific railroads and the Louisville canal furnish instances of such action by that body. The gift to the sufferers from the overflow of the Mississippi, and prior acts of the kind, must also be borne in mind. *Pine Grove Tp. v. Talcott*, 19 Wall. 666, 667, 22 L. Ed. 227.

2. **Right of legislature depends on right of taxation**.—*Loan Ass'n v. Topeka*, 20 Wall. 655, 660, 22 L. Ed. 455.

3. **Taxation must be for a public purpose**.—*Loan Ass'n v. Topeka*, 20 Wall. 655, 664, 22 L. Ed. 455. See, generally, the title **TAXATION**.

If municipal corporations have a fund or other property out of which they can pay the debts which they contract, without resort to taxation, it may be within the power of the legislature of the state to authorize them to use it in aid of projects strictly private or personal, but which would in a secondary manner contribute

to the public good; or where there is property or money vested in a corporation of the kind for a particular use, as public worship or charity, the legislature may pass laws authorizing them to make contracts in reference to this property, and incur debts payable from that source. *Loan Ass'n v. Topeka*, 20 Wall. 655, 659, 22 L. Ed. 455.

4. **Aid to private enterprises prohibited**.—*Loan Ass'n v. Topeka*, 20 Wall. 655, 22 L. Ed. 455. See post, "Aid to Private Manufacturer," I, A, 4.

**Legislature cannot authorize private aid**.—"The strongest advocates for the validity of these laws never placed it on the ground of the unlimited power in the state legislature to tax the people, but conceded that where the purpose for which the tax was to be issued could no longer be justly claimed to have a public character, but was purely in aid of private or personal objects, the law authorizing it was beyond the legislative power, and was an unauthorized invasion of private right." *Loan Ass'n v. Topeka*, 20 Wall. 655, 662, 22 L. Ed. 455; *Olcott v. Supervisors*, 16 Wall. 678, 689, 21 L. Ed. 382.

5. **Question of public use, one of general law**.—*Olcott v. Supervisors*, 16 Wall. 678, 690, 21 L. Ed. 382.

6. **Construction of turnpikes or canals**.—*Railroad Co. v. County of Otoe*, 16 Wall. 667, 673, 21 L. Ed. 375.



3. **AID TO PLANK ROADS.**—Legislative authority given to a municipality to borrow money for any public purpose, authorizes the municipality to borrow money to aid the construction of a plank road, leading from, extending to or passing through the municipality furnishing the aid.<sup>7</sup>

4. **AID TO PRIVATE MANUFACTURER.**—The legislature has no authority to authorize a municipality to lend its bonds to assist private persons in conducting a private manufacturing business,<sup>8</sup> like a rolling mill,<sup>9</sup> or a foundry and machine shop,<sup>10</sup> unless given authority by the constitution of the state.<sup>11</sup> The fact that the municipal authorities paid one installment of interest upon bonds issued in aid of private manufactures, by means of a levy of taxes, does not alter the case. It works no estoppel.<sup>12</sup> A private corporation, however, as well as individuals, may be employed by a city in the construction of works needed for the health, comfort, and convenience of its citizens; and, though such works may be used by the corporation for its own gain, yet, as they advance the public good, the corporation may be properly aided in their construction by the city; and for that purpose its obligations may be issued, unless some constitutional or legislative provision stands in the way.<sup>13</sup> But where the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not a public purpose.<sup>14</sup>

5. **AID FOR IMPROVEMENT OF WATER POWER.**—Undoubtedly the development of the water power in the rivers that traverse the city would add to the commerce and wealth of the citizens, but certainly power to govern the city does not imply power to expend the public money by donating it to private persons as a bonus for developing the water power in the city and vicinity so as to make

**Chesapeake and Ohio Canal—Mortgaged to Maryland for aid given.**—Under the statutes of Maryland of 1834, ch. 241, 1835, ch. 395, 1838, ch. 396, and 1844, ch. 281, and the instruments executed pursuant to those statutes, the tolls and revenues of the Chesapeake and Ohio Canal Company are mortgaged to the state of Maryland, to secure the repayment of money lent by the state to the company, and the payment of dividends and interest on the stock subscribed for by the state; subject, in the first place, to the appropriation of so much of the tolls and revenues as is necessary to keep the canal in repair, to provide the necessary supply of water, and to pay the salaries of officers and annual expenses; and, in the second place, to a mortgage to trustees to secure the payment of certain bonds of the company. And, at the suit in equity of the state and of such trustees, even before the state has taken possession under its mortgages, a general creditor of the company, who at the time of contracting his debt had notice of the provisions of the statutes and of the mortgages, will be restrained from levying on money deposited by the company in a bank, and needed to meet such necessary expenses. *Macalester v. Maryland*, 114 U. S. 598, 29 L. Ed. 233. See, generally, the title *CANALS*, vol. 3, p. 546.

7. **Plank roads.**—*Mitchell v. Burlington*, 4 Wall. 270, 18 L. Ed. 350, and *Larned v. Burlington*, 4 Wall. 275, 18 L. Ed. 453, overruled as to the power to issue bonds in payment by *Brenham v. German-American Bank*, 144 U. S. 174, 36 L. Ed. 391;

*Grand Chute v. Winegar*, 15 Wall. 355, 21 L. Ed. 170.

8. **Private aid prohibited.**—*Parkersburg v. Brown*, 106 U. S. 487, 500, 27 L. Ed. 238; *Cole v. LaGrange*, 113 U. S. 1, 28 L. Ed. 896; *Loan Ass'n v. Topeka*, 20 Wall. 655, 22 L. Ed. 455. See ante, "In General," I, A, 1.

**Taxation in aid of private enterprises unlawful.**—"To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms." *Loan Ass'n v. Topeka*, 20 Wall. 655, 664, 22 L. Ed. 455.

9. **Rolling mill.**—*Cole v. LaGrange*, 113 U. S. 1, 9, 28 L. Ed. 896.

10. **Foundry and machine shop.**—*Commercial Bank v. Iola*, 154 U. S., appx., 617, 22 L. Ed. 463.

11. **Constitution of state must give authority.**—*Parkersburg v. Brown*, 106 U. S. 487, 500, 27 L. Ed. 238.

12. **Payment of interest works no estoppel where want of authority.**—*Loan Ass'n v. Topeka*, 20 Wall. 655, 22 L. Ed. 455.

13. **City may aid private corporation for health, or comfort of inhabitants.**—*New Orleans v. Clark*, 95 U. S. 644, 652, 24 L. Ed. 521.

14. **Law authorizing aid to all private manufacturers.**—*Loan Ass'n v. Topeka*, 20 Wall. 655, 665, 22 L. Ed. 455.

it available for manufacturing purposes.<sup>15</sup>

6. AID TO INTERNAL IMPROVEMENTS.—Power to grant aid for internal improvements, confers authority to aid in the construction of railroads,<sup>16</sup> and includes authority to assist in the construction of depots and side tracks of an existing railroad,<sup>17</sup> and authorizes a city to guarantee the payment of the bonds of a railroad company.<sup>18</sup> Bridges,<sup>19</sup> turnpikes, building ferries and reclaiming swamps have all been held to be internal improvements to which municipal aid might be granted.<sup>20</sup> Under a Kansas statute a steam custom grist mill, owned and operated by an individual, has been held to be a work of internal improvement to which municipal aid might be granted,<sup>21</sup> while under a Nebraska statute a steam grist mill was held not to be a work of internal improvement.<sup>22</sup> But when the legislature has given to grist mills and the water power connected with them a public character, the improvement of the water power by constructing a canal for water power purposes to propel public grist mills, must be regarded as a public work of internal improvement.<sup>23</sup>

7. AID TO RAILROADS—*a. Power to Make a Subscription.*—It is well settled by numerous decisions, that the legislature of a state, unless restrained by constitutional provisions, may authorize the villages, towns, counties, cities,<sup>24</sup> and

**15. Development of water power.**—*Ottawa v. Carey*, 108 U. S. 110, 123, 27 L. Ed. 669. See post, "Aid to Internal Improvements," I, A, 6.

**16. Internal improvements—Railroads.**—*Savannah v. Kelly*, 108 U. S. 184, 27 L. Ed. 696; *Savannah v. Martin*, 108 U. S. 191, 27 L. Ed. 698; *Burlington Tp. v. Beasley*, 94 U. S. 310, 314, 24 L. Ed. 161. See post, "Aid to Railroads," I, A, 7.

**17. Construction of depots and side tracks of railroads.**—*Rock Creek Tp. v. Strong*, 96 U. S. 271, 276, 24 L. Ed. 815.

**18. Guaranty of railroad bonds.**—*Savannah v. Kelly*, 108 U. S. 184, 191, 27 L. Ed. 696; *Savannah v. Martin*, 108 U. S. 191, 27 L. Ed. 698.

**19. Bridges.**—*United States v. Dodge County Comm'rs*, 110 U. S. 156, 162, 28 L. Ed. 103; *County Comm'rs v. Chandler*, 96 U. S. 205, 24 L. Ed. 625.

**Toll bridge.**—A bridge, intended and used as a thoroughfare, is a public highway whether subject to toll or not, and is a work of internal improvement within the meaning of a statute authorizing municipal aid in works of internal improvement. *County Comm'rs v. Chandler*, 96 U. S. 205, 24 L. Ed. 625.

**20. Turnpikes, building, ferrie, reclaiming swamps.**—*Burlington Tp. v. Beasley*, 94 U. S. 310, 314, 24 L. Ed. 161. See ante, "Aid to Turnpikes and Canals," I, A, 2.

**21. Grist mill—Internal improvement.**—*Burlington Tp. v. Beasley*, 94 U. S. 310, 313, 24 L. Ed. 161.

**Steam grist mill—Statute making them public mills.**—A steam custom grist mill, not on a watercourse or operated by water power, was held to be a "work of internal improvement," within an act of Kansas authorizing municipal bonds in aid of "the construction of railroads or water power, \* \* \* or for other works of internal improvement." The decision was based, in part, on the ground, that there was another act which declared that "all

water, steam or other mills, whose owners or occupiers grind or offer to grind grain for toll or pay, are hereby declared public mills," and provided for the order in which customers should be served, and prescribed the duties of the miller, and that the rates of toll should be posted; and, as it would also be competent for the legislature to regulate the toll, it was held that aid to the mill was aid of a public work of internal improvement. *Blair v. Cumming County*, 111 U. S. 363, 372, 28 L. Ed. 457.

**22. Steam grist mill—No internal improvement.**—*Osborne v. Adams County*, 109 U. S. 1, 27 L. Ed. 835; *Osborne v. Adams County*, 106 U. S. 181, 27 L. Ed. 129.

**23. Improvement of water power for grist mills.**—*Blair v. Cumming County*, 111 U. S. 363, 28 L. Ed. 457 (Neb. Act. Feb. 15, 1869). See ante, "Aid for Improvement of Water Power," I, A, 5.

**24. Legislature may authorize villages, towns, counties to aid railroads.**—*Campbell v. Kenosha*, 5 Wall. 194, 18 L. Ed. 610; *Tip-ton County v. Locomotive Works*, 103 U. S. 523, 26 L. Ed. 340; *Otoe County v. Baldwin*, 111 U. S. 1, 28 L. Ed. 331; *Thomson v. Lee County*, 3 Wall. 327, 18 L. Ed. 177; *Rogers v. Keokuk*, 154 U. S., appx., 546, 18 L. Ed. 74; *Queensbury v. Culver*, 19 Wall. 83, 90, 22 L. Ed. 100; *Meyer v. Muscatine*, 1 Wall. 384, 17 L. Ed. 564; *Pine Grove Tp. v. Talcott*, 19 Wall. 666, 676, 22 L. Ed. 227; *Rogers v. Burlington*, 3 Wall. 654, 665, 18 L. Ed. 79; *Larned v. Burlington*, 4 Wall. 275, 277, 18 L. Ed. 353; *Mitchell v. Burlington*, 4 Wall. 270, 274, 18 L. Ed. 350; *Olcott v. Supervisors*, 16 Wall. 678, 21 L. Ed. 382; *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. Ed. 520; *Gilman v. Sheboygan*, 2 Black 510, 17 L. Ed. 305; *Railroad Co. v. County of Otoe*, 16 Wall. 667, 21 L. Ed. 375; *Weber v. Lee County*, 6 Wall. 210, 18 L. Ed. 781; *New Buffalo v. Iron Co.*, 105 U. S. 73, 26 L. Ed. 1024; *Young v. Clarendon Tp.*, 132 U. S. 340, 346, 33 L. Ed. 356; *Claiborne County v.*



townships,<sup>25</sup> but not school districts, established and existing for educational purposes only,<sup>26</sup> of the state through which the railway passes, to borrow money, issue their bonds, subscribe for the stock of the company, or purchase the same to aid the railway company in constructing or completing such a public improvement. Legislation of the kind may be prohibited by a state constitution, but such an act is not in contravention of any implied limitation of the power of a state to pass laws to promote the usual purposes of municipal corporations.<sup>27</sup> To aid in the building of a railroad is a public purpose, and, being for the general welfare of the ordinary municipal corporations, such as counties, cities and towns, through which the road is to pass, is a corporate purpose, within the meaning of a constitutional provision vesting in the legislature power to authorize municipal corporations to assess and collect taxes "for corporate purposes."<sup>28</sup> A general statute authorizing municipalities to lend its credit to any railroad duly incorporated and organized, authorizes the lending of the city credit to railroads then in existence as well as to those subsequently incorporated and organized.<sup>29</sup> The legislature can even authorize aid to a railroad

Brooks, 111 U. S. 400, 28 L. Ed. 470; *United States v. Railroad Co.*, 17 Wall. 322, 330, 21 L. Ed. 597; *Loan Ass'n v. Topeka*, 20 Wall. 655, 660, 22 L. Ed. 455; *Board of Comm'rs v. Aspinwall*, 21 How. 539, 16 L. Ed. 208; *Ottawa v. Carey*, 108 U. S. 110, 123, 27 L. Ed. 669; *Pendleton County v. Amy*, 13 Wall. 297, 20 L. Ed. 579; *Cole v. LaGrange*, 113 U. S. 1, 7, 23 L. Ed. 896; *Taylor v. Ypsilanti*, 105 U. S. 60, 69, 26 L. Ed. 1008; *Barnum v. Okolona*, 148 U. S. 393, 395, 37 L. Ed. 495; *Sheboygan Co. v. Parker*, 3 Wall. 93, 96, 18 L. Ed. 33; *Wells v. Supervisors*, 102 U. S. 625, 26 L. Ed. 122; *Bissell v. Jeffersonville*, 24 How. 287, 16 L. Ed. 664; *Thompson v. Perrine*, 103 U. S. 806, 26 L. Ed. 612; *Harter v. Kernochan*, 103 U. S. 562, 26 L. Ed. 411; *Rock Creek Tp. v. Strong*, 96 U. S. 271, 24 L. Ed. 815; *Zabriskie v. Cleveland, etc., R. Co.*, 23 How. 381, 16 L. Ed. 488. See ante, "Aid to Internal Improvements," I, A, 6.

**Town and village identical in Illinois.**—Authority given to any village, city, county or township to subscribe to railroad stock has been held to include an incorporated town in Illinois. The term "town" was held to mean the same thing as "village" according to the usage in the laws of Illinois. *Enfield v. Jordan*, 119 U. S. 680, 685, 30 L. Ed. 523.

**25. Townships may be authorized to aid railroads.**—*Bolles v. Brimfield*, 120 U. S. 759, 761, 30 L. Ed. 786; *Riggs v. Johnson County*, 6 Wall. 166, 18 L. Ed. 768; *United States v. Keokuk*, 6 Wall. 514, 18 L. Ed. 933; *Cass County v. Johnston*, 95 U. S. 360, 365, 24 L. Ed. 416, overruling *Harshman v. Bates County*, 92 U. S. 569, 23 L. Ed. 747; *Unity v. Burrage*, 103 U. S. 447, 26 L. Ed. 405.

**Constitutional restriction in counties applicable to township.**—A constitutional restriction providing that the legislature shall not authorize a city, county or town to grant aid to private corporations except upon certain conditions, applies to townships also. *Harshman v. Bates*

*County*, 92 U. S. 569, 23 L. Ed. 747, approved in *Jarrott v. Moberly*, 103 U. S. 580, 586, 26 L. Ed. 492.

**26. School districts cannot be authorized to aid railroads.**—*Weightman v. Clark*, 103 U. S. 256, 260, 26 L. Ed. 392.

**27. Act authorizing aid to railroads not violative of any implied limitation on legislative power.**—*St. Joseph Tp. v. Rogers*, 16 Wall. 644, 663, 21 L. Ed. 328; *Rogers v. Burlington*, 3 Wall. 654, 663, 18 L. Ed. 79; *Mitchell v. Burlington*, 4 Wall. 270, 273, 18 L. Ed. 350. See, also, *Unity v. Burrage*, 103 U. S. 447, 459, 26 L. Ed. 405.

**Railroad—May also carry on manufacturing business.**—A company is none the less a railroad company, within the meaning of the act of the general assembly of the state of Illinois, approved Nov. 6, 1849, authorizing counties to subscribe to the capital stock of railroad companies, because its charter vests it with power to carry on, in addition to the business of such a company, that of a coal, or a mining, or a furnace, or a manufacturing company. *Randolph County v. Post*, 93 U. S. 502, 23 L. Ed. 957.

**Mandatory statute requiring counties to grant aid to railroads.**—In *Queensbury v. Culver*, 19 Wall. 83, 91, 22 L. Ed. 100, the court said: "It may be that a mandatory statute requiring a municipal corporation to subscribe for stock in a railroad company, or to contribute to the construction of the railroad of such a company, is not a legitimate exercise of legislative power, and that it is not even an act of legislation."

**28. Construction of railroad is a corporate purpose.**—*Folsom v. Ninety Six*, 159 U. S. 611, 628, 40 L. Ed. 278; *Livingston County v. Darlington*, 101 U. S. 407, 411, 413, 25 L. Ed. 1015; *Harter v. Kernochan*, 103 U. S. 562, 571, 26 L. Ed. 411; *Anderson v. Santa Anna*, 116 U. S. 356, 363, 29 L. Ed. 633; *Bolles v. Brimfield*, 120 U. S. 759, 30 L. Ed. 786; *Confarr v. Santa Anna Tp.*, 116 U. S. 366, 29 L. Ed. 636.

**29. General statute authorizes aid to**



extending beyond the limits of a municipality into the interior of the state,<sup>30</sup> or beyond the limits of a county and outside of the state.<sup>31</sup> But a statute giving a county authority to subscribe to the stock of companies organized under the law of the state, does not authorize a subscription by the county to the stock of a railroad of another state, which under certain circumstances was authorized to extend its road into the state and for that purpose possess and exercise all the rights, powers and privileges conferred by the law of the state, upon corporations organized under the laws of the state.<sup>32</sup>

**b. Power to Make a Donation.**—Unless the constitution of a state makes a distinction, there is no substantial difference in principle between aid given to a railroad company by subscription to its stock and aid given by donations of money or land,<sup>33</sup> and unless restrained by a constitutional prohibition, the legislature of a state may properly authorize a county to make a donation to a railroad company.<sup>34</sup> But power to subscribe to the stock of a railroad company does not authorize a donation to the railroad.<sup>35</sup> A donation, to be raised by taxation, to aid in the construction of a railroad, is a corporate purpose within the meaning of the Illinois constitution, allowing taxation for corporate purposes only.<sup>36</sup> Where bonds had been voted by a county at an election, and a subscription was made and bonds issued in conformity therewith by the proper authorities, and at the same time they made a sale and transferred the stock of the county to the president of the railroad for the railroad company, it was held that where the bonds were delivered the transaction was complete, and the bonds as they passed from the hands of the railroad company to bona fide holders, passed free from any impairment by reason of any dealings between the county authorities and the railroad.<sup>37</sup>

**B. Express Constitutional Limitations on Power**—1. **RESTRICTION ON LOAN OF CREDIT.**—A constitutional restriction upon the loan of the credit of a municipality without a certain vote of the voters, does not authorize municipal corporations to act without an act expressly granting such authority. Further

**railroads subsequently incorporated.**—James *v.* Milwaukee, 16 Wall. 159, 21 L. Ed. 267.

**30. Railroad beyond municipality.**—Gelpcke *v.* Dubuque, 1 Wall. 175, 17 L. Ed. 520.

**31. Railroad beyond state.**—Otoe County *v.* Baldwin, 111 U. S. 1, 13, 28 L. Ed. 331; Railroad Co. *v.* County of Otoe, 16 Wall. 667, 21 L. Ed. 375.

**Iowa.**—The general grant of legislative authority to the legislature by the Iowa constitution authorizes the conferring of power upon a municipality to grant aid to railroads. Gelpcke *v.* Dubuque, 1 Wall. 175, 204, 17 L. Ed. 520; Rogers *v.* Lee County, 154 U. S., appx., 547, 18 L. Ed. 75; Rogers *v.* Keokuk, 154 U. S., appx., 546, 18 L. Ed. 74.

**32. Statute authorizing aid to railroads of state, does not authorize aid to railroad of another state.**—Allen *v.* Louisiana, 103 U. S. 80, 86, 26 L. Ed. 318.

**33. No distinction between donations and subscriptions unless constitution makes a distinction.**—Olcott *v.* Supervisors, 16 Wall. 678, 698, 21 L. Ed. 382; Railroad Co. *v.* County of Otoe, 16 Wall. 667, 675, 21 L. Ed. 375; Queensbury *v.* Culver, 19 Wall. 83, 22 L. Ed. 100; New Buffalo *v.* Iron Co., 105 U. S. 73, 75, 26 L. Ed. 1024.

**34. Otoe County v. Baldwin, 111 U. S. 1, 13, 28 L. Ed. 331; Railroad Co. v.**

County of Otoe, 16 Wall. 667, 676, 21 L. Ed. 375; Olcott *v.* Supervisors, 16 Wall. 678, 697, 21 L. Ed. 382.

**35. Ottawa v. Carey, 108 U. S. 110, 124, 27 L. Ed. 669. See post, "Any Railroad," II, C, 2, b.**

**36. Donation is a corporate purpose.**—Harter *v.* Kernochan, 103 U. S. 562, 571, 26 L. Ed. 411; Anderson *v.* Santa Anna, 116 U. S. 356, 363, 29 L. Ed. 633; Confarr *v.* Santa Anna Tp., 116 U. S. 366, 29 L. Ed. 636.

**Grant of land on nominal consideration not a donation.**—A grant of land by a county to a railroad on a nominal consideration and the construction of the railroad through the county, was held not to be a donation within the decisions of the Wisconsin court denying power to the legislature to authorize donations by municipalities to railways. Roberts *v.* Northern Pac. R. Co., 158 U. S. 1, 39 L. Ed. 873.

**37. Sale of stock to railroad president.**—Anderson County Comm'rs *v.* Beal, 113 U. S. 227, 28 L. Ed. 966.

**Return of stock for small amount of bonds does not render transaction a donation.**—Where a county in pursuance of legal authority made a subscription and received the full amount of stock of the railroad in payment and later, in pursuance of an agreement previously made be-

legislation is required.<sup>38</sup> This provision prohibits both the issue of obligations directly to the company, or the purchase of lands to be donated to such company, by the issue of obligations to others, without such previous assent.<sup>39</sup>

2. **RESTRICTIONS AGAINST STATE AID.**—A clause in a state constitution providing "the credit of the state shall never be given to, or bound in aid of any individual, association or corporation," refers only to state action and state credit, and does not prevent the legislature from authorizing municipalities to grant aid to railroads or other highways.<sup>40</sup>

3. **RESTRICTIONS AS TO TAKING PRIVATE PROPERTY.**—The clause in Nebraska constitution prohibiting taking private property for public use without just compensation is a restriction upon the right of eminent domain, not upon the right of taxation, and does not restrain the power of the legislature to authorize municipal aid to railroads, or other highways.<sup>41</sup>

4. **RESTRICTIONS AS TO GRANTING SPECIAL PRIVILEGES.**—A special statute authorizing subscriptions by county courts of counties along the line of a certain railroad, is not in conflict with a constitutional restriction against granting special privileges, but containing a proviso that the legislature may authorize charters of incorporation as deemed proper, on the ground that it authorizes a limited number of counties to make, and a particular railroad to receive, a subscription to its stock.<sup>42</sup>

5. **RESTRICTIONS AS TO CREATION OF CORPORATION BY SPECIAL LAWS.**—The provisions of the Iowa constitution that corporations shall not be created by special laws except for political or municipal purposes and the provision that the general assembly shall not create debts or liabilities in excess of a certain amount do not forbid the conferring of power upon a municipal corporation to purchase stock in railways and issue bonds in payment.<sup>43</sup>

6. **RESTRICTIONS AS TO FUTURE SUBSCRIPTIONS AND DONATIONS—ILLINOIS.**—The Illinois constitution of 1870 prohibited municipal subscriptions and donations, but excepted municipal subscriptions authorized under existing laws by a vote of the people of such municipality prior to the adoption of the new constitution, and it has been held that this saving clause, though applying in its terms to subscriptions, includes donations previously authorized,<sup>44</sup> but the

tween the county and railroad, the city returned the stock in consideration of a return of a very small amount of bonds, it was held that the contract did not render the transaction a donation, so as to make the bonds come within the prohibitory clause of the state constitution and thus render the bonds invalid in the hands of bona fide purchasers. *Cairo v. Zane*, 149 U. S. 122, 37 L. Ed. 673.

**Donation—Want of authority.**—Bonds issued by a municipality to make a donation to a railroad, where there was no authority to make a donation, are void. *Concord v. Portsmouth Sav. Bank*, 92 U. S. 625, 631, 23 L. Ed. 628; *Dixon County v. Field*, 111 U. S. 83, 28 L. Ed. 360.

38. **Restriction on loan of credit without a certain vote not an affirmative grant of authority.**—*Jarrolt v. Moberly*, 103 U. S. 580, 588, 26 L. Ed. 492; *Hayes v. Holly Springs*, 114 U. S. 120, 123, 29 L. Ed. 81; *Norton v. Board of Comm'rs*, 129 U. S. 479, 489, 32 L. Ed. 774.

39. **Restriction on loan of credit, prohibits direct or indirect loan.**—*Jarrolt v. Moberly*, 103 U. S. 580, 585, 26 L. Ed. 492.

40. **Restrictions on state aid.**—*Railroad Co. v. County of Otse*, 16 Wall. 667, 21 L. Ed. 375; *Taylor v. Ypsilanti*, 105 U. S. 60,

26 L. Ed. 1008; *Pine Grove Tp. v. Talcott*, 19 Wall. 666, 22 L. Ed. 227.

41. **Restriction on taking of private property as limiting right.**—*Railroad Co. v. County of Otse*, 16 Wall. 667, 674, 21 L. Ed. 375.

42. **Restriction against granting special privileges.**—*Tipton County v. Locomotive Works*, 103 U. S. 523, 26 L. Ed. 340.

43. **Restriction on creation of corporation by special laws.**—*Gelpeks v. Dubuque*, 1 Wall. 175, 205, 17 L. Ed. 520.

44. **Saving clause of Illinois constitution applicable to donations as well as subscriptions.**—*Louisville v. Savings Bank*, 104 U. S. 469, 471, 26 L. Ed. 775; *Fairfield v. Gallatin County*, 100 U. S. 47, 25 L. Ed. 544; *Harter v. Kernochan*, 103 U. S. 562, 26 L. Ed. 411; *Moultrie County v. Fairfield*, 105 U. S. 370, 375, 26 L. Ed. 945; *Enfield v. Jordan*, 119 U. S. 680, 690, 30 L. Ed. 523. See, however, *Concord v. Portsmouth Sav. Bank*, 92 U. S. 625, 23 L. Ed. 628, overruled as to this point.

**Decision in Concord v. Portsmouth Bank explained.**—In *Concord v. Portsmouth Sav. Bank*, 92 U. S. 625, 23 L. Ed. 628, the United States supreme court held that donations by counties or other municipalities in Illinois to railroad companies could



constitution did not take away authority to issue bonds under a valid act of assembly enacted before the constitution went into effect, legalizing a subscription authorized by a vote taken without legal authority.<sup>45</sup>

## II. Construction of Statutes Granting Power.

**A. Rule of Construction.**—All grants of power to municipalities to grant municipal aid are to be construed strictly and not to be extended beyond the terms of the law,<sup>46</sup> yet such statutes are not of a criminal character, and proceedings are not to be so technically construed and limited as make them a mere snare to those who are encouraged to invest in the securities of the municipality.<sup>47</sup>

**B. Can Power Be Implied**—1. IN GENERAL.—Authority to make municipal subscriptions to railroads cannot be implied from any general grant of municipal power, but must be expressly conferred by statute,<sup>48</sup> and unless the specific power is granted, all subscriptions, and all donations to quasi public corpora-

not lawfully be made after July 2, 1870, though authorized by a statute enacted and a popular vote cast before the adoption of the constitution. This ruling was made in ignorance of the fact, to which their attention was not at the time called, that the supreme court of Illinois had, in an unreported case, decided that the intention of the framers of the constitution was not to prohibit donations authorized under pre-existing laws by a vote of the people prior to the adoption of that instrument, but to place subscriptions and donations on the same footing. *Louisville v. Savings Bank*, 104 U. S. 469, 471, 26 L. Ed. 775.

**Increase of municipal subscription after constitution prohibiting municipal subscription took effect.**—Illinois saving clause rendered void the increase of a municipal subscription to a railroad voted at an election held after the new constitution went into effect. *Illinois, etc., R. Co. v. Wade*, 140 U. S. 65, 35 L. Ed. 342.

**Subscription voted on condition—Power taken away by constitution.**—Where the township of Concord voted in 1869 a donation merely, to be met by taxation within the period of two years, and to be paid if the railroad was constructed through the villages of Concord and Sheldon, the power to make such donation was taken away where the railroad was not built before July 2, 1870, as the donation was not acted upon before that date. *Concord v. Robinson*, 121 U. S. 165, 169, 30 L. Ed. 885.

**45. Illinois constitution not retroactive.**—*Jonesboro City v. Cairo, etc., R. Co.*, 110 U. S. 192, 198, 28 L. Ed. 116.

**46. Rule of construction.**—*Hill v. Memphis*, 134 U. S. 198, 203, 33 L. Ed. 887; *Curtis v. Butler County*, 24 How. 435, 448, 16 L. Ed. 745; *Moran v. Commissioners*, 2 Black 722, 723, 17 L. Ed. 342.

**Statutes to be construed as intended when passed.**—"These statutes are to be construed as they were intended to be understood when they were passed, twenty years since. The after-wisdom, obtained by unfortunate results, cannot justly be applied in their interpretation." *Schuyler*

*County v. Thomas*, 98 U. S. 169, 172, 25 L. Ed. 88.

**Statute of congress—Fair interpretation.**

—A statute of congress granting aid to a railroad company should receive a fair interpretation. It must be considered in the nature of a proposal to enterprising men to engage in the work. *United States v. Union Pac. R. Co.*, 91 U. S. 72, 23 L. Ed. 224.

**47. Statutes not to be technically construed so as to be a snare.**—*Andes v. Ely*, 158 U. S. 312, 321, 39 L. Ed. 996.

**48. Power must be expressly conferred.**—*Quincy v. Jackson*, 113 U. S. 332, 336, 28 L. Ed. 1001; *Lewis v. Shreveport*, 108 U. S. 282, 286, 27 L. Ed. 728; *East Oakland Tp. v. Skinner*, 94 U. S. 255, 258, 24 L. Ed. 125; *Thomson v. Lee County*, 3 Wall. 327, 18 L. Ed. 177; *Quincy v. Cooke*, 107 U. S. 549, 551, 27 L. Ed. 549; *Dixon County v. Field*, 111 U. S. 83, 89, 28 L. Ed. 360; *Kelley v. Milan*, 127 U. S. 139, 150, 32 L. Ed. 77; *Marsh v. Fulton County*, 10 Wall. 676, 19 L. Ed. 1040; *Wells v. Supervisors*, 102 U. S. 625, 26 L. Ed. 122; *Ottawa v. Carey*, 108 U. S. 110, 123, 27 L. Ed. 669; *Daviess County v. Dickinson*, 117 U. S. 657, 663, 29 L. Ed. 1026. See *Enfield v. Jordan*, 119 U. S. 680, 687, 30 L. Ed. 523.

**Ohio act of 1850.**—Where the Ohio acts of 1850, 1851, provided that the county commissioners might subscribe to the stock of a railroad if the people assented at a special election, but if they did not then, in that case, the township trustees might subscribe if by a vote of the qualified voters they were authorized, it was held that the authority of the township under these acts existed only where, after the passage of the act of 1851, a county subscription had been negatived by a county vote or by the refusal or failure of the county commissioners within a reasonable time to submit the question to a popular vote. *Northern Bank v. Porter Tp.*, 110 U. S. 608, 28 L. Ed. 258.

**Donation and subscription under same statute.**—Where a statute authorized the counties along the line of a particular railroad to subscribe to the stock or to make a donation to aid in the construction of



tions, as well as the corporate bonds issued for their payment, are absolutely void, even as against bona fide holders of the bonds.<sup>49</sup>

2. FROM PROVISION GIVING "AGENT OF ANY CORPORATE BODY" POWER TO SUBSCRIBE.—A statute giving the "agent of any corporate body" power to subscribe for stock in a railroad company, does not authorize a municipal corporation to grant aid, but applies to private corporations only.<sup>50</sup>

3. FROM CHARTER PROVISIONS AS TO ELECTION TO DETERMINE AMOUNT.—Power to subscribe to the stock of a railroad and issue bonds in payment is implied from provisions in the charter of the railroad that subscription may be taken in county bonds and authorizing the commissioners of certain counties to apply for a subscription, payable in county bonds, and the provision for an election to determine the amount of subscription.<sup>51</sup>

4. FROM POWER TO BORROW MONEY ON CREDIT OF CITY.—Power to borrow money on the credit of the city and issue bonds under the seal of the city therefore, does not, alone, confer authority to subscribe to the stock of a railroad company, and issue bonds in payment thereof.<sup>52</sup>

5. FROM POWER OF TERRITORY TO INCUR DEBTS FOR ADMINISTRATION OF INTERNAL AFFAIRS.—A territorial statute cannot confer upon a county the power to issue bonds to aid a railroad, where the acts of congress limit the obligations of any municipal corporation to such as are "necessary for the administration of its internal affairs."<sup>53</sup>

**C. Construction of Particular Statutes**—1. PARTICULAR LOCALITIES AUTHORIZED—*a. New County Cut from Another County.*—Where a general act authorized all the counties except one in New Jersey to grant aid to railways and subsequently a county was set off from this excepted county but a proviso was made specifically declaring that the new county should come under the operation of any act from which the original county had been excepted, the new county could grant aid to railways, and its issue of bonds for the aid of the railway were not issued without authority.<sup>54</sup>

the road, with previous assent of the voters, and another section of the statute permitted a subscription to the stock of the company by a certain county to a specified amount, the county mentioned in the statute may make a donation under the first provision of the statute and a subscription under the second section. *Moultrie County v. Fairfield*, 105 U. S. 370, 26 L. Ed. 945.

49. Specific power to subscribe and issue bonds must be expressly granted.—*Thomson v. Lee County*, 3 Wall. 327, 18 L. Ed. 177; *Marsh v. Fulton County*, 10 Wall. 676, 19 L. Ed. 1040; *St. Joseph Tp. v. Rogers*, 16 Wall. 644, 21 L. Ed. 328; *McClure v. Oxford Tp.*, 94 U. S. 429, 24 L. Ed. 129; *Wells v. Supervisors*, 102 U. S. 625, 26 L. Ed. 122; *Allen v. Louisiana*, 103 U. S. 80, 26 L. Ed. 318; *Ottawa v. Carey*, 108 U. S. 110, 123, 27 L. Ed. 669; *Pendleton County v. Amy*, 13 Wall. 297, 304, 20 L. Ed. 579; *Lewis v. Shreveport*, 108 U. S. 282, 286, 27 L. Ed. 728; *Dixon County v. Field*, 111 U. S. 83, 28 L. Ed. 360. See post, "Payment of Subscription." IX.

50. Authority to agent of "any corporate body" does not authorize municipality to grant aid.—*East Oakland Tp. v. Skinner*, 94 U. S. 255, 257, 24 L. Ed. 125.

51. Power may be implied from provisions of the railroad charter.—*Wilson County v. National Bank*, 103 U. S. 770, 27 L. Ed. 488.

Power may be implied from provisions

of city charter and general statutes.—A statute which enacts that whenever any railroad company "shall have received or may hereafter receive the bonds of any city or county upon subscriptions of stock by such city or county, such bonds may bear an interest" at the rate specified, and "may be sold by the company," in a way mentioned, implies that a city (whose charter gave it power to borrow money for public purposes), had power to subscribe to the stock and to issue its bonds in payment, and makes the subscription and bonds as valid as if authorized by the statute directly. *Gelpcke v. Dubuque*, 1 Wall. 175, 220, 17 L. Ed. 520.

52. Power to "borrow money on credit of city" does not authorize municipal aid and issue of bonds in payment.—*Jonesboro City v. Cairo, etc.*, R. Co., 110 U. S. 192, 196, 28 L. Ed. 116; *Brenham v. German-American Bank*, 144 U. S. 174, 36 L. Ed. 391, overruling *Rogers v. Burlington*, 3 Wall. 654, 18 L. Ed. 79, and *Mitchell v. Burlington*, 4 Wall. 270, 276, 18 L. Ed. 350.

53. Debts necessary for "administration of internal affairs."—*Lewis v. Pima County*, 155 U. S. 54, 57, 39 L. Ed. 67. See, also, *Utter v. Franklin*, 172 U. S. 416, 43 L. Ed. 498, cited in *Folsom v. Ninety Six*, 159 U. S. 611, 629, 40 L. Ed. 278.

54. New county cut from county not authorized to grant aid.—*Montclair v. Ramsdell*, 107 U. S. 147, 160, 27 L. Ed. 431.

b. *Town or County, "to, into, Through, from, or Near Which, Railroad Is or May Be Located."*—When an act provides that any town or county through or near which a certain railroad or its branches "may be located" may grant aid to a railroad, it is necessary that the whole extension or branch be located before any county may subscribe and issue bonds. It is not enough that a location be made through a particular county.<sup>55</sup> But an act authorizing the board of county commissioners of any county to, into, through, from, or near which any railroad is or may be located, to subscribe to the capital stock of the company, does not require the location of the road as a condition precedent to submitting the question of subscription to a vote of the qualified electors of the county.<sup>56</sup>

c. *County Through Which a Railroad Might Run or Pass.*—A statute authorizing any county through which a road may run to render aid in the construction of the road, does not require the road to be actually built before the county is authorized to give the aid.<sup>57</sup> Likewise if the charter of a railroad company authorizes the counties "through which it may pass" to subscribe to its stock, a county lying between the two termini of the road may subscribe without waiting until the route is actually located.<sup>58</sup>

d. *When Necessary to Aid Completion of Road in Which Citizens Have an Interest.*—It is not necessary for a county to have a pecuniary interest in the completion of a railroad begun before the adoption of North Carolina constitution of 1868, in order to aid in the construction of a railroad under the provisions of North Carolina code, § 1996, conferring power upon counties "to subscribe to the stock of a railroad company when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest." Aid may be given to railroads before their commencement as well as after their commencement under the above statute.<sup>59</sup>

e. *Township Along the Route or at the Termini.*—The fact that a township which was a "terminal" township, became a township "along the route" of a railroad, because of the extension of the route, does not affect the validity of bonds issued to the railroad when either "terminal townships" or townships "along the route" of the railroad were authorized to subscribe.<sup>60</sup>

f. *Any County in Which Part of Route May Be.*—The expression, "Any county in which any part of the route of said railroad may be," when used with reference to a road not yet surveyed or located, gives a broad latitude and

55. *County through which railroad "may be located."*—*Purdy v. Lansing*, 128 U. S. 557, 32 L. Ed. 531.

56. *County to, into, through or near which railroad may be located.*—*Commissioners v. Thayer*, 94 U. S. 631, 24 L. Ed. 133.

57. *County through which a railroad may run.*—*Kenicott v. Supervisors*, 16 Wall. 452, 21 L. Ed. 319.

58. *Through which the railroad "may pass."*—*Woods v. Lawrence County*, 1 Black 386, 17 L. Ed. 122; *Curtis v. Butler County*, 24 How. 435, 446, 16 L. Ed. 745.

*North Carolina ordinance of 1868.*—Where the North Carolina ordinance of March 8, 1868, incorporating a certain railroad to run by way of certain points to a point in the northwestern part of the state gave the counties "near or through which the railroad might pass," authority to subscribe to the stock of the company according to the provisions of North Carolina laws, 1852, which authorized the counties to subscribe as the inhabitants at an election determined and to issue

bonds therefor, it was held that the counties near or through which the railroad might pass were authorized to subscribe to the stock of the railroad and issue bonds in payment. *Wilkes County v. Coler*, 190 U. S. 107, 47 L. Ed. 971.

59. *Completion of railroad in which county has an interest.*—*Stanly County v. Coler*, 190 U. S. 437, 47 L. Ed. 1126.

60. *Along the route or at the termini.*—Where a law of New Jersey provided for the appointment of commissioners for townships "along the route or at the termini" of a certain railroad and allowed them to issue bonds, dispose of same and invest the proceeds in the stock of a certain railroad, and later an act was passed permitting an extension of the road but with the proviso that a township not authorized to aid by the preceding aid, could not do so under this act, it was held that the fact that a township which was a terminal township, became a township "along the route" of the railroad, because of the extension of the road, did not affect the vested right of the bona fide trans-



embraces all the counties through or into which it is possible that the said road could be located. A previous location of the road is not required by the terms of the statute.<sup>61</sup>

2. AID TO PARTICULAR RAILROADS—*a. Company Making Road or Roads to City.*—Authority given to a city to take stock in a chartered company for making "roads" to a city, authorizes a city to subscribe to a railroad,<sup>62</sup> and authorizes taking stock in a road between other cities or towns, which is in extension and prolongation of one leading into the city.<sup>63</sup>

*b. Any Railroad.*—A power given to subscribe to "any railroad" includes the power to subscribe to all railroads without restriction. A subscription to one does not extinguish the power to subscribe to any other railroad to a like amount.<sup>64</sup>

*c. De Facto Railroad.*—A county issuing bonds to a de facto railroad in payment of subscription to the stock of the railroad cannot deny its corporate existence, and its ability to contract in a suit brought upon the bonds given to it.<sup>65</sup>

*d. Branch Railroad.*—A road constructed from the terminus of the main line in a northeasterly direction has been held to be a branch road so as to authorize counties through which the railroad or any of its branches might run to subscribe to its stock.<sup>66</sup>

*e. Railroad Near Township.*—An act which gives authority to counties to subscribe in behalf of townships to the capital stock of any railroad company within the state building or proposing to build a railroad into, through, or near such townships, authorizes a subscription to a railroad nine miles distant from the township. The word "near" is relative in its signification. What would be near in one locality would not be in another. Each case must be governed by its special circumstances. The main inquiry is whether a railroad, when constructed, will be near enough to contribute to the convenience or advance the business interests of the particular township involved.<sup>67</sup>

*f. Making a "Connection" with Another Railroad.*—Legislative authority granted to counties to aid a railway within the county or to aid railroads through which this road or any other railroad with which this road may be "joined, connected or intersected," does not require the road to be actually constructed before the county is authorized to aid the road, but the aid was intended to be given before the railroad was built, and the counties were expected to take the ordinary risk incident to the undertaking,<sup>68</sup> and the authority to construct the connecting road, and the entering into a contract for its construction, form a "connection" within the meaning of the statute.<sup>69</sup>

feree of the securities. *Pompton v. Cooper Union*, 101 U. S. 196, 25 L. Ed. 803.

61. *Any county.*—*Schuyler County v. Thomas*, 98 U. S. 169, 172, 25 L. Ed. 88; *Callaway County v. Foster*, 93 U. S. 567, 23 L. Ed. 911. See *Commissioners v. Thayer*, 94 U. S. 631, 638, 24 L. Ed. 133; *Pompton v. Cooper Union*, 101 U. S. 196, 202, 25 L. Ed. 803.

62. *Making "roads" to the city.*—*Evansville v. Dennett*, 161 U. S. 434, 440, 40 L. Ed. 760. See ante, "Aid to Railroads," I, A, 7.

63. *Authorizes aid to extension of one leading into the city.*—*Van Hostrup v. Madison City*, 1 Wall. 291, 17 L. Ed. 538.

64. *Any railroad.*—*Chicot County v. Lewis*, 103 U. S. 164, 167, 26 L. Ed. 495. See ante, "Aid to Railroads," I, A, 7.

*Railroad organized under laws of another state.*—A railroad, organized under Illinois laws, which subsequently complies with the laws of Missouri and extends its

road into Missouri, the law providing such railroad should have and exercise all the rights, powers and privileges conferred by the general laws of the state, is not a Missouri corporation so as to come within the provision of the Missouri law allowing municipalities to subscribe to the stock of Missouri corporations. *Allen v. Louisiana*, 103 U. S. 80, 86, 26 L. Ed. 318.

65. *De facto railroad.*—*Commissioners v. Bolles*, 94 U. S. 104, 106, 24 L. Ed. 46. See, generally, the title QUO WARRANTO.

66. *Branch railroad.*—*Howard County v. Booneville Cent. Nat. Bank*, 108 U. S. 314, 316, 27 L. Ed. 738.

67. *"Near" township.*—*Kirkbridge v. Lafayette County*, 108 U. S. 208, 211, 27 L. Ed. 705.

68. *Connection with another railroad.*—*Kenicott v. Supervisors*, 16 Wall. 452, 21 L. Ed. 319.

69. *Construction of statute as to connection.*—*Kenicott v. Supervisors*, 16 Wall. 452, 21 L. Ed. 319.



3. **AMOUNT OF AID**—a. *Legislative Restriction as to Amount of Indebtedness as Limiting the Right to Subscribe.*—A legislative restriction upon the amount of indebtedness which a municipality may incur, does not prevent the legislature from passing a law authorizing a subscription to the stock of a railroad company in excess of the indebtedness which it may incur. This restriction applies to the city only and not to the legislature.<sup>70</sup>

b. *Constitutional Restrictions as to Amount of Donation.*—If the constitution of the state prescribes the amount which a county may donate to a railroad company, that provision operates as an absolute limitation upon the power of the county to exceed that amount, and it is well settled that no recitals in the bonds, or endorsed thereon, can estop the county from setting up their invalidity, based upon a want of constitutional authority to issue the same.<sup>71</sup>

c. *Bonds in Excess of Amount.*—The holders of bonds, issued by a county in excess of its authority, by an offer to surrender and cancel so much of such bonds as may upon inquiry be found to exceed the limit authorized by law, cannot invest a court of equity with jurisdiction to ascertain the amount of such excess, and declare the residue of such bonds valid and enforce the payment thereof against the county.<sup>72</sup>

**70. Legislature may authorize indebtedness for municipal aid in excess of statutory limitation.**—*Amey v. Allegheny City*, 24 How. 364, 16 L. Ed. 614.

**Subscription excepted from statutory limitation.**—Where the legislature passed a statute limiting the debt which a certain municipality might incur to \$500,000, but expressly excepted a municipal subscription of \$200,000 to the railroad, and the city subsequently made another subscription of \$200,000 to the railroad, the city's debt with the two subscriptions having become beyond the limit allowed, it was objected the bonds issued in payment of the second subscription were void and unauthorized, but it was held the bonds were valid, as the first subscription being expressly excepted, was not to be counted in estimating the debt as to the limitation. *Amey v. Allegheny City*, 24 How. 364, 16 L. Ed. 614.

**71. Constitutional limitation on amount is absolute.**—*Hedges v. Dixon County*, 150 U. S. 182, 187, 37 L. Ed. 1044.

**72. Equity will not cancel over issue where bonds are issued in excess of authority.**—*Hedges v. Dixon County*, 150 U. S. 182, 183, 37 L. Ed. 1044. See, generally, the title EQUITY, vol. 5, p. 803.

**Issue in excess of authorization.**—Where bonds are issued in excess of what the county was authorized to donate under a constitutional provision and for that reason are invalid at law, a promise to pay so much thereof as could have been lawfully issued will not be implied and enforced against the county, on the theory that the bonds are void only to the extent that they exceed ten per cent of the assessed valuation of the property of the county at the time of their issuance, and upon the abatement of that excess the holders are entitled to have the residue thereof—which the county could have lawfully issued—treated as valid, because of the incidental benefits derived from the construction of the road which was

sought to be secured by the donation of bonds. *Hedges v. Dixon County*, 150 U. S. 182, 185, 37 L. Ed. 1044.

**Bonds in excess of amount canceled.**—In *Daviess County v. Dickinson*, 117 U. S. 657, 29 L. Ed. 1026, under authority conferred by statute, the county voted a subscription of \$250,000 to a railroad company, which was made, and, by order of the county court, bonds of the county to that amount were ordered to be sold and disposed of by a committee, for the purpose of paying such subscription. The officers of the county, without authority, executed and issued bonds in the amount of \$300,000. The bonds, as they were delivered, were separately numbered and entered upon the county register. The court held that the power to issue bonds was limited to \$250,000, and that the bonds issued in excess of that amount were unlawful and void. It was further held that bonds to the amount authorized, which were first issued and delivered, were valid and entitled to payment. In that case there was a clear and well-defined line between the legal and illegal issues, which enabled the court to declare invalid such of the bonds as exceeded the amount authorized, and to hold that the illegal excess did not vitiate the bonds which were authorized and legally issued. There was no scaling of the entire issue in that case so as to bring it within the limits of the county's authority. The \$250,000, which the court pronounced valid, had been expressly authorized by the county, and the bonds for that amount were readily separated from the \$50,000 excess which had not been authorized. It did not, therefore, involve any investigation on the part of the court to ascertain what the county could lawfully issue, but was merely the identification of the bonds which it intended to issue. Again, the amount of the bonds issued was not based upon the assessed valuation of the property of the county, but was limited to the amount

d. *Limitation as to Amount Not a Limitation as to Number of Subscriptions.*—Power given to a county to subscribe to the stock of any railroad not exceeding a certain amount does not restrict the county to a single subscription, but only limits the subscription to that amount to any one railroad.<sup>74</sup>

e. *Repeal of Limitation as to Amount by Amendment of Charter.*—If the act incorporating a railroad permits townships to subscribe to it to a certain amount only, and then on certain conditions, and a subsequent amendatory act authorizes townships, cities, towns and counties to subscribe, and mentions no limitation as to amount, but prescribes entirely different conditions precedent, it removes the limitation as to amount in the act of incorporation. The new act covers the entire subject and repeals the former provisions.<sup>75</sup>

### III. Election and Assent of Voters or Taxpayers.

**A. Necessity for Popular Vote.**—The legislature of a state may provide for aiding railroads by municipal authorities either with or without a vote of the people.<sup>76</sup> It is firmly established that the formality of a popular vote is not necessary,<sup>77</sup> unless the assent of the voters or taxpayers is required by the constitution as a prerequisite to a grant of municipal aid. In such case the assent of the voters, or taxpayers, as required, is indispensable to the grant.<sup>78</sup> Likewise if a statute requires the legal approval of the voters, taxpayers, or inhabitants as a prerequisite to a municipal subscription, the approval must be given as required or there is no authority to act.<sup>79</sup> The legislature of a state, however, unless the constitution contains provisions forbidding it, may pass a special statute authorizing county courts of counties "on the line of a certain railroad" to make subscriptions to the railroad without the assent of the voters, although a general statute of the state requires the previous assent of people of such counties expressed at a proper election.<sup>80</sup> But until the legislature authorizes an election, a vote of the people cannot be taken which will bind the municipality or confer upon the municipal authorities the power to make such a subscription. The legislative authority to obtain the popular assent is as essential to the validity of the election as it is to the subscription.<sup>81</sup>

**B. Petition by Taxpayers**—1. **RECORD MUST SHOW STATUTORY AUTHORITY HAS BEEN PURSUED.**—Where a majority of the taxpayers of a town are authorized by statute, on petition to the county court, to encumber the property

which the people of the county, by an election duly held, had determined should be issued.

74. *Limitation as to amount to any railroad not a limitation to one subscription.*—*Chicot County v. Lewis*, 103 U. S. 164, 167, 26 L. Ed. 495; *Empire v. Darlington*, 101 U. S. 87, 25 L. Ed. 878.

75. *Removal of limitation as to amount by subsequent provision covering subject.*—*Pana v. Bowler*, 107 U. S. 529, 538, 27 L. Ed. 424.

76. *Legislature may provide for municipal aid with or without popular vote.*—*Railroad Co. v. County of Otoe*, 16 Wall. 667, 677, 21 L. Ed. 375; *Thompson v. Perrine*, 103 U. S. 806, 812, 26 L. Ed. 612; *Thomson v. Lee County*, 3 Wall. 327, 18 L. Ed. 177.

77. *Popular vote unnecessary.*—*Dallas County v. McKenzie*, 110 U. S. 686, 28 L. Ed. 285; *St. Joseph Tp. v. Rogers*, 16 Wall. 644, 664, 21 L. Ed. 328; *Jonesboro City v. Cairo, etc., R. Co.*, 110 U. S. 192, 197, 28 L. Ed. 116; *Quincy v. Cooke*, 107 U. S. 549, 554, 27 L. Ed. 549.

78. *Constitutional requirement as to popular vote.*—*Jarrolt v. Moberly*, 103 U.

S. 580, 26 L. Ed. 492; *East Oakland Tp. v. Skinner*, 94 U. S. 255, 258, 24 L. Ed. 125.

79. *Statutory requirement as to popular vote.*—*Katzenberger v. Aberdeen*, 121 U. S. 172, 30 L. Ed. 911; *Rich v. Mentz Tp.*, 134 U. S. 632, 33 L. Ed. 1074; *East Oakland Tp. v. Skinner*, 94 U. S. 255, 258, 24 L. Ed. 125; *Grenada County Supervisors v. Brogden*, 112 U. S. 261, 28 L. Ed. 704.

*Inhabitants means legal voters.*—An act requiring the approval of the "inhabitants" of a town means the approval of the legal voters. *Walnut v. Wade*, 103 U. S. 683, 694, 26 L. Ed. 526, approved in *Ohio v. Frank*, 103 U. S. 697, 26 L. Ed. 531.

*Approval of taxpayers.*—The word "taxpayers" in a statute requiring the assent of the taxpayers for a municipal subscription to railroad stock, means taxpayers having the qualifications otherwise of lawful voters. *Hannibal v. Fautleroy*, 105 U. S. 408, 412, 26 L. Ed. 1103.

80. *Special statute allowing subscriptions without assent of voters.*—*Tifton County v. Locomotive Works*, 103 U. S. 523, 533, 26 L. Ed. 340.

81. *Legislative authority for election essential.*—*Allen v. Louisiana*, 103 U. S. 80.



of all, in aid of a railroad or other corporation, the record must show that the statutory authority has been pursued.<sup>82</sup> But if authority is given to a city to take stock in a road, "on the petition of two-thirds of the citizens," the proviso will be presumed to have been complied with where the bonds show, on their face, that they were issued in virtue of an ordinance of council of the city making the subscription; the bonds being in the hands of bona fide holders for value.<sup>83</sup>

2. NECESSITY FOR DESIGNATION OF RAILROAD IN PETITION.—The railroad to which the aid is to be given need not be designated by its corporate name in the petition. Any mode of description which designates it is sufficient.<sup>84</sup>

3. CONDITIONS ATTACHED TO PETITION.—The attaching of a condition to the signatures to a petition does not always and necessarily vitiate it.<sup>85</sup> If conditions are attached to a petition for the issue of county bonds to aid a railroad, the county judge may hear and determine whether or not the conditions named have been performed, whether such limitation or qualification affected substantially the merits of the application, or whether the condition had been waived or so far performed since the signature, as to cease to be any limitation upon the petition.<sup>86</sup>

4. PROCEEDINGS ON PETITION.—Proceedings on the petition before the county judge are not void because the notice does not specify the place at which the hearing on the petition is to be had. Where a notice fails to name any other place it will be presumed that the place intended is the regular office of the county judge. No particular specification is required unless the hearing is to be had at some place other than that at which his judicial work is customarily done.<sup>87</sup>

5. OFFICER'S DECISION AS TO REQUISITE NUMBER OF PETITIONERS.—The decision of the officer charged by law with the duty of deciding whether the petition contains the requisite number of taxpayers is conclusive where the bonds show no defect upon their face and are in the hands of bona fide holders.<sup>88</sup>

**C. Election**—1. IN GENERAL.—Defects, irregularities, or informalities, which do not affect the result of the vote, do not affect its validity.<sup>89</sup>

86, 26 L. Ed. 318; *Quincy v. Cooke*, 107 U. S. 549, 553, 27 L. Ed. 549.

82. Record must show statutory authority has been pursued.—*Rich v. Mentz* Tp., 134 U. S. 632, 640, 33 L. Ed. 1074; *Bissell v. Jeffersonville*, 24 How. 287, 16 L. Ed. 664.

83. Presumption as to compliance with statute.—*Van Hostrup v. Madison City*, 1 Wall. 291, 17 L. Ed. 538. See, generally the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

84. Railroad need not be named in petition.—*Scipio v. Wright*, 101 U. S. 665, 25 L. Ed. 1037.

85. Attaching condition does not vitiate petition.—*Andes v. Ely*, 158 U. S. 312, 320, 39 L. Ed. 996.

86. Conditional petition.—*Andes v. Ely*, 158 U. S. 312, 320, 39 L. Ed. 996.

87. Notice failing to name place of hearing on petition.—*Andes v. Ely*, 158 U. S. 312, 323, 39 L. Ed. 996.

88. Conclusiveness of officer's decision as to requisite number of petitioners.—*Orleans v. Platt*, 99 U. S. 676, 25 L. Ed. 404; *East Lincoln v. Davenport*, 94 U. S. 801, 24 L. Ed. 322; *Van Hostrup v. Madison City*, 1 Wall. 291, 17 L. Ed. 538; *Andes v. Ely*, 158 U. S. 312, 39 L. Ed. 996. See, generally, the title MUNICIPAL,

COUNTY, STATE AND FEDERAL SECURITIES.

89. Defects or irregularities in vote.—*Commissioners v. Thayer*, 94 U. S. 631, 640, 24 L. Ed. 133. See, also, *East Lincoln v. Davenport*, 94 U. S. 801, 24 L. Ed. 322; *Supervisors v. Schenck*, 5 Wall. 772, 18 L. Ed. 556. See, generally, the title ELECTIONS, vol. 5, p. 721.

**Election presided over by improper party.**—An irregularity in the conduct of the election in that the election was presided over and the returns made not by the supervisor, assessor and collector of the township, ex officio judges of election, but by a moderator chosen by the electors present, does not invalidate bonds in the hands of bona fide holders. *Pana v. Bowler*, 107 U. S. 529, 539, 541, 27 L. Ed. 424.

**Two elections on same day.**—Where two elections were held on the one day—one, for the purpose of ratifying a new constitution, the other to decide whether municipal bonds should be issued in payment of a donation previously authorized—but the polls in the first election were to remain open until sunset, and the second election was a town meeting called for 9 a. m., the presumption is that the township had in fact voted for issuing bonds before the close of the general



2. **PETITION FOR ELECTION.**—If a petition for the holding of an election to determine whether a subscription should be made to a railroad contains a less number of signers than the law requires, the election held in pursuance thereof is not invalidated. This is but an irregularity or informality not affecting the result of the election.<sup>90</sup> But if the law requires the application for the town meeting shall be made by "twenty voters and taxpayers" and the record does not show that any of those who signed the petition for the meeting were taxpayers, there can be no recovery on the bonds, issued by authority of a vote taken at such meeting.<sup>91</sup>

3. **NOTICE OF ELECTION.**—The notice of election must be given in the manner the law prescribes and must be published for the length of time required by the statute,<sup>92</sup> but no valid notice of an election can be given until the act goes into effect, because until then no officer of the township has authority to designate the time or place of holding it.<sup>93</sup> It will be presumed that proper notices of the election were given where the election was held, and the votes cast at the election were canvassed by the proper officers, and an order made by the county court for a subscription in accordance with the terms of the order for the election.<sup>94</sup> A transposition of two words in the corporate name of the railroad in the petition for election and notice of election does not destroy the result of the election where the route of the railroad was sufficiently set out in the petition and notice for election and it could be ascertained for what railroad the donation was intended.<sup>95</sup> The municipality may be estopped to deny any want of proper notice by payment of interest for several years.<sup>96</sup>

4. **SUBMISSION OF QUESTION TO POPULAR VOTE.**—The name of the particular railroad to which a subscription is to be made need not be inserted in the proposition for the popular vote, where the statute is general and authorizes a subscription to "any railroad" having a particular location.<sup>97</sup> It is sufficient if the proposition submitted to vote designate the route and the proposed termini of the road.<sup>98</sup> The submission of a single proposition to subscribe to the stock of three separate railroads does not render the subscription invalid, and it may

election, and the issue of bonds authorized comes within a saving clause of the constitution protecting municipal grants of aid previously authorized. *Louisville v. Savings Bank*, 14 U. S. 469, 26 L. Ed. 775.

90. **Petition for election containing less number than law requires.**—*Elmwood Tp. v. Marcy*, 92 U. S. 289, 296, 23 L. Ed. 710. See post, "Notice of Election," III, C, 3.

91. **Petition not showing petitioners to be taxpayers where statute requires it.**—*Gilson v. Dayton*, 123 U. S. 59, 31 L. Ed. 74.

92. **Publication of notice.**—*McClure v. Oxford Tp.*, 94 U. S. 429, 24 L. Ed. 129. See *Elmwood Tp. v. Marcy*, 92 U. S. 289, 296, 23 L. Ed. 710.

**Construction of order of court as to publication of notice.**—Where the notice required for the election was not prescribed by statute, but was fixed by the order of the county court to be given by publication in a newspaper for five weeks, there being, however, only thirty-four days between the order and the date of the election, it was held the notice was sufficient, as the county court could not be supposed to have directed a notice which was impossible to give, and must be construed in a reasonable way, as meaning a publication in each of the five weeks; not as meaning publication for

five full weeks of seven days each. *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 97, 37 L. Ed. 93.

93. **No valid notice can be given until act goes into effect.**—*McClure v. Oxford Tp.*, 94 U. S. 429, 433, 24 L. Ed. 129.

94. **Presumption as to proper notice.**—*Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 97, 37 L. Ed. 93.

95. **Transposition in words of corporate name in notice of election.**—*Moultrie County v. Fairfield*, 105 U. S. 370, 26 L. Ed. 945. See ante, "Petition for Election," III, C, 2.

96. **Municipality may be estopped by payment of interest.**—*Anderson County Comm'rs v. Beal*, 113 U. S. 227, 240, 28 L. Ed. 966. See, generally, the title INTEREST, vol. 7, p. 217.

97. **Name of railroad need not be inserted in submission of proposition.**—*Block v. Commissioners*, 99 U. S. 686, 698, 25 L. Ed. 491; *Commissioners v. Thayer*, 94 U. S. 631, 640, 24 L. Ed. 133; *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 37 L. Ed. 93.

98. **Designation of route and termini of road sufficient.**—*Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 100, 37 L. Ed. 93; *Commissioners v. Thayer*, 94 U. S. 631, 24 L. Ed. 133; *Scipio v. Wright*, 101 U. S. 665, 25 L. Ed. 1037.

be remedied by a curative statute subsequently enacted;<sup>99</sup> nor does the word "bonus" in the submission of a proposition to the voters for appropriating the swamp lands of a county as a "bonus" to any company for building a railroad through the county, make it a gift or voluntary donation to the railroad, so as to come within a prohibitory clause in the state constitution against donations.<sup>1</sup> The acceptance and holding by the county of the certificate of stock of the company, the issue and delivery of the bonds to the company, and the payment of interest on them for a time, will cure defects, if any existed, as to the order for submitting the question of subscription to a popular vote, and authorizes a bona fide taker of the bonds to presume that every thing necessary to their validity had been properly done.<sup>2</sup>

5. CONDUCT OF ELECTION.—The requirement of an act that the "election shall be held and conducted and return thereof made as is provided by law," means in case of a town the law provided for town elections. If a village or city, and the law of its incorporation has special provisions, those are to be followed; otherwise, any general law as to village or city elections is to be observed.<sup>3</sup>

6. MAJORITY OF LEGAL VOTERS.—The phrase "a majority of the legal voters" requires only a majority of the legal voters voting at the election notified and held to ascertain whether the proposition to subscribe for the stock of the company should be adopted or rejected.<sup>4</sup>

7. DETERMINING RESULT OF ELECTION.—The action of the persons or the tribunal authorized by law to determine the result of an election held for the purposes of ascertaining whether a municipal township shall issue its bonds in aid of an object authorized by law is conclusive, and a bona fide purchaser of the bonds is under no obligation to look beyond it.<sup>5</sup>

8. AUTHORITY LIMITED TO TERMS OF PROPOSITION AS VOTED.—The authority granted by an election is limited to the exact terms of the vote. A municipal corporation cannot alter the subscription voted by the people, unless the legislature authorizes same.<sup>6</sup>

**99. Submission in one proposition of subscription to several railroads.**—*Morgan County v. Allen*, 103 U. S. 498, 26 L. Ed. 498; *Chicot County v. Lewis*, 103 U. S. 164, 26 L. Ed. 495. See post, "Curative Acts," VIII, A, 2.

**Laches.**—The supreme court will not inquire whether the particular mode in which the people were invited to pass upon the proposed subscription affected the substance or validity of the subscription when made; or, whether the subscription was not a waiver of any irregularity in that respect, where the suit was brought more than fifteen years after the subscription had been made, and the county never disputed, in any direct form, the legality by the subscription or the order submitting the question of subscription. *Morgan County v. Allen*, 103 U. S. 498, 511, 26 L. Ed. 498.

1. Effect of "bonus" in submission of proposition.—*Kenicott v. Supervisors*, 16 Wall. 452, 470, 21 L. Ed. 319. See ante, "Aid to Railroads," I, A, 7.

2. Defects in order for submission.—*Commissioners v. January*, 94 U. S. 202, 24 L. Ed. 110.

3. Conduct of election.—*Oregon v. Jennings*, 119 U. S. 74, 95, 30 L. Ed. 323.

4. Majority of legal voters.—*St. Joseph Tp. v. Rogers*, 16 Wall. 644, 665, 21 L. Ed. 328.

**Approval of qualified voters.**—A statute

requiring the approval of two-thirds of the qualified voters means the approval of two-thirds of those voting. *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 37 L. Ed. 93; *Carroll County v. Smith*, 111 U. S. 556, 565, 28 L. Ed. 517.

**Township aid act of Missouri.**—The township aid act of Missouri of 1868, requiring the assent of two-thirds of the qualified voters voting at the election, in order to make a subscription to a railroad, is not unconstitutional because the Missouri constitution provides that no such aid shall be given unless with the assent of two-thirds of the qualified voters. *Cass County v. Johnston*, 95 U. S. 360, 24 L. Ed. 416, partly overruling *Harshman v. Bates County*, 92 U. S. 569, 23 L. Ed. 747; *Cass County v. Jordan*, 95 U. S. 373, 24 L. Ed. 419; *Cass County v. Shores*, 95 U. S. 375, 24 L. Ed. 219.

5. Determining result of election.—*Rock Creek Tp. v. Strong*, 96 U. S. 271, 24 L. Ed. 815.

6. Authority limited to terms of proposition as voted.—*Bell v. Railroad Co.*, 4 Wall. 598, 601, 18 L. Ed. 338; *Daviess County v. Dickinson*, 117 U. S. 657, 29 L. Ed. 1026; *German Savings Bank v. Franklin County*, 128 U. S. 526, 32 L. Ed. 519; *Citizens' Sav., etc., Ass'n v. Perry County*, 156 U. S. 692, 39 L. Ed. 585.

**Limitation as to amount.**—Where a statute authorized the county court to sub-



**Condition as to Time of Completion.**—Where, prior to the adoption of a new constitution prohibiting municipal aid unless authorized by a vote prior to the adoption of the new constitution, the people had voted for a subscription to a railroad on a certain condition, the law providing that the subscription should not be valid and binding until the conditions are complied with, and the condition was not complied with prior to the adoption of the new constitution, it was held that bonds issued without the compliance with the condition were unlawful as they had not been authorized by a vote taken prior to the adoption of the constitution.<sup>7</sup>

9. **NUMBER OF ELECTIONS.**—There is no limitation as to the time when, or the number of times, the voters might be called upon to decide the question of subscription, where the statute contains no restriction upon the number of times.<sup>8</sup>

#### IV. When Subscription Becomes Binding.

**A. Aid Not Obligatory until Subscription Is Actually Made.**—Legislative authority given to a municipality to grant aid, upon the assent of the voters expressed at an election, does not make such aid obligatory on its part when the voters have assented to the grant of aid in the prescribed manner. The aid is still discretionary with the municipality and the company acquires no vested rights by such vote which cannot be taken away by the legislature. Until the subscription is made the contract is unexecuted and not binding upon either party.<sup>9</sup> The power to subscribe to the stock of a railroad includes authority to agree to subscribe and a new constitution subsequently enacted could not impair the contract.<sup>10</sup>

**B. Subscription on Books of Company Unnecessary.**—An actual manual subscription on the books of a railroad company is not indispensably necessary to bind a municipality as a subscriber to the capital stock of the railroad.<sup>11</sup>

scribe for such an amount of stock only, as should be fixed and proposed by the commissioners named in the statute, and be approved by the vote of a majority of the voters of the county; the authority of the county court, either to levy taxes, or to issue bonds, was limited to the amount so proposed and voted. That amount was \$250,000. The county court therefore had no authority to issue bonds for a greater amount, and any bonds issued in excess of that amount were unlawful and void. *Daviess County v. Dickinson*, 117 U. S. 657, 663, 29 L. Ed. 1026.

**Condition as to commencement and completion of road.**—Where a subscription is voted by a county to the stock of a railroad on condition that the railroad be commenced in the county within nine months from the date of the election, it was held that this was a condition precedent which must be complied with. *German Savings Bank v. Franklin County*, 128 U. S. 526, 32 L. Ed. 519.

**Location of machine shops.**—Where the people of a county voted for the subscription on the condition specified in the election notices, that no subscription should be made nor bonds issued until the company's machine shops were located at a certain point, it was held that bonds issued by the county court before the condition was complied with were void. *Citizens' Sav., etc., Ass'n v. Perry County*, 156 U. S. 692, 700, 39 L. Ed. 585.

7. *German Savings Bank v. Franklin County*, 128 U. S. 526, 532, 32 L. Ed. 519.

**Subscription to another railroad than the vote authorized.**—A subscription to a certain railroad authorized by the voters of the county does not authorize a subscription to one of three new corporations formed by an amendment to the charter of the former corporation, and bonds issued to one of such companies are void even in the hands of innocent purchasers, as there was no power to issue same. *Marsh v. Fulton County*, 10 Wall. 676, 19 L. Ed. 1040.

**Purchase of city debt.**—In *New Albany v. Burke*, 11 Wall. 96, 105, 20 L. Ed. 155, the common council were free to exercise their own discretion. They were under no obligation to subscribe at all, and they might take as little or as much stock as they pleased, not exceeding six hundred thousand dollars. The arrangement assailed by the complainants was not a modification of the subscription previously made, or a bonus given for a release. It was rather a purchase of the city debt and was not beyond the power of the contracting parties.

8. **Number of election.**—*Supervisors v. Galbraith*, 99 U. S. 214, 219, 25 L. Ed. 410.

9. **Aid not obligatory until subscription is actually made.**—*Aspinwall v. Board of Commissioners*, 22 How. 364, 16 L. Ed. 296.

10. **Power to subscribe includes power to agree to subscribe.**—*Moultrie County v. Rockingham, etc., Sav. Bank*, 92 U. S. 631, 632, 634, 23 L. Ed. 631.

11. **Subscription on books of company unnecessary.**—*Bates County v. Winters*,



**C. What Amounts to Subscription**—1. **IN GENERAL.**—There is no restriction upon the power of the legislature to declare what shall amount to a subscription to the stock of a railroad, or what shall be the evidence that the party proposing to take a stock has completed the contract. The legislature may require such evidence to be in writing upon the books of the company, under the authority of the officers of the town, or it may authorize it to be done by an order or resolution of the county court, or it may authorize an engagement to take stock to be made by parol, or it may make a majority vote of the legal voters of the town who voted at an election an equivalent to and substitute for a subscription upon the books of the company.<sup>12</sup>

2. **RESOLUTION OF MUNICIPAL AUTHORITIES AS A SUBSCRIPTION.**—"If the body or agency having authority to make \* \* \* a subscription passes an ordinance or resolution to the effect that it does thereby, in the name and on behalf of the municipality, subscribe a specified amount of stock, and presents a copy of that ordinance or resolution to the company for acceptance as a subscription, and the company does, in fact, accept, and notifies the municipality, or its proper agent, to that effect, the contract of subscription is complete, and binds the parties according to its terms."<sup>13</sup>

## V. Exercise of Power.

**A. Legislature May Direct Manner of Exercise.**—The legislature may direct the mode in which the power shall be carried out by the counties and may direct that it shall be carried out by a special commission, although the constitution declares county officers shall be elected by the electors of the county.<sup>14</sup>

**B. Provisions of Statute Must Be Strictly Followed.**—Municipal officers cannot rightfully dispense with any of the essential forms of proceeding which the legislature has prescribed for the purpose of investing them with power to act in the matter of making a subscription. If they do, the bonds they issue will be invalid in the hands of all who cannot claim protection as bona fide holders.<sup>15</sup> The provisions of the statute must be strictly pursued.<sup>16</sup> If the statute designates the authorities who are to issue the bonds in payment of the subscription, that officer alone can perform the act,<sup>17</sup> but a legislative act pre-

112 U. S. 325, 327, 28 L. Ed. 744; *Nugent v. Supervisors*, 19 Wall. 241, 22 L. Ed. 83; *Moultrie County v. Rockingham, etc.*, Sav. Bank, 92 U. S. 631, 23 L. Ed. 631; *Cass County v. Gillett*, 100 U. S. 585, 594, 25 L. Ed. 585.

12. **Legislature unrestricted to declare what amounts to a subscription.**—*East Lincoln v. Davenport*, 94 U. S. 801, 802, 24 L. Ed. 322; *Nugent v. Supervisors*, 19 Wall. 241, 22 L. Ed. 83.

13. **Resolution of municipal authorities as a subscription.**—*Bates County v. Winters*, 112 U. S. 325, 327, 28 L. Ed. 744; *Nugent v. Supervisors*, 19 Wall. 241, 22 L. Ed. 83; *Moultrie County v. Rockingham, etc.*, Sav. Bank, 92 U. S. 631, 23 L. Ed. 631; *Bates County v. Winters*, 97 U. S. 83, 89, 24 L. Ed. 933; *Cass County v. Gillett*, 100 U. S. 585, 25 L. Ed. 585.

**Kansas.**—Where, pursuant to a statute entitled "An act authorizing counties and cities to issue bonds to railroad companies," approved Feb. 10, 1865, as amended Feb. 26, 1866, an election was held in a county in Kansas upon the question of a county subscription to the capital stock of "any railroad company" then, or thereafter to be, organized which should construct a railroad from a point in Missouri to a point in the county, and

the result having, May 8, 1867, been declared by the proper authorities to be in favor of the subscription, and so entered on their minutes, the bonds were, in 1870, issued in payment of the subscription to a Missouri company, which caused the road to be built, held, that the subscription was binding, and that the county, in an action on the bonds by such a purchaser, is estopped from asserting that in fact a majority of the qualified electors had not voted in favor of the issue of the bonds. *Block v. Commissioners*, 99 U. S. 686, 25 L. Ed. 491.

14. **Legislature may direct mode of exercise.**—*Sheboygan Co. v. Parker*, 3 Wall. 93, 18 L. Ed. 33.

15. **Essential forms of proceedings must be complied with.**—*McClure v. Oxford Tp.*, 94 U. S. 429, 432, 24 L. Ed. 129.

16. **Provisions of statute must be strictly pursued.**—*Ogden v. Daviess County*, 102 U. S. 634, 26 L. Ed. 263; *Marsh v. Fulton County*, 10 Wall. 676, 19 L. Ed. 1040; *Harshman v. Bates County*, 92 U. S. 569, 23 L. Ed. 747; *Young v. Clarendon Tp.*, 132 U. S. 340, 347, 33 L. Ed. 356.

17. **Authorities designated to issue bonds must issue same.**—*Norton v. Shelly County*, 118 U. S. 425, 30 L. Ed. 178.

scribing the mode in which counties shall issue their bonds, is but the act of one legislature; and accordingly a special act giving to a county a right to issue their bonds in disregard of the ordinary legislative provisions, authorizes such last-named sort of issue.<sup>18</sup> When there is no express limitation as to the time of making a subscription by a county to aid in the construction of a railroad, it is optional with those who could do so to make it, when most convenient or advantageous to themselves.<sup>19</sup>

### C. Statutes Authorizing Grand Jury to Fix Amount of Subscription.

—Where statutes provide for the fixing of the amount of subscription by a grand jury, it is not necessary for the grand jury to set forth the terms and manner of payment.<sup>20</sup>

## VI. Conditional Grant of Aid.

**A. Legislature May Impose Conditions.**—The legislature in granting authority to subscribe to the stock of a railroad can impose such conditions as it may choose,<sup>21</sup> or if the municipality has authority, it may give upon conditions,<sup>22</sup> but the city may waive any self-imposed condition upon the grant of aid.<sup>23</sup> Where the right to exercise the power has been subjected to conditions prescribed by the legislature, the municipality cannot waive or dispense with such conditions.<sup>24</sup> But the municipality may be estopped from denying a compliance with the statutory requirements, by recitals in the bonds, where the recitals have been made by officers entrusted under the statute with the duty of determining whether the statutory requirements had been complied with.<sup>25</sup>

**B. Power to Grant Aid "with or without Conditions."**—Power to make a donation "with or without conditions" authorizes a municipality to secure such

**18. Special act of legislature may vary general mode of procedure.**—*Railroad Co. v. County of Otoe*, 16 Wall. 667, 21 L. Ed. 375. See post, "Power to Issue Bonds in Payment," IX, B.

**19. Time of making subscription.**—*Woods v. Lawrence County*, 1 Black 386, 410, 17 L. Ed. 122.

**20. Grand jury fixing amount of subscription.**—*Woods v. Lawrence County*, 1 Black 386, 17 L. Ed. 122. See ante, "Amount of Aid," II, C, 3.

**21. Legislature may impose any conditions it chooses.**—*Young v. Clarendon Tp.*, 132 U. S. 340, 346, 347, 33 L. Ed. 356; *Otoe County v. Baldwin*, 111 U. S. 1, 13, 28 L. Ed. 331; *Railroad Co. v. County of Otoe*, 16 Wall. 667, 21 L. Ed. 375.

**22. Converse v. Fort Scott**, 92 U. S. 503, 508, 23 L. Ed. 621.

**23. Self-imposed conditions may be waived.**—*Graves v. Saline County*, 161 U. S. 359, 374, 40 L. Ed. 732.

**Waiver must be by municipality acting as the principal.**—But where the municipality is empowered to subscribe with or without conditions as it may think fit, and where the conditions are such as it chooses to impose, there seems to be no good reason why it may not be competent for such municipality to waive such self-imposed conditions, provided, of course, such waiver is by the municipality acting as the principal, and not by mere agents or official persons. *Graves v. Saline County*, 161 U. S. 359, 373, 40 L. Ed. 732.

**Conditions as to completion and operation.**—Where municipal aid is granted upon condition that the railway shall be com-

pleted and in operation within a specified time, such condition should be given a reasonable interpretation. *Provident Life, etc., Co. v. Mercer County*, 170 U. S. 593, 42 L. Ed. 1156.

**24. Statutory conditions not waivable.**—*Graves v. Saline County*, 161 U. S. 359, 373, 40 L. Ed. 732.

**25. Municipality may be estopped by recitals in bonds.**—*Menasha v. Hazard*, 102 U. S. 81, 26 L. Ed. 85; *Oregon v. Jennings*, 119 U. S. 74, 30 L. Ed. 323; *Pana v. Bowler*, 107 U. S. 529, 540, 27 L. Ed. 424; *Sherman County v. Simons*, 109 U. S. 735, 738, 27 L. Ed. 1093; *Commissioners v. January*, 94 U. S. 202, 24 L. Ed. 110; *Orleans v. Platt*, 99 U. S. 676, 683, 25 L. Ed. 404; *Provident Life, etc., Co. v. Mercer County*, 170 U. S. 593, 601, 42 L. Ed. 1156; *Pompton v. Cooper Union*, 101 U. S. 196, 203, 25 L. Ed. 803; *Daviess County v. Huidekoper*, 98 U. S. 98, 102, 25 L. Ed. 112; *Coloma v. Eaves*, 92 U. S. 484, 491, 23 L. Ed. 579; *Randolph County v. Post*, 93 U. S. 502, 23 L. Ed. 957; *Leavenworth County v. Barnes*, 94 U. S. 70, 24 L. Ed. 63; *Commissioners v. Bolles*, 94 U. S. 104, 24 L. Ed. 46; *Commissioners v. Thayer*, 94 U. S. 631, 24 L. Ed. 133; *Cass County v. Johnston*, 95 U. S. 360, 24 L. Ed. 416; *Schuyler County v. Thomas*, 98 U. S. 169, 25 L. Ed. 88; *Bissell v. Jeffersonville*, 24 How. 287, 299, 16 L. Ed. 664; *Venice v. Murdock*, 92 U. S. 494, 489, 23 L. Ed. 583; *St. Joseph Tp. v. Rogers*, 16 Wall. 644, 21 L. Ed. 328; *Marcy v. Oswego Tp.*, 92 U. S. 637, 639, 23 L. Ed. 748; *Scotland County v. Thomas*, 94 U. S. 682, 24 L. Ed. 219; *Larned v. Burlington*, 4 Wall. 275, 276, 18



special privileges for the people of the municipality not inconsistent with public policy, as the railroad company is willing to concede.<sup>26</sup>

**C. Construction of Statutes Granting Power on Conditions**—1. **ESTIMATE OF GRADING, EMBANKMENT AND MASONRY**.—An estimate of cost and not of quantity satisfies the requirement of a statute that before an application can be made to the county authorities to order an election to decide whether the county shall subscribe to the railroad, an "estimate of the grading, embankment, and masonry made under oath of the engineer," shall be given.<sup>27</sup>

2. **CONDITION AS TO COMPLETION OF FIVE MILES OF TRACK**.—Under Pennsylvania act providing that the railroad company's franchises should be used and enjoyed when five miles of the railroad had been finished, as fully as if the whole road had been completed, it was held not to require a part of the railroad to be built in each county before it could subscribe.<sup>28</sup>

## VII. Effect of Assignments and Consolidation of Corporations upon Grants of Aid.

**A. Assignments of Franchises as Invalidating Subscription**.—County subscriptions to a branch railroad, organized by a committee of the railroad, to which railroad and its branches aid was authorized, are not invalidated by a partial assignment of franchises to another railroad prior to the subscription.<sup>29</sup> The transferee of a stock subscription requires all the rights of the railroad to which the subscription has been made, upon the performance of all the conditions,<sup>30</sup> but the assignment by a railroad of a tax voted to assist in the construction of the road does not carry the right to sue for and collect the taxes to him discharged of the equities between the company and the taxpayers.<sup>31</sup>

L. Ed. 353. See, generally, the title **MUNICIPAL, COUNTY, STATE AND FEDERAL AID**.

**26. Municipality may impose conditions not inconsistent with public policy**.—Taylor v. Ypsilanti, 105 U. S. 60, 62, 26 L. Ed. 1008, approved in New Buffalo v. Iron Co., 105 U. S. 73, 26 L. Ed. 1024.

**Conditions as to location of terminus**.—Where a statute authorizes a municipality "to pledge its aid by loan or donation, with or without conditions" with the assent of a majority of the electors voting at a meeting held, called for that purpose, this does not limit the municipality to a loan or donation, but it may impose conditions that the railroad should have and continue its eastern terminus in the city, or connect with another railroad within its limits, and that the railroad shall give every citizen subscribing and paying for a share of stock municipal bonds of the city to the amount subscribed and paid for, not exceeding the amount of the city's subscription, and allowing thirty days for the citizens of the city to subscribe to the railroad company's stock to the amount of the city's aid. Taylor v. Ypsilanti, 105 U. S. 60, 61, 26 L. Ed. 1008.

**27. Estimate of grading**.—Wilson County v. National Bank, 103 U. S. 770, 779, 26 L. Ed. 488.

**Condition as to location of tracks**.—Where an act of the general assembly of the state of Illinois in force March 7, 1867, authorized towns acting under the township organization law of the state—of which the town of Concord was one—to appropriate money to aid in the construction of a certain railroad, to be paid to

said company as soon as its track should have been located and constructed through such towns, it was held, that the town could not make an appropriation or donation in aid of the company until its road was located and constructed through the town. Concord v. Portsmouth Sav. Bank, 92 U. S. 625, 23 L. Ed. 628.

**28. Completion of five miles of track**.—Woods v. Lawrence County, 1 Black 386, 413, 17 L. Ed. 122.

**29. Partial assignment**.—Cass County v. Gillett, 100 U. S. 585, 591, 25 L. Ed. 585.

**30. Transfer of stock subscription**.—Ray County v. Vansycle, 96 U. S. 675, 24 L. Ed. 800.

**Missouri—Transfer of subscription**.—Where a county had subscribed aid to the stock of a railroad prior to the adoption of the Missouri constitution prohibiting such aid unless sanctioned by an election, and subsequent to the adoption of this constitution, the first railroad B., to which the stock was subscribed, made an agreement with another railroad C. and the county, by which the subscription of the county to B. was released on consideration that the county transfer the subscription to C. railroad, by which the county received a railroad in all material respects like the railroad originally contemplated, it was held that the C. railroad acquired a right to the original subscription to B. and the bonds issued to aid the C. railroad were valid in the hands of bona fide holders. Ray County v. Vansycle, 96 U. S. 675, 24 L. Ed. 800.

**31. Assignment of tax**.—Sully v. Drennan, 113 U. S. 287, 291, 28 L. Ed. 1007.



**B. Consolidation of Corporation as Invalidating Subscription.**—The consolidation of a railroad to which a stock subscription or donation has been made, with another railroad, under laws existing at the time of the subscription or donation, permitting such consolidation, does not invalidate the subscription to the stock of one of the constituent companies. The consolidated corporation succeeds to the rights to enforce same and the municipality is not released therefrom,<sup>32</sup> nor does the consolidation affect the rights of the municipality to make a subscription which it was authorized to make to one of the constituent companies,<sup>33</sup> and this is not changed, although the consolidation be made by authority given after a state constitution forbidding municipal aid takes effect, and although the subscription be made to the stock of such newly organized company, and the bonds be issued after the same period.<sup>34</sup> The fact that the company with which the railroad consolidated belonged to another state in no way affects the right of a county to issue bonds in payment of the subscription to one of the companies.<sup>35</sup> But if authority to make a subscription to a railroad has only been voted and the county court is merely the agent of the county to make the subscription, and the consolidation takes place before the subscription is actually made, the authority of the agent to make the subscription ceases as the railroad to which he was authorized to make a subscription no longer exists. The consolidated railroad succeeds to no right to enforce the subscription as there was no vested right to which to succeed.<sup>36</sup>

### VIII. Grants and Repeal of Authority.

**A. Grant of Authority**—1. **IN GENERAL.**—The legislature must authorize the subscription by a statute passed in advance or by a proper statute of ratification and authorization passed subsequently.<sup>37</sup>

2. **CURATIVE ACTS.**—A municipal subscription to the stock of a railroad company, or in aid of the construction of a railroad, made without authority previously conferred, may be confirmed and legalized by subsequent legislative en-

**32. Consolidation of corporation.**—*Bates County v. Winters*, 112 U. S. 325, 28 L. Ed. 744; *East Lincoln v. Davenport*, 94 U. S. 801, 24 L. Ed. 322; *Henry County v. Nicolay*, 95 U. S. 619, 24 L. Ed. 394; *New Buffalo v. Iron Co.*, 105 U. S. 73, 76, 26 L. Ed. 1024; *Chickaming v. Carpenter*, 106 U. S. 663, 27 L. Ed. 307; *Nugent v. Supervisors*, 19 Wall. 241, 22 L. Ed. 83; *Harter v. Kernochan*, 103 U. S. 562, 574, 26 L. Ed. 411.

**Rights and privileges pass without mention upon consolidation.**—The rights, privileges and franchises of a railroad need not be expressly declared to pass over to the other railroad with which it consolidates. The authority given to consolidate, "upon such terms as may be deemed just and proper," includes the power to transfer to the consolidated company the franchises and privileges connected with the road, if the law itself did not have that effect and the consolidated company succeeds to the right to enforce the loan of aid. *Green County v. Conness*, 109 U. S. 104, 106, 27 L. Ed. 872.

**33. Subscription authorized but never made before consolidation.**—*Empire v. Darlington*, 101 U. S. 87, 25 L. Ed. 878; *Schuyler County v. Thomas*, 98 U. S. 169, 25 L. Ed. 88; *Wilson v. Salamanca*, 99 U. S. 499, 25 L. Ed. 330; *Scotland County v. Thomas*, 94 U. S. 682, 24 L. Ed. 219; *Menasha v. Hazard*, 102 U. S. 81, 95, 26 L. Ed. 85; *Tipton County v. Locomotive*

*Works*, 103 U. S. 523, 533, 26 L. Ed. 340; *Livingston County v. First Nat. Bank*, 128 U. S. 102, 32 L. Ed. 359.

**Power of municipality to subscribe is a right and privilege of railroad.**—The power given to a municipal corporation to subscribe to the stock of a railroad company may be, also, a right and privilege of that company. *Scotland County v. Thomas*, 94 U. S. 682, 24 L. Ed. 219; *Wilson v. Salamanca*, 99 U. S. 499, 25 L. Ed. 330; *Empire v. Darlington*, 101 U. S. 87, 91, 25 L. Ed. 878; *Tipton County v. Locomotive Works*, 103 U. S. 523, 533, 26 L. Ed. 340.

**34. Authority to consolidate given after enactment of state constitution forbidding aid.**—*Schuyler County v. Thomas*, 98 U. S. 169, 173, 25 L. Ed. 88; *Scotland County v. Thomas*, 94 U. S. 682, 24 L. Ed. 219; *Scotland County v. Hill*, 132 U. S. 107, 112, 33 L. Ed. 261; *Green County v. Conness*, 109 U. S. 104, 27 L. Ed. 872.

**35. Consolidation with railroad of another state.**—*Scotland County v. Thomas*, 94 U. S. 682, 694, 24 L. Ed. 219.

**36. Authority of agent destroyed by consolidation.**—*Bates County v. Winters*, 97 U. S. 83, 24 L. Ed. 933; *Harshman v. Bates County*, 92 U. S. 569, 23 L. Ed. 747, distinguished in *Scotland County v. Thomas*, 94 U. S. 682, 691, 24 L. Ed. 219.

**37. Legislature may authorize in advance or subsequently ratify.**—*Hayes v.*

actment, when legislation of that character is not prohibited by the constitution, and when that which was done would have been legal had it been done under legislative sanction previously given.<sup>38</sup> Likewise congress may validate the vote of the people of a territory to make a donation to a railroad under an invalid territorial statute, and may provide that instead of a donation the railroad shall give an equal amount of stock to the county, and bonds issued by a territory under such authority are valid. Such an act of congress is equivalent to an express grant of authority.<sup>39</sup> The legislature of a state cannot, after the adoption of a state constitution requiring a certain vote as a prerequisite to a subscription, legalize a municipal subscription assented to by a less majority or legal voters than is prescribed in the constitution.<sup>40</sup> But defects and irregularities in subscriptions may, in all cases, be ratified by a curative act subsequently enacted where the legislature could have originally conferred the power to do it in the manner in which it was done.<sup>41</sup> The legislative recognition may be made by implication.<sup>42</sup> Such subsequent ratification by the legislature of what had been done by the voters cannot be regarded as imposing a debt upon them against their will. The legislature simply gives effect to the wishes of the people, as ex-

Holly Springs, 114 U. S. 120, 125, 29 L. Ed. 81.

**38. Subscription made without authority may be legalized.**—Grenada County Supervisors *v.* Brogden, 112 U. S. 261, 28 L. Ed. 704; Leavenworth County *v.* Barnes, 94 U. S. 70, 24 L. Ed. 63; Campbell *v.* Kenosha, 5 Wall. 194, 18 L. Ed. 610; Quincy *v.* Cooke, 107 U. S. 549, 27 L. Ed. 549; Ritchie *v.* Franklin County, 22 Wall. 67, 22 L. Ed. 825; The City *v.* Lamson, 9 Wall. 477, 483, 19 L. Ed. 725; Bolles *v.* Brimfield, 120 U. S. 759, 760, 30 L. Ed. 786; Anderson *v.* Santa Anna, 116 U. S. 356, 364, 29 L. Ed. 633; Jonesboro City *v.* Cairo, etc., R. Co., 110 U. S. 192, 28 L. Ed. 116; Otoe County *v.* Baldwin, 111 U. S. 1, 28 L. Ed. 331; Thomson *v.* Lee County, 3 Wall. 327, 18 L. Ed. 177; Thompson *v.* Perrine, 103 U. S. 806, 26 L. Ed. 612; Bissell *v.* Jeffersonville, 24 How. 287, 16 L. Ed. 664; St. Joseph Tp. *v.* Rogers, 16 Wall. 644, 666, 21 L. Ed. 328. See, generally, the title CONSTITUTIONAL LAW, vol. 4, p. 1.

**County supervisors having no authority to subscribe cannot ratify unauthorized subscription.**—Where supervisors of a county possessed no authority to make a subscription or issue bonds to a railroad company, in the first instance, without the previous sanction of the qualified voters of the county, they could not ratify a subscription to the company already made without such authorization. Marsh *v.* Fulton County, 10 Wall. 676, 19 L. Ed. 1040.

**39. Congress validating invalid territorial subscription.**—National Bank *v.* Yankton County, 101 U. S. 129, 25 L. Ed. 1046; Utter *v.* Franklin, 172 U. S. 416, 43 L. Ed. 498.

**Territorial bonds—Railroad not completed.**—Bonds issued by Pima County, Arizona, to assist in the construction of a railroad in literal compliance with a territorial statute which was declared void because beyond the power of the territorial legislation, come within the pro-

visions of the act of congress of June 6, 1896 (29 Stat. 262), authorizing the refunding of all outstanding bonds of the territory and its counties and municipalities which had been authorized by the legislature and "had been sold or exchanged in good faith in compliance with the terms of the act of the legislature by which they had been authorized." They are not invalid because, subsequent to their issue, the original holders of the bonds failed to complete the railroad and the county thereby received no benefit from same, and as the county did not make the completion of the road a condition precedent to the issue of the bonds, nor make their validity dependant upon the subsequent conduct of the railroad company, bad faith cannot be predicated of the transaction so long as there was not only a substantial, but a literal, compliance with the requirements of the act under which they were issued. Murphy *v.* Utter, 186 U. S. 95, 112, 113, 46 L. Ed. 1070.

**40. Legalizing subscription violative of state constitution.**—Katzenberger *v.* Aberdeen, 121 U. S. 172, 178, 30 L. Ed. 911.

**41. Defects and irregularities may be cured.**—Elmwood Tp. *v.* Marcy, 92 U. S. 289, 297, 23 L. Ed. 710; Commissioners *v.* Thayer, 94 U. S. 631, 24 L. Ed. 133; Rogers *v.* Keokuk, 154 U. S., appx., 546, 18 L. Ed. 74; St. Joseph Tp. *v.* Rogers, 16 Wall. 644, 663, 21 L. Ed. 328; Bissell *v.* Jeffersonville, 24 How. 287, 295, 16 L. Ed. 664; Jonesboro City *v.* Cairo, etc., R. Co., 110 U. S. 192, 196, 28 L. Ed. 116; Otoe County *v.* Baldwin, 111 U. S. 1, 15, 28 L. Ed. 331; Quincy *v.* Cooke, 107 U. S. 549, 555, 27 L. Ed. 549; Thompson *v.* Perrine, 103 U. S. 806, 813, 26 L. Ed. 612; Thomson *v.* Lee County, 3 Wall. 327, 18 L. Ed. 177; Gelpcke *v.* Dubuque, 1 Wall. 175, 203, 17 L. Ed. 520.

**42. Legislative recognition may be implied.**—Campbell *v.* Kenosha, 5 Wall. 194, 18 L. Ed. 610.

**Intention of legislature to validate insufficiently shown.**—Where a city sub-



pressed in the customary mode for ascertaining the popular will.<sup>43</sup> A provision in the charter of a city that the bonds of the city shall be exempt from tax, does not validate bonds unlawfully issued.<sup>44</sup>

**B. Repeal of Authority.**—1. IN GENERAL.—The legislature may repeal laws authorizing municipal subscriptions to railways any time before the subscription is actually made. And even if there has been a public vote in favor of a subscription, such vote does not itself form a contract with the railway company protected by the constitution, the court holding that until the subscription is actually made the contract is unexecuted.<sup>45</sup>

2. BY CONSTITUTIONAL PROVISIONS.—The adoption of a new constitution prohibiting municipal aid, takes away all authority to grant such aid under previous authority unless some valid contract required it to be done.<sup>46</sup> Some constitutional restrictions upon the power of the legislature to authorize municipal aid have been held to be a limitation upon the future power of the legislature only, and not intended to be retroactive so as to affect laws in existence when the constitution was adopted.<sup>47</sup> Of course, the adoption of a new constitution prohibiting municipal aid cannot impair or annul a contract between a county and a railroad previously made and partly performed before the new constitution went into effect.<sup>48</sup> But the provisions of a railroad charter, authorizing a county to

scribed for stock in a railroad corporation, after what was called a "special election" was held, but neither the election nor the subscription was authorized by any act of the legislature, and afterward the legislature passed an act providing "that all subscriptions to the capital stock of the" corporation, "made by any county, city, or town in this state, which were not made in violation of the constitution of this state, are hereby legalized, ratified, and confirmed," and thereafter the city issued bonds to pay for its subscription and a suit was brought against the city, by a bona fide holder of coupons cut from the bonds, to recover their amount, it was held the intention of the legislature to confirm and ratify the subscription could not be ascertained with certainty from the language of the act, and the bonds were not validated. *Hayes v. Holly Springs*, 114 U. S. 120, 29 L. Ed. 81.

**43. Curing defects, not imposing debt against will.**—*Bolles v. Brimfield*, 120 U. S. 759, 764, 30 L. Ed. 786; *Grenada County Supervisors v. Brogden*, 112 U. S. 261, 262, 28 L. Ed. 704; *Anderson v. Santa Anna*, 116 U. S. 356, 364, 29 L. Ed. 633; *Harter v. Kernochan*, 103 U. S. 562, 26 L. Ed. 411.

**44. Provision as to exemption from taxation as validating bonds.**—*Brenham v. German-American Bank*, 144 U. S. 174, 188, 36 L. Ed. 391.

**45. Legislature may repeal laws authorizing aid before subscription is actually made.**—*Aspinwall v. Board of Commissioners*, 22 How. 364, 16 L. Ed. 296; *Wadsworth v. Supervisors*, 102 U. S. 534, 26 L. Ed. 221; *Norton v. Board of Comm'rs*, 129 U. S. 479, 32 L. Ed. 774; *Concord v. Portsmouth Sav. Bank*, 92 U. S. 625, 23 L. Ed. 628; *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 666, 40 L. Ed. 838. See ante, "When Subscription Becomes Binding," IV.

**Particular statutes repealed.**—*Savannah v. Kelly*, 108 U. S. 184, 188, 27 L. Ed. 696; *Louisiana v. Taylor*, 105 U. S. 454, 26 L. Ed. 1133; *Clay County v. Society for Savings*, 104 U. S. 579, 26 L. Ed. 856; *Pana v. Bowler*, 107 U. S. 529, 27 L. Ed. 424; *Red Rock v. Henry*, 106 U. S. 596, 27 L. Ed. 251; *Moultrie County v. Fairfield*, 105 U. S. 370, 26 L. Ed. 945; *Callaway County v. Foster*, 93 U. S. 567, 23 L. Ed. 911; *Howard County v. Paddock*, 110 U. S. 384, 28 L. Ed. 171; *Schuyler County v. Thomas*, 98 U. S. 169, 25 L. Ed. 88.

**46. New constitution prohibiting aid takes away authority unless contract has been made.**—*Railroad Co. v. Falconer*, 103 U. S. 821, 827, 26 L. Ed. 471. See, also, *McKittrick v. Arkansas Cent. R. Co.*, 152 U. S. 473, 495, 38 L. Ed. 518; *Aspinwall v. Board of Commissioners*, 22 How. 364, 16 L. Ed. 296; *Wadsworth v. Supervisors*, 102 U. S. 534, 26 L. Ed. 221.

**47. Constitutional restrictions not retroactive.**—*Louisiana v. Taylor*, 105 U. S. 454, 458, 26 L. Ed. 1133; *Ralls County v. Douglass*, 105 U. S. 728, 26 L. Ed. 957; *Callaway County v. Foster*, 93 U. S. 567, 23 L. Ed. 911; *Scotland County v. Thomas*, 94 U. S. 682, 24 L. Ed. 219; *Henry County v. Nicolay*, 95 U. S. 619, 24 L. Ed. 394; *Ray County v. Vansycle*, 96 U. S. 675, 24 L. Ed. 800; *Schuyler County v. Thomas*, 98 U. S. 169, 25 L. Ed. 88; *Cass County v. Gillett*, 100 U. S. 585, 25 L. Ed. 585; *Scotland County v. Hill*, 132 U. S. 107, 112, 33 L. Ed. 261; *Livingston County v. First Nat. Bank*, 128 U. S. 102, 116, 32 L. Ed. 359; *Supervisors v. Galbraith*, 99 U. S. 214, 25 L. Ed. 410; *Macon County v. Shores*, 97 U. S. 272, 24 L. Ed. 889. See ante, "Restrictions as to Future Subscriptions and Donations—Illinois," I, B, 6.

**48. Constitution cannot impair contract.**—*Clay County v. Society for Savings*, 104 U. S. 579, 590, 26 L. Ed. 856; *Moultrie County v. Rockingham, etc., Sav. Bank*,



subscribe to a railroad confers a power upon a public corporation or civil institution of government, which can be modified, changed, enlarged, or restrained, by the legislative authority, the charter not importing a contract, within the meaning of the clause of the constitution prohibiting a state from passing a law impairing the obligation of contracts.<sup>49</sup> Of course a railroad, to whose stock an unauthorized agreement to subscribe has been made, cannot set up that a contract right of the railroad was impaired by a new constitution, subsequently adopted, forbidding municipal aid.<sup>50</sup>

### IX. Payment of Subscription.

**A. By Levy of Taxes.**—When no provision is made as to payment of the subscription, the power to raise money by taxation to pay the amount of the subscription is conclusively implied, unless the law which confers the authority to subscribe, or some general law in force at the time, clearly manifests a contrary legislative intention.<sup>51</sup>

**B. Power to Issue Bonds in Payment**—1. **CAN POWER BE IMPLIED**—a. *In General.*—The grant of authority to a municipal corporation to subscribe for stock in a railroad does not carry with it the power to issue bonds in payment of the subscription, unless the power to issue such bonds is expressly or by reasonable implication conferred by statute.<sup>52</sup> And a municipality empowered to

92 U. S. 631, 23 L. Ed. 631; *Broughton v. Pensacola*, 93 U. S. 266, 269, 23 L. Ed. 896. See, generally, the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 758.

**49. Provisions in charter giving authority to a county to subscribe do not import a contract.**—*Aspinwall v. Board of Commissioners*, 22 How. 364, 16 L. Ed. 296, approved in *Norton v. Board of Comm'rs*, 129 U. S. 479, 490, 32 L. Ed. 774.

**Constitutional provision not affecting authority given in charter of railroad.**—Constitutional provisions prohibiting loans or subscriptions for stock, except with the assent of the electors, has been held to be prospective, not retroactive; hence not affecting the charter of a company which was in existence before the adoption of the constitutional provision and the powers given by the charter remained as if no such constitution existed. *Cass County v. Gillett*, 100 U. S. 585, 25 L. Ed. 585; *Henry County v. Nicolay*, 95 U. S. 619, 24 L. Ed. 394; *Callaway County v. Foster*, 93 U. S. 567, 570, 23 L. Ed. 911.

**50. Unauthorized subscription.**—*Railroad Co. v. Falconer*, 103 U. S. 821, 26 L. Ed. 471.

**51. Power to levy tax for payment of subscription implied.**—*Quincy v. Jackson*, 113 U. S. 332, 337, 28 L. Ed. 1001; *United States v. New Orleans*, 98 U. S. 381, 393, 25 L. Ed. 225; *Norton v. Dyersburg*, 127 U. S. 160, 32 L. Ed. 85; *Hill v. Memphis*, 134 U. S. 198, 203, 33 L. Ed. 887; *Loan Ass'n v. Topeka*, 20 Wall. 655, 22 L. Ed. 455; *Ralls County Court v. United States*, 105 U. S. 733, 735, 26 L. Ed. 1220; *Kelley v. Milan*, 127 U. S. 139, 32 L. Ed. 77. See, generally, the titles **MUNICIPAL CORPORATIONS; TAXATION**.

**52. Authority to issue bonds must be expressly given.**—*Kelley v. Milan*, 127 U. S. 139, 150, 32 L. Ed. 77; *Marsh v. Fulton*

*County*, 10 Wall. 676, 19 L. Ed. 1040; *Wells v. Supervisors*, 102 U. S. 625, 630, 26 L. Ed. 122; *Ottawa v. Carey*, 108 U. S. 110, 123, 27 L. Ed. 669; *Daviess County v. Dickinson*, 117 U. S. 657, 663, 29 L. Ed. 1026; *Hill v. Memphis*, 134 U. S. 198, 203, 33 L. Ed. 887; *Norton v. Dyersburg*, 127 U. S. 160, 175, 32 L. Ed. 85; *Young v. Clarendon Tp.*, 132 U. S. 340, 347, 33 L. Ed. 356; *Clairborne County v. Brooks*, 111 U. S. 400, 406, 28 L. Ed. 470; *Sheboygan Co. v. Parker*, 3 Wall. 93, 96, 18 L. Ed. 33; *Barnum v. Okolona*, 148 U. S. 393, 395, 37 L. Ed. 495; *Brenham v. German-American Bank*, 144 U. S. 174, 36 L. Ed. 391, overruling *Rogers v. Burlington*, 3 Wall. 654, 18 L. Ed. 79, and *Mitchell v. Burlington*, 4 Wall. 270, 18 L. Ed. 350.

**State may require city to issue bonds to aid a railroad.**—This power to issue city bonds to aid a railway could no doubt have been imposed upon the city as a duty, and its exercise directed without the assent or against the wish of the corporation or its citizens. The state could do it directly for and on behalf of the city, and without its intervention. *United States v. Railroad Co.*, 17 Wall. 322, 331, 21 L. Ed. 597.

**Authority to issue bonds—Mortgage.**—Where the statute of North Carolina authorizing the issuance of bonds of the state in payment of its subscription to a railroad stock, provided that with each several bond a deed of mortgage for an equal amount of stock, should constitute a part of the bond and be transferable with it, and should have the force of registered mortgages without actual registry, it was held that when the endorsement was made and the bond issued by the state it was tantamount to a separation and identification of the number of shares of railroad stock named therein and constituted a separate mortgage upon the

issue bonds to aid the construction of a railroad is acting within the scope of its municipal powers when it determines to do so.<sup>53</sup>

b. *From Charter Provisions of Railroad.*—The authority for issuing bonds may be expressly given in the charter of the railroad to be aided,<sup>54</sup> or may be implied from provisions in the charter of the railroad relative to the granting and the holding of elections to authorize municipal aid.<sup>55</sup>

c. *From Provisions as to Collection of Taxes.*—No implication to issue bonds arises, however, from the grant to a municipal corporation of power to appropriate moneys in aid of the construction of a railroad, accompanied by a provision directing the levy and collection of taxes to meet such appropriation, and prescribing no other mode of payment.<sup>56</sup> notwithstanding there is a provision in the charter of the railroad company allowing it to sell any bonds it may receive as donations or in payment of subscriptions. The implied prohibition against the issue of bonds by the county still remains.<sup>57</sup> And where bonds were void because so issued without authority, a purchaser of the bonds from the railway is not subrogated to the rights of the railroad to enforce the collection of the appropriation made by the town.<sup>58</sup> An act authorizing a municipality to incur a debt for subscription to a railroad, implies authority to levy a tax to pay the debt in excess of the limitation permitted for ordinary municipal purposes.<sup>59</sup>

d. *From Provisions as to Payment on Such Terms and in Such Manner as May Be Agreed upon.*—Power given by a legislative enactment to make payments upon such terms and in such manner as may be agreed upon by the company and proper county, authorized the county to pay its subscription in county bonds.<sup>60</sup>

e. *From Power to Subscribe as Fully as Any Individual.*—Authority to subscribe for stock in a railway company, "as fully as any individual," authorizes the issue by the city of its negotiable bonds in payment of the stock.<sup>61</sup>

number of shares named in each bond. *South Dakota v. North Carolina*, 192 U. S. 286, 287, 48 L. Ed. 448.

**53. Municipality issuing bonds acts in scope of its powers.**—*United States v. Railroad Co.*, 17 Wall. 322, 21 L. Ed. 597.

**Authority to subscribe according to terms of power of subscription.**—Authority to subscribe to the stock of a railroad in accordance with the laws and conditions of a former subscription, which authorized an issue of bonds in payment of the subscription, authorizes an issue of bonds to pay the second subscription. *Amey v. Allegheny City*, 24 How. 364, 16 L. Ed. 614.

**54. Authority may be given in charter of railroad.**—*Cass County v. Gillett*, 100 U. S. 585, 25 L. Ed. 585; *Henry County v. Nicolay*, 95 U. S. 619, 24 L. Ed. 391.

**Charter provision as to subscriptions as limiting issue of bonds.**—Where power had been given to counties to subscribe to the stock of railways and authority was given in the charter of a new railroad for counties to subscribe and to issue bonds in payment and another clause provided that the counties should have the same authority to subscribe as under pre-existing law, but counsel contended that this latter section was a reservation of the power given by the general laws of the state and that the power to issue bonds being a distinct power was not included in the reservation and hence ceased to exist, it was held that the clause did not limit the operation and application of the general

laws of the state. *Kankakee County v. Aetna Life Ins. Co.*, 106 U. S. 668, 670, 27 L. Ed. 309.

**55. Authority may be implied from charter provision as to elections to authorize aid.**—*Wilson County v. National Bank*, 103 U. S. 770, 777, 778, 26 L. Ed. 488.

**56. Power not implied from provisions as to levy of taxes.**—*Wells v. Supervisors*, 102 U. S. 625, 631, 632, 26 L. Ed. 122; *Ogden v. Daviess County*, 102 U. S. 634, 639, 26 L. Ed. 263; *Concord v. Robinson*, 121 U. S. 165, 167, 30 L. Ed. 885; *United States v. Macon County*, 99 U. S. 582, 25 L. Ed. 331; *Katzenberger v. Aberdeen*, 121 U. S. 172, 30 L. Ed. 911; *Aetna Life Ins. Co. v. Middleport*, 124 U. S. 534, 31 L. Ed. 537.

**57. Charter provision as to selling bonds received.**—*Wells v. Supervisors*, 102 U. S. 625, 26 L. Ed. 122.

**58. Subrogation of bondholder to rights of railroad.**—*Aetna Life Ins. Co. v. Middleport*, 124 U. S. 534, 31 L. Ed. 537.

**59. Tax may be in excess of limitation for ordinary purposes.**—*Quincy v. Jackson*, 113 U. S. 332, 337, 28 L. Ed. 1001.

**60. Power to make payments on terms and manner as may be agreed upon.**—*Curtis v. Butler County*, 24 How. 435, 16 L. Ed. 745; *Woods v. Lawrence County*, 1 Black 386, 17 L. Ed. 122.

**61. Power to subscribe as fully as any individual.**—*Seybert v. Pittsburg*, 1 Wall. 272, 17 L. Ed. 553.



**f. From Power to Borrow Money for Public Purposes.**—Power “to borrow money for public purposes on the credit of the city” does not imply authority to borrow money by the issue of bonds in payment of a municipal subscription to a railroad.<sup>62</sup>

**g. Power to Borrow Money for Any Object in Its Discretion.**—A charter giving a city power “to borrow money for any object in its discretion,” and a statute of the state providing that “bonds of any city” issued to railroad companies “may have interest at any rate not exceeding” a rate named, and “may be sold by the company at such discount as may be deemed expedient”—authorizes the city to issue bonds to aid the construction of railways. The statute, in connection with the power, gives the requisite authority.<sup>63</sup>

**2. WHEN BONDS MAY BE ISSUED.**—If the act authorizing the subscription does not require the approval of the railroad to the proposition as a condition precedent to the subscription to stock and issue of bonds, the bonds may be issued as soon as the proposition has been approved by the voters at an election.<sup>64</sup> But if the subscription to the stock of the railroad company, made by a county, was legal, the circumstance that the bonds were issued after the enactment of a constitutional provision forbidding such aid does not impair their validity.<sup>65</sup>

**3. TO WHOM MADE PAYABLE.**—A statutory direction that bonds issued to aid a railroad shall be made payable “to the railroad company or their successors and assigns,” is merely directory, and the bonds may be made payable to the railroad company or bearer.<sup>66</sup>

**4. POWER TO IMPOSE CONDITIONS AS TO ISSUE OF BONDS.**—“The legislature, in granting permission to a municipality to issue its bonds in aid of a railroad, may impose such conditions as it may choose,” and such bonds to be valid must be issued in conformity with the restrictions and conditions of the enabling act.<sup>67</sup>

**62. Power to borrow money for public purposes.**—*Brenham v. German-American Bank*, 144 U. S. 174, 36 L. Ed. 391, overruling *Rogers v. Burlington*, 3 Wall. 654, 18 L. Ed. 79, and *Mitchell v. Burlington*, 4 Wall. 270, 18 L. Ed. 350.

**63. Power to borrow money for any object in city's discretion.**—*Meyer v. Muscatine*, 1 Wall. 384, 17 L. Ed. 564.

**64. Bonds may be issued upon voters' approval, where approval of railroad unnecessary.**—*Walnut v. Wade*, 103 U. S. 683, 695, 26 L. Ed. 526.

**65. Bonds may be issued after enactment of constitution forbidding aid.**—*Callaway County v. Foster*, 93 U. S. 567, 23 L. Ed. 911.

**66. Directory statute as to parties to whom bonds were to be made payable.**—*Supervisors v. Galbraith*, 99 U. S. 214, 217, 25 L. Ed. 410.

**67. Legislature may impose conditions in issue of bonds.**—*Barnum v. Okolona*, 148 U. S. 393, 395, 37 L. Ed. 495; *Sheboygan Co. v. Parker*, 3 Wall. 93, 96, 18 L. Ed. 33; *Wells v. Supervisors*, 102 U. S. 625, 26 L. Ed. 122; *Claiborne County v. Brooks*, 111 U. S. 400, 28 L. Ed. 470; *Young v. Clarendon Tp.*, 132 U. S. 340, 346, 33 L. Ed. 356; *Provident Life, etc., Co. v. Mercy County*, 170 U. S. 593, 600, 42 L. Ed. 1156. See, generally, the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

**Conditions prescribed by legislature cannot be waived.**—Where there is a total want of power to subscribe for stock and to issue bonds in payment, a municipality

cannot estop itself from raising such a defense by admissions, or by issuing securities negotiable in form, nor even by receiving and enjoying the proceeds of such bonds. So, too, it may be admitted that, even where the power to subscribe for stock and to issue bonds in payment was validly granted, yet where the right to exercise the power has been subjected to conditions prescribed by the legislature, the municipality cannot dispense with or waive such conditions. *Graves v. Saline County*, 161 U. S. 359, 373, 40 L. Ed. 732.

**Completion of railroad through county.**—A condition that bonds shall not be binding “until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same,” is complied with where the railway enters on the north line of the county, and runs within the county limits a distance of nearly twenty miles, although it does not touch the south county line, nor come within a nearer distance of it than two miles. It need not go through the county from one end to the other. *Provident Life, etc., Co. v. Mercer County*, 170 U. S. 593, 602, 42 L. Ed. 1156.

**Authority to issue bonds to aid a railroad to complete the roads.**—A statute authorizing a municipality to issue bonds “to aid a railroad to complete the roads,” does not make it necessary that the road be surveyed and the termini be fixed before the bonds can be issued, where the statute contains no restriction when or under what circumstances the commissioners



And where there is a provision in the statute as to the length of time the bonds may run, it must be strictly complied with or the bonds will be void.<sup>68</sup> But a provision in an act authorizing township aid, that the township shall issue the bonds for the amount determined to be issued within sixty days after the question of aid is determined by a vote of the electors, does not invalidate bonds issued more than sixty days after the election.<sup>69</sup> Of course any condition imposed by the vote of the people as a condition precedent to the issue of bonds in payment of the subscription becomes a part of the authority and must be complied with, in order that the bonds may be valid and binding.<sup>70</sup> But a municipality cannot escape liability on its bonds issued in aid of a railway by an agreement with the railroad that the liability shall be contingent upon the road being constructed within the county, and on the insolvency of the railroad, creditors can enforce the liability on the bonds due and unpaid.<sup>71</sup> A municipality may be estopped, however, as against a bona fide holder to plead noncompliance with conditions, unless there was a total want of authority to subscribe for stock or issue bonds in payment.<sup>72</sup>

should sell the bonds. The discretion of the commissioners empowered to make the sale is conclusive. *Pompton v. Cooper Union*, 101 U. S. 196, 25 L. Ed. 803.

**Presumption as to fulfillment of conditions.**—A county issuing bonds to a railroad company in payment of stock in the road, which subscription the county was authorized by legislative enactment to make and to pay for by the issue of the bonds, only after certain things directed had been performed, may be estopped against asserting that the conditions attached to a grant of the power were not fulfilled. Where the issue of the bonds without such previous fulfillment would be a misdemeanor, by the county officers, it is to be presumed, though perhaps not conclusively, that the conditions were fulfilled. And an estoppel would take place where the county had received the proper amount of stock for which the bonds were issued; had held it for seventeen years, and was actually enjoying it at the time when pleading want of authority to subscribe. *Pendleton County v. Amy*, 13 Wall. 297, 20 L. Ed. 579.

**68. Provision as to length of time bonds may run.**—*Barnum v. Okolona*, 148 U. S. 393, 395, 37 L. Ed. 495; *Norton v. Dyersburg*, 127 U. S. 160, 32 L. Ed. 85; *Brenham v. German-American Bank*, 144 U. S. 174, 188, 36 L. Ed. 391.

**69. Provision as to issuance in sixty days.**—*Chickaming v. Carpenter*, 106 U. S. 663, 667, 27 L. Ed. 307.

**70. Conditions voted become part of authority.**—*German Savings Bank v. Franklin County*, 128 U. S. 526, 537, 32 L. Ed. 519.

**Location of terminus and machine shops.**—Where a city made a donation to a railroad in consideration that the railroad permanently establish its eastern terminus in the city and establish and construct at said city the machine shops and car works of the railway, it was held the real essence of the contract was that the railroad company should, in its process of construction, make this city its eastern terminus, and

should establish there its depot, its machine shops and car works; and that this should be done in the ordinary course of its business, with the purpose that it should be permanent. But it did not amount to a covenant that the company would never cease to keep its eastern terminus, its depot, machine and car shops there. *Texas, etc., R. Co. v. Marshall*, 136 U. S. 393, 302, 34 L. Ed. 385.

**71. Insolvency.—Agreement between railroad and municipality.**—*Morgan County v. Allen*, 103 U. S. 498, 26 L. Ed. 498.

**72. Graves v. Saline County**, 161 U. S. 359, 40 L. Ed. 732. See, also, *Provident Life, etc., Co. v. Mercer County*, 170 U. S. 593, 42 L. Ed. 1156. See, generally, the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

**Levy of tax and payment of interest.—Estoppel.**—The levy of a tax and payment of interest by the proper county authorities, validates, in the hands of bona fide holders for value, county bonds, issued in their origin, irregularly, as ex gr. in virtue of a popular vote ordered by a "county court," instead of one ordered by the "board of supervisors;" the vote, however, and other proceedings having been in all respects other than the source of order, regular. (In this case the tax had been levied and the interest paid by the county for nine years before it was set up that the bonds were void.) *Supervisors v. Schenck*, 5 Wall. 772, 18 L. Ed. 556.

**Refunding of bonds.—Original issue invalid.—Estoppel.**—When in pursuance of the funding laws outstanding original bonds issued in payment of a county subscription to a railroad are refunded in new bonds on a vote by the same constituent body that authorized the original issue, and when in accordance with the vote so taken, and in formal compliance with the other directions of the funding law, negotiable securities were issued and delivered in payment of the outstanding bonds which were void because a condition of such subscription was not performed; such action on the part of the legal voters

5. **REPEAL OF AUTHORITY TO ISSUE BONDS.**—The legislature of a state can at any time before bonds are issued in aid of a railroad or before a county comes under legal obligation to issue them, repeal the statute conferring the power to issue them and thereby withdraw all authority to issue them.<sup>73</sup>

6. **REDEMPTION AND SATISFACTION OF BONDS**—a. *In General.*—Where a municipality has authority to issue bonds to aid in the construction of a railroad and is authorized to levy such a tax as is necessary to pay them, the power to levy taxes sufficient to meet, at maturity, the obligation to be incurred, is conclusively implied, unless the law which confers the authority, or some general law in force at the time, clearly manifests a contrary legislative intention; and this authority cannot be taken away by subsequent legislation without impairing the obligation of the contract.<sup>74</sup>

b. *Federal Aid Bonds*—(1) *Payment of Interest.*—A provision requiring the Union Pacific Railroad "to pay the bonds at maturity" which had been issued by the United States government to aid in the construction of the railroad, did not require the Union Pacific Railroad to pay each installment of interest as it fell due, but implied an obligation to pay the principal and interest at the time fixed for the payment of the principal.<sup>75</sup>

(2) *Payment of Percentage on Net Earnings*—(a) *Act of July 1, 1862.*—The net earnings of the Union Pacific from which the railroad is to pay five per cent to the government annually on its loan, means the excess of the gross earnings over the expenditures defrayed in producing them. The "earnings" of the road include all the receipts arising from the company's operations as a railroad company, but not those from the public lands granted, nor fictitious receipts for the transportation of its own property. "Net earnings," within the meaning of the law, are ascertained by deducting from the gross earnings all the ordinary expenses of organization and of operating the road, and expenditures made bona fide in improvements, and paid out of earnings, and not by the issue of bonds or stock; but not deducting interest paid on any of the bonded debt of the company.<sup>76</sup> The completion of the Union Pacific Railroad, so as to require the pay-

of the county may be regarded as a declaration that there had been, by the actual construction of the road and the delivery of the stock, a substantial compliance with the original conditions and the county will be estopped to assert the invalidity of the bonds in the hands of a bona fide holder, when the original subscription consistently with the statute might have been made unconditional. *Graves v. Saline County*, 161 U. S. 359, 40 L. Ed. 732.

73. **Repeal of authority to issue bonds.**—*Wadsworth v. Supervisors*, 102 U. S. 534, 538, 26 L. Ed. 221.

**Donation—Illinois constitution of 1870.**—The power to make a donation, authorized by a popular vote to a certain railroad when the road was constructed through the town, was taken away by the Illinois constitution of 1870, where the donation was not actually made before that time as the power to make the donation was not operative until the condition was fulfilled and the state constitution having taken away the authority before the condition was fulfilled, the bonds could not be issued. *Concord v. Portsmouth Sav. Bank*, 92 U. S. 625, 23 L. Ed. 628. See, also, *Norton v. Board of Comm'rs*, 129 U. S. 479, 32 L. Ed. 774.

74. **Power to levy tax cannot be taken away without impairing contract.**—*Scotland County Court v. Hill*, 140 U. S. 41,

46, 35 L. Ed. 351. See, generally, the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 758.

**Land conveyed to state as indemnity—Bondholders' rights.**—Where land is conveyed to the state by a corporation as indemnity against losses on her bonds loaned to it, the bondholders have no equity for the application of the land to the payment of the bonds which can be enforced against the state, and her grantees take the property discharged of any claim of the bondholders. *Chamberlain v. St. Paul, etc., R. Co.*, 92 U. S. 299, 23 L. Ed. 715.

**Municipality may transfer stock to holder of bonds where bond issue void.**—A railway company which had received the bonds of a town in payment of a subscription to its stock and transferred the bonds for consideration cannot object to the town's taking up the bonds from the transferee and delivering to him the certificates of stock received from the railroad, where the bonds have been held to be void. *Illinois, etc., R. Co. v. Wade*, 110 U. S. 65, 35 L. Ed. 342.

75. **Payment of interest on Union Pacific loan.**—*United States v. Union Pac. R. Co.*, 91 U. S. 72, 86, 23 L. Ed. 224.

76. **Net earnings of Union Pacific.**—*Union Pac. R. Co. v. United States*, 99 U. S. 402, 25 L. Ed. 274.



ment of 5 per cent of its net earnings to the government as payment on its loan, occurred when the company reported its road as completed and the president of the United States accepted and the bonds were issued to it, although the president's action was only provisional.<sup>77</sup>

(b) *Act of May 7, 1878.*—Under the Thurman act, passed May 7, 1878 (20 Stat. 58, c. 96), in the estimate of the net earnings from which five per cent annually is to be paid the government on its loan, those expenses which have the effect of permanently improving the value of the company's property and works are not to be deducted from the gross receipts.<sup>78</sup>

c. *Provision in Statute Authorizing Bonds as to Payment of Interest.*—A provision in a statute, under which a railroad was sold, as to the rate of interest payable on the outstanding bonds of the railroad, constitutes a contract with the purchasers which cannot be changed without their consent.<sup>79</sup>

**C. City Subscription as Payment of County Subscription.**—A subscription to a railroad by a city within a county will not be regarded as payment of whole or as part of the county subscription when the subscription of the city as matter of law is wholly disconnected from the subscription made by the county.<sup>80</sup>

**D. Exchange and Delivery of Bonds to Railroad.**—A statute authorizing towns to subscribe to the capital stock of railroad companies and issue bonds for the purpose of borrowing money therefor, does not authorize an exchange of bonds for the shares of stock, and a purchaser with knowledge that such was done cannot recover.<sup>81</sup> On the other hand bonds may be delivered to the railroad directly, where the statute permits the municipal authorities to "dispose of the bonds to such persons or corporations as they should deem most advantageous for the town, but not at less than par," and requires them not to pay over "any money or bonds," to the railroad company until certain satisfactory assurances are furnished them.<sup>82</sup>

**United States retaining compensation for services rendered the government as payment on loan.**—By the act of July 1, 1862, "all compensation for services rendered for the government" was to be applied to the payment of the bonds issued by the United States to aid in building the road. By the act of July 2, 1864, only "one-half of the compensation for services rendered for the government" by said company was required to be applied to the payment of the bonds. The act of May 7, 1878, merely restored the provisions of the act of July 1, 1862, and again required all compensation for services rendered the government to be applied to the payment of the bonds. The compensation referred to in paragraph 2, act of May 7, 1878, ch. 96, 20 Stat. 56, was that earned by transportation over that part only of its lines which had been assisted by the government subsidy and the government could not retain compensation earned on roads not built on government subsidy as payment on the bonds. *United States v. Union Pac. R. Co.*, 118 U. S. 235, 30 L. Ed. 173.

**77. Time of completion of Union Pacific as to payment of loan.**—*Union Pac. R. Co. v. United States*, 99 U. S. 402, 417, 25 L. Ed. 274; *United States v. Central Pac. R. Co.*, 99 U. S. 449, 25 L. Ed. 287; *United States v. Sioux City, etc., R. Co.*, 99 U. S. 491, 25 L. Ed. 292.

**78. Estimate of net earnings—Thurman act.**—*United States v. Central Pac. R. Co.*,

138 U. S. 84, 34 L. Ed. 895. See ante, "Payment of Percentage on Net Earnings," IX, B, 6, b, (2).

**79. Internal improvement fund of Florida.**—The Florida statute, Jan. 6, 1865, under which a railroad was sold by the trustees of an internal improvement fund, who had guaranteed the payment of the bonds of the company, provided that the purchaser should pay one-half per cent semiannually until all the bonds of the company were paid. The proceeds of the sale were applied to paying off some of the bonds. It was held the purchaser was only bound to pay one-half per cent semiannually on the remainder of the bonds outstanding and not on the entire amount of bonds issued and that the statute under which the purchaser bought constituted a contract with the purchaser and could not be changed without their mutual consent. *Doggett v. Railroad Co.*, 99 U. S. 72, 25 L. Ed. 301.

**80. City subscription as payment of county subscription.**—*Morgan County v. Allen*, 103 U. S. 498, 515, 26 L. Ed. 498.

**81. Exchange of bonds for railroad stock.**—*Scipio v. Wright*, 101 U. S. 665, 25 L. Ed. 1037. See, however, *Rogers v. Burlington*, 3 Wall. 654, 666, 18 L. Ed. 79.

**82. Delivery of bonds at par to railroad.**—*Queensbury v. Culver*, 19 Wall. 83, 93, 94, 22 L. Ed. 100.

**Statute directing advertisement for sealed proposals for bonds—Issue directly to railroad.**—Where a state statute



**E. Limitations as to Selling Bonds at Less than Par.**—A limitation upon a railroad company that it should not sell the bonds of the counties at less than par, after it had taken them in payment of the subscription, has no other meaning than that they should not so sell them at the expense of the counties—causing any loss to them less than their par value.<sup>83</sup>

**F. Enabling Act Erroneously Referred to in Bonds as Vitiating Bonds.**—The fact that the act under which the bonds were issued is erroneously referred to in their recitals does not render them void.<sup>84</sup>

**G. Purchase of Stock as Redemption of Former Obligation to Guarantee Bonds.**—The purchase of the stock of a railroad company by a state, is not such a redemption of a former obligation to guarantee the payment of its second mortgage bonds upon compliance with certain conditions which might never be complied with, as to take it out of a constitutional prohibition, enacted before the issue of the bonds but after the obligation to guarantee the railroad bonds had been incurred, forbidding a further increase of debt. It was a new debt, based upon a new consideration.<sup>85</sup>

**H. Statute Making Bonds Full and Complete Evidence.**—A statute providing that the bonds issued in pursuance of it are made "full and complete evidence, both in law and equity, to establish the indebtedness of the county according to their tenor and effect," is not unconstitutional.<sup>86</sup>

### X. Rights of Municipality as Stockholder.

Where a part of a county is organized as a body corporate and authorized to subscribe to the stock of a railroad, it becomes thereby the owner of the stock, and, as owner, it is entitled to exercise all the rights and privileges of ownership, including the right to vote the stock, unless the legislature creating it and prescribing its powers has, in terms, vested such control of the stock in other hands.<sup>87</sup> But the acceptance of certificates of a municipal loan in the place of certificates of stock, without more, does not operate to convey to the city the interest of the stockholders in the corporate property.<sup>88</sup>

### XI. Right of Taxpayer to Stock.

If a statute gives a taxpayer an amount of stock proportionate to the taxes he pays upon such subscription, the taxpayer's equity in the stock only arises as he pays the bonds, and not as he simply pays interest on them.<sup>89</sup>

provided for the issuance of state bonds to pay a subscription to the stock of a railroad and directed the treasurer to prepare bonds and advertise for sealed proposals and accept terms offered most advantageous to state, but in no case was the price to be less than par, and he did so but no proposals were received, and the bonds were then delivered to the railroad in payment of the state's subscription at par, the transaction was the same as if the railroad had been the only bidder and had purchased same for cash at par and this was not changed by the fact that the railroad issued no certificates to the state. *South Dakota v. North Carolina*, 192 U. S. 286, 48 L. Ed. 448.

**Power to municipality to purchase its own bonds.**—A city may lawfully purchase its own bonds and it may make a contract to take back certain bonds issued by it to aid a railroad by paying the sums for which the bonds were pledged by the railroad and thus be released from the issuance of the balance of the authorized issue. *New Albany v. Burke*, 11 Wall. 96, 20 L. Ed. 155.

**83. Construction of provision as to selling bonds at less than par.**—*Woods v. Lawrence County*, 1 Black 386, 412, 17 L. Ed. 122.

**84. Erroneous recital in bonds as to enabling act.**—*Commissioners v. January*, 94 U. S. 202, 24 L. Ed. 110.

**85. Purchase of stock as redemption of obligation to guarantee bonds.**—*Williams v. Louisiana*, 103 U. S. 637, 26 L. Ed. 595.

**86. Statute making bonds "full and complete" evidence.**—*Sheboygan Co. v. Parker*, 3 Wall. 93, 96, 18 L. Ed. 33. See, generally, the title CONSTITUTIONAL, LAW, vol. 4, p. 1.

**87. Municipality may vote stock.**—*Hancock v. Louisville, etc., R. Co.*, 145 U. S. 409, 416, 36 L. Ed. 755.

**88. Certificate of loan as conveying interest in corporation.**—*Philadelphia v. Collector*, 5 Wall. 720, 736, 18 L. Ed. 614.

**89. Taxpayers' right to stock does not arise upon payment of interest on bonds.**—*Hancock v. Louisville, etc., R. Co.*, 145 U. S. 409, 417, 36 L. Ed. 755.

# MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

BY A. P. WALKER.

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#### CROSS REFERENCES.

See the titles *APPEAL AND ERROR*, vol. 1, p. 333; *BILLS, NOTES AND CHECKS*, vol. 3, p. 257; *BONDS*, vol. 3, p. 382; *BRIDGES*, vol. 3, p. 516; *CONSTITUTIONAL LAW*, vol. 4, p. 1; *CONTRACTS*, vol. 4, p. 552; *CORPORATIONS*, vol. 4, p. 621; *COUNTIES*, vol. 4, p. 825; *COUPONS*, vol. 4, p. 846; *ESTOPPEL*, vol. 5, p. 913; *GAS*, vol. 6, p. 545; *GUARANTY*, vol. 6, p. 580; *ILLEGAL CONTRACTS*, vol. 6, p. 737; *IMPLIED CONTRACTS*, vol. 6, p. 888; *INJUNCTIONS*, vol. 6, p. 1022; *INTEREST*, vol. 7, p. 217; *LACHES*, vol. 7, p. 790; *LIMITATION OF ACTIONS AND ADVERSE POSSESSION*, vol. 7, p. 900; *MUNICIPAL CORPORATIONS*, ante, p. 546; *MUNICIPAL COUNTY, STATE AND FEDERAL AID*, ante, p. 618; *ORDINANCES; PAYMENT; RAILROADS; RECORDS; SEALS AND SEALED INSTRUMENTS; STREETS AND HIGHWAYS; WARRANTY; WATER COMPANIES AND WATERWORKS*.

#### I. Power to Issue.

**A. In General.**—The power in a municipal corporation to borrow money, or to incur indebtedness, carries with it the power to issue the usual evidences of indebtedness to the lender or other creditor. Such evidences may be in the form of promissory notes, warrants and, perhaps most generally, in that of a bond.<sup>1</sup>

**1. Power to issue.—In general.**—*Merrill v. Monticello*, 138 U. S. 673, 687, 34 L. Ed. 1069; *Brenham v. German American Bank*, 144 U. S. 173, 186, 36 L. Ed. 390; *Police Jury v. Britton*, 15 Wall. 566, 21 L. Ed. 251; *The Mayor v. Ray*, 19 Wall. 468, 22 L. Ed. 164; *Wall v. Monroe County*, 103 U. S. 74, 78, 26 L. Ed. 430; *Seybert v. Pittsburg*, 1 Wall. 272, 17 L. Ed. 553; *Comanche County v. Lewis*, 133 U. S. 198, 207, 33 L. Ed. 604; *Hill v. Memphis*, 134 U. S. 198, 204, 33 L. Ed. 887; *Little Rock v. National Bank*, 98 U. S. 308, 311, 25 L. Ed. 108. See, generally, the titles *COUNTIES*, vol. 4, p. 825; *MUNICIPAL CORPORATIONS*, ante, p. 546; *STATES; UNITED STATES*.

**Substitution of liabilities.—Issuing evidences of debt.**—If a city has power to bind itself by substituting a new liability for a canceled one, it may do so by any instrument of acknowledgment which af-

fords sufficient evidence of a debt. The two classes of obligations are governed by the same rule. *Little Rock v. National Bank*, 98 U. S. 308, 311, 25 L. Ed. 108. See post, "In General," IV, F, 8, a.

**Promissory note.**—A municipal or quasi corporation can make, in a proper case, a promissory note, and thereby bind itself for any debt contracted in the course of its legitimate business, for any expenses incurred in any matter or thing which it is authorized to do, or any matter which is not foreign to the purposes of its creation. *Indiana v. Glover*, 155 U. S. 513, 521, 39 L. Ed. 243.

**Drainage warrants.**—The authority to issue \$20,000 of drainage warrants to W. for money collected by the city for the drainage fund but which was misappropriated by it, was given by the act of Louisiana of 1876, providing "for the purchase and settlement of all or any rights

But there is a marked legal difference between the power to give a note to a lender for the amount of money borrowed, or to a creditor for the amount due, and the power to issue for sale, in open market, a bond, as a commercial security, with immunity, in the hands of a bona fide holder for value, from equitable defenses.<sup>2</sup> For treatment of authority of municipal corporations to issue negotiable securities, free to pass from hand to hand not subject to equitable defenses, see post, "Negotiable Securities," I, B.

**B. Negotiable Securities**—1. *IN GENERAL*.—The purpose and object of a municipal corporation do not ordinarily require the exercise of the power to issue negotiable paper; they are not trading corporations and ought not to become such.<sup>3</sup> The power of municipal corporations to borrow money, and to issue negotiable securities therefor, depends upon a true construction of its charter and the legislation of the state applicable to it, and bonds issued without such authority are void.<sup>4</sup> Hence it is properly said that they have not implied power to issue corporate bonds which will bind them, but such power must exist expressly in their charters, or must be conferred by special act of the legislature.<sup>5</sup>

arising in favor of said ship canal company or said transferee under the act of 1871," and is also authorized by the ordinance of May 26, providing for the full settlement of all claims for damages and to secure the absolute sale, relinquishment and transfer to New Orleans of all rights—arising in favor of the canal company. *New Orleans v. Warner*, 180 U. S. 199, 207, 45 L. Ed. 493.

The act of Feb. 24, 1876, § 16, of Louisiana, authorizing New Orleans to transact and contract for the purchase and settlement of any right, franchises, privileges, etc., and for the purchase and transfer of the dredging plant, and upon which authority New Orleans passed ordinances authorizing the mayor to enter into agreement with the canal company for its purchase and "also for the full settlement of all claims for damages" and upon the execution of the agreement to draw upon the city administrator of finance for \$300,000 in full settlement, will be considered as authorizing the issue of drainage warrants by the city for damages claimed by the ship canal company, where the ordinances show that the claim for damages was included within its terms and the city has long acquiesced in that construction. *New Orleans v. Warner*, 180 U. S. 199, 205, 45 L. Ed. 493.

**2. Distinguished from power to issue commercial paper.**—*Brenham v. German American Bank*, 144 U. S. 173, 186, 36 L. Ed. 390; *Merrill v. Monticello*, 138 U. S. 673, 687, 34 L. Ed. 1069; *Police Jury v. Britton*, 15 Wall. 566, 21 L. Ed. 251; *Clairborne County v. Brooks*, 111 U. S. 400, 407, 28 L. Ed. 470.

**3. Negotiable securities.**—The Mayor *v. Ray*, 19 Wall. 468, 469, 476, 22 L. Ed. 164. See, generally, the title MUNICIPAL CORPORATIONS, ante, p. 546.

**4. Merrill v. Monticello**, 138 U. S. 673, 682, 34 L. Ed. 1069; *Kenicott v. Supervisors*, 16 Wall. 452, 464, 21 L. Ed. 319; *St. Joseph Tp. v. Rogers*, 16 Wall. 644, 21

L. Ed. 328; *Wells v. Supervisors*, 102 U. S. 625, 630, 26 L. Ed. 122; *Crow v. Oxford*, 119 U. S. 215, 30 L. Ed. 388. See *Utter v. Franklin*, 172 U. S. 416, 43 L. Ed. 498. See, also, *Cole v. La Grange*, 113 U. S. 1, 28 L. Ed. 896; *Parkersburg v. Brown*, 106 U. S. 487, 27 L. Ed. 238; *Commercial Bank v. Iola*, 154 U. S., appx., 617, 22 L. Ed. 463. As to power to borrow money, see the title MUNICIPAL CORPORATIONS, ante, p. 546.

County bonds issued without warrant of law must be declared void and insufficient to support a judgment. *Dixon County v. Field*, 111 U. S. 83, 90, 28 L. Ed. 360. See post, "Bonds Issued without Authority," IV, Q, 2, b, (24).

**Bonds issued in violation of constitution.**—Bonds were held void in the case of *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138, because they were issued in violation of a provision of the constitution of Illinois. See *Litchfield v. Ballou*, 114 U. S. 190, 191, 29 L. Ed. 132.

Public bonds issued in contravention of the constitution of the state are without warrant of law and are void. *Dixon County v. Field*, 111 U. S. 83, 97, 28 L. Ed. 360.

**Charter provision exempting bonds from taxation.**—A provision in the charter of the city, that bonds of the corporation of the city "shall not be subject to tax" cannot be regarded as recognizing the validity of bonds unlawfully issued. Whatever that provision may mean, it cannot include bonds unlawfully issued. *Brenham v. German American Bank*, 144 U. S. 173, 188, 36 L. Ed. 390.

**5. No implied power.**—*Kenicott v. Supervisors*, 16 Wall. 452, 465, 21 L. Ed. 319; *Marsh v. Fulton County*, 10 Wall. 676, 19 L. Ed. 1040; *Grand Chute v. Wingar*, 15 Wall. 355, 21 L. Ed. 170; *Board of Commissioners v. Aspinwall*, 21 How. 539, 16 L. Ed. 208; *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. Ed. 520; *Moran v. Commissioners*, 2 Black 722, 17 L. Ed. 342; *Marsh v. Fulton County*, 10 Wall. 676, 19 L. Ed.



And the rule seems to be well settled that mere political bodies constituted for the purpose of local policy and administration, and having the power of levying taxes to defray all public charges created, whether they are or are not formally invested with corporate capacity, have no power or authority to make and utter commercial paper of any kind free from equitable defenses in the hands of a bona fide holder, unless such power is expressly conferred upon them by law,<sup>6</sup> or clearly implied from some other power expressly given which cannot be fairly exercised without it.<sup>7</sup> Of course bonds are void where there is no power

1040; *South Ottawa v. Perkins*, 94 U. S. 260, 262, 24 L. Ed. 154; *United States v. Railroad Co.*, 17 Wall. 322, 21 L. Ed. 597; *Pendleton County v. Amy*, 13 Wall. 297, 20 L. Ed. 579; *Kenicott v. Supervisors*, 16 Wall. 452, 21 L. Ed. 319; *St. Joseph Tp. v. Rogers*, 16 Wall. 644, 21 L. Ed. 328; *Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579.

**Holder chargeable with notice of law.**—*Ogden v. County of Daviess*, 102 U. S. 634, 641, 26 L. Ed. 263; *Wells v. Supervisors*, 102 U. S. 625, 634, 26 L. Ed. 122. See post, "Authority to Issue," IV, Q, 2, a, (3), (c), aa.

**A municipality must have legislative authority** to subscribe to the capital stock of a bridge company before its officers can bind the body politic to the payment of bonds purporting to be issued on that account. *McClure v. Oxford Tp.*, 94 U. S. 429, 24 L. Ed. 129. See *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. Ed. 154.

**6. Express power.**—*Police Jury v. Britton*, 15 Wall. 566, 21 L. Ed. 251; *Claiborne County v. Brooks*, 111 U. S. 400, 28 L. Ed. 470; *Kelley v. Milan*, 127 U. S. 139, 32 L. Ed. 77; *Young v. Clarendon Tp.*, 132 U. S. 340, 33 L. Ed. 356; *Brenham v. German American Bank*, 144 U. S. 173, 185, 36 L. Ed. 390; *Hill v. Memphis*, 134 U. S. 198, 203, 33 L. Ed. 887; *Merrill v. Monticello*, 138 U. S. 673, 691, 34 L. Ed. 1069; *Hopper v. Covington*, 118 U. S. 148, 30 L. Ed. 190; *The Mayor v. Ray*, 19 Wall. 468, 22 L. Ed. 164; *Barnett v. Denison*, 145 U. S. 135, 36 L. Ed. 652; *Carter County v. Sinton*, 120 U. S. 517, 525, 30 L. Ed. 701; *The Mayor v. Lindsey*, 19 Wall. 485, 22 L. Ed. 180; *Wells v. Supervisors*, 102 U. S. 625, 26 L. Ed. 122; *Sheboygan Co. v. Parker*, 3 Wall. 93, 18 L. Ed. 33; *Barnum v. Okolona*, 148 U. S. 393, 395, 37 L. Ed. 495. See *Rogers v. Burlington*, 3 Wall. 654, 18 L. Ed. 79; *Concord v. Portsmouth Sav. Bank*, 92 U. S. 625, 23 L. Ed. 628. See post, "By Whom Issued," IV, G, 2, c.

**The legislation of the state of Indiana in 1878** does not anywhere expressly confer "upon incorporated towns of the state the general power of issuing, for sale in open market, negotiable securities, in the form of bonds and coupons, which, in the hands of bona fide purchasers before maturity, will be subject to no legal or equitable defenses in favor of the maker." This is so although the Indiana legislature, by acts in force in 1878, had authorized towns to issue bonds for certain specified purposes. *Merrill v. Monticello*, 138 U.

S. 673, 675, 34 L. Ed. 1069.

**7. Implied power.**—*Concord v. Portsmouth Sav. Bank*, 92 U. S. 625, 23 L. Ed. 628; *Hill v. Memphis*, 134 U. S. 198, 203, 33 L. Ed. 887; *Brenham v. German American Bank*, 144 U. S. 173, 185, 36 L. Ed. 390; *Young v. Clarendon Tp.*, 132 U. S. 340, 33 L. Ed. 356; *Kelley v. Milan*, 127 U. S. 139, 32 L. Ed. 77; *Claiborne County v. Brooks*, 111 U. S. 400, 28 L. Ed. 470; *Police Jury v. Britton*, 15 Wall. 566, 21 L. Ed. 251; *The Mayor v. Ray*, 19 Wall. 468, 22 L. Ed. 164; *Carter County v. Sinton*, 120 U. S. 517, 525, 30 L. Ed. 701; *The Mayor v. Lindsey*, 19 Wall. 485, 22 L. Ed. 180; *Wells v. Supervisors*, 102 U. S. 625, 26 L. Ed. 122; *Concord v. Robinson*, 121 U. S. 165, 30 L. Ed. 885; *Barnett v. Denison*, 145 U. S. 135, 139, 36 L. Ed. 652; *Merrill v. Monticello*, 138 U. S. 673, 691, 34 L. Ed. 1069.

**Power to subscribe to railroad stock.**—In *Kelley v. Milan*, 127 U. S. 139, 32 L. Ed. 77, and *Norton v. Dyersburg*, 127 U. S. 160, 32 L. Ed. 85, it was held that the power granted to a municipal corporation to become a stockholder in a railroad company did not carry with it the power to issue negotiable bonds in payment of the subscription, unless the latter power was expressly or by reasonable implication conferred by statute.

**Power to subscribe to railroad stock and issue certificates of loan.**—The acts of the legislature authorizing a city to subscribe for a certain amount of stock of a railroad company and to issue certificates of loan in payment thereof, and a subsequent act increasing such subscription confers authority on the city to issue certificates of loan, otherwise called bonds, with coupons, to pay for its first and second subscriptions to the capital stock of the railroad company. *Amey v. Allegheny City*, 24 How. 364, 16 L. Ed. 614. See, generally, the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID, ante, p. 618.

**Power to subscribe and agree on terms of payment.**—In the case of *Curtis v. Butler County*, 24 How. 435, 16 L. Ed. 745, it was held that the counties through parts of which the Northwestern Railroad may pass were authorized to subscribe to the capital stock of the company, and to make payments on such terms as might be agreed upon between the company and the county. It was also then decided that the power given to the county to subscribe included its right to issue bonds,

in the legislature to authorize a tax in aid of the purpose for which they were issued.<sup>8</sup>

**Territorial Legislation Contrary to Revised Statutes.**—The act of a territorial legislature which authorizes a county to issue bonds for a purpose in violation of U. S. Rev. Stat., which prohibits territorial legislatures to authorize any municipal corporation to incur any debt or obligation other than such as shall be necessary to the administration of its internal affairs, is invalid.<sup>9</sup>

**Constitutional Requirements as to Enacting Statutes.**—State statutes authorizing municipalities to issue bonds for specified purposes upon certain conditions must be passed in accordance with constitutional requirements and not in violation of such provisions.<sup>10</sup>

2. **STATUTES AND CHARTERS GRANTING POWER.**—See ante, "In General," I, B, 1.

3. **POWER IMPLIED FROM GRANT OF OTHER EXPRESS POWERS.**—The power to issue negotiable bonds implied from a grant of other express powers which could not be fairly exercised if it were otherwise, depends upon the circumstances of each particular case.<sup>11</sup> Such implications of power should not be encouraged or

with coupons for interest attached, for the payment of its subscription. Where the charter of a railroad company authorizes the counties "through which it may pass" to subscribe to its stock, and provided that payment of the stock should be made upon such terms and in such manner as might be agreed on between the company and the county, an agreement to pay in bonds, with coupons attached for the semiannual interest, is binding, and the bonds being issued accordingly, are lawful and valid securities. *Woods v. Lawrence County*, 1 Black 386, 17 L. Ed. 122.

In a suit brought to recover the arrears of interest on such bonds, if the statute requires the grand jury to fix the amount of the subscription and to approve of it, it is not necessary for the holder to show that the grand jury fixed the manner and terms of paying for the stock; nor is it a defense for the county to show that the grand jury omitted to do so. It is enough that the manner and terms of payment were agreed upon between the company and the commissioners. *Woods v. Lawrence County*, 1 Black 386, 17 L. Ed. 122. See, generally, the title **MUNICIPAL, COUNTY, STATE AND FEDERAL AID**, ante, p. 618.

8. **Absence of legislative power to authorize tax.**—*Loan Ass'n v. Topeka*, 20 Wall. 655, 22 L. Ed. 455; *Moultrie County v. Fairfield*, 105 U. S. 370, 379, 26 L. Ed. 945; *Parkersburg v. Brown*, 106 U. S. 487, 27 L. Ed. 238. See *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138; *Hedges v. Dixon County*, 150 U. S. 182, 199, 37 L. Ed. 1044.

"But here it is conceded that there is power, within certain limits, to levy a tax to pay these bonds. They cannot, therefore, be void. *Marcy v. Oswego Tp.*, 92 U. S. 637, 23 L. Ed. 748." *Moultrie County v. Fairfield*, 105 U. S. 370, 379, 26 L. Ed. 945. See post, "Bonds Issued without Authority," IV, A, 2, b, (24).

9. **Territorial legislation contrary to**

**revised statutes.**—*Lewis v. Pima County*, 155 U. S. 54, 39 L. Ed. 67, construing and applying § 1889 amended by 20 Stat. at Large 101, to an act of the legislature of Arizona authorizing a county to issue bonds to a certain amount and exchange the same for railroad bonds. The bonds were held void.

10. **Constitutional provision requiring the yeas and nays to be entered upon the journals of each house of the general assembly.**—*Wilkes County v. Coler*, 180 U. S. 506, 45 L. Ed. 642; *Wilkes County v. Coler*, 190 U. S. 107, 47 L. Ed. 971. See *Stanly County v. Coler*, 190 U. S. 437, 444, 47 L. Ed. 1126. See the title **STATUTES**.

11. **Statutory power to fund indebtedness.**—The act of the general assembly of Kentucky of January 30, 1878, authorizing Carter county to compromise and settle with the holders of the bonds and coupons executed by that county while the parts of Elliott and Boyd counties which had been set off from Carter county, were still parts of that county, authorizes the county court of Carter county to issue negotiable securities which passed by delivery and in the hands of innocent holders are free from taxes which would be good as between the original parties. *Carter County v. Sinton*, 120 U. S. 517, 523, 30 L. Ed. 701.

As the new obligations were to be executed to take up and cancel old negotiable securities to a large amount, and were to be made payable at a future time, there cannot be a doubt of the intention of the legislature to authorize the execution of "obligations" negotiable in form and in law, if necessary to secure a settlement. The authority to include in the obligations such stipulations as to interest as might be agreed on clearly implies authority to attach interest coupons, and everything indicates a purpose to invest the court with all the powers as to the form of the obligations that were necessary to enable it to meet the requirements of the holders of the outstanding bonds and coupons in this particular. *Carter*

extended,<sup>12</sup> and it is a well-settled rule that any doubt as to the existence of such power ought to be determined against its existence.<sup>13</sup>

**Statutory Power to Borrow Money.**—It has been held that statutory power granted to a city "to borrow money for any public purpose," gave authority to the city to borrow money to aid a railroad company in building a road for public travel and transportation, and that, as a means of borrowing money to accomplish such object, the city might issue its bonds to be sold by the railroad company to raise the money.<sup>14</sup>

**Implied Power to Borrow Money.**—The rule seems to be that the implied power of a municipal corporation to borrow money to enable it to execute the powers expressly conferred upon it by law, if existing at all, does not authorize it to create and issue negotiable securities to be sold in the market and to be taken by the purchaser freed from the equities that might be set up by the maker.<sup>15</sup> To borrow money, and to give a bond or obligation therefor which may circulate in the market as a negotiable security, freed from any equities that

*County v. Sinton*, 120 U. S. 517, 525, 30 L. Ed. 701.

**Authority to issue bonds in aid of railroad.**—*Converse v. Fort Scott*, 92 U. S. 503, 509, 23 L. Ed. 621. See, generally, the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID, ante, p. 618.

In *Concord v. Robinson*, 121 U. S. 165, 30 L. Ed. 885, it was held that a grant to a municipal corporation of power to appropriate moneys in aid of the construction of a railroad, accompanied by a provision directing the levy and collection of taxes to meet such appropriation, and prescribing no other mode of payment, did not authorize the issuing of negotiable bonds in payment of such appropriation. See *Wells v. Supervisors*, 102 U. S. 625, 631, 26 L. Ed. 122; *Ogden v. County of Daviess*, 102 U. S. 634, 639, 26 L. Ed. 263; *Claiborne County v. Brooks*, 111 U. S. 400, 28 L. Ed. 470.

**Power to subscribe for railroad stock.**—Power conferred by a statute on a municipal corporation to subscribe for the stock of a railroad company does not include the power to issue negotiable bonds representing a debt in order to pay for the subscription. *Hill v. Memphis*, 134 U. S. 198, 203, 33 L. Ed. 887; *Brenham v. German American Bank*, 144 U. S. 173, 185, 36 L. Ed. 390; *Merrill v. Monticello*, 138 U. S. 673, 691, 34 L. Ed. 1069; *Wells v. Supervisors*, 102 U. S. 625, 26 L. Ed. 122.

**Statutory power to erect county buildings.**—A statute which conferred upon counties the power to erect a courthouse, jail and other necessary county buildings, did not authorize the issue of commercial paper as evidence of or security for a debt contracted for the construction of such a building. *Claiborne County v. Brooks*, 111 U. S. 400, 28 L. Ed. 470.

**Power to issue bonds to fund previous debt.**—In *Police Jury v. Britton*, 15 Wall. 566, 571, 572, 21 L. Ed. 251, it was held that the trustees or representative officers of a parish, county, or other local jurisdiction in Louisiana, invested with the usual powers of administration in specific

matters, and the power of levying taxes to defray the necessary expenditures of the jurisdiction, had no implied authority to issue negotiable securities for the purpose of raising money or funding a previous debt.

Under the laws of New Jersey, the board of chosen freeholders of the county of Hudson had no authority, Dec. 14, 1876, to purchase lands whereon to erect a courthouse, and to issue in payment therefor bonds payable out of the amount appropriated and limited for the fiscal year commencing Dec. 1, 1877. *Crampton v. Zabriskie*, 101 U. S. 601, 25 L. Ed. 1070.

**Tennessee.**—*Kelley v. Milan*, 127 U. S. 139, 32 L. Ed. 77; *Norton v. Dyersburg*, 127 U. S. 160, 175, 32 L. Ed. 85.

**12. Implication of such power not to be encouraged.**—*Merrill v. Monticello*, 138 U. S. 673, 689, 34 L. Ed. 1069; *Police Jury v. Britton*, 15 Wall. 566, 21 L. Ed. 251.

**13. Doubt determined against power.**—*Brenham v. German American Bank*, 144 U. S. 173, 182, 36 L. Ed. 390.

**14. Statutory power to borrow money for "any public purpose."**—*Rogers v. Burlington*, 3 Wall. 654, 666, 18 L. Ed. 79. See *Mitchell v. Burlington*, 4 Wall. 270, 18 L. Ed. 350.

A plank road is a public purpose for which a municipal corporation may borrow money by the issue of bonds, where such road leads from, extends to, or passes through the limits of its territory. *Larned v. Burlington*, 4 Wall. 275, 18 L. Ed. 353.

**15. Implied power to borrow money.**—*Merrill v. Monticello*, 138 U. S. 673, 686, 34 L. Ed. 1069; *Police Jury v. Britton*, 15 Wall. 566, 21 L. Ed. 251; *The Mayor v. Ray*, 19 Wall. 468, 22 L. Ed. 164; *Brenham v. German American Bank*, 144 U. S. 173, 36 L. Ed. 390.

This view is confirmed by the almost invariable legislative practice in the states to confer, when it is deemed expedient, upon municipalities and public corporations, in express terms, the power to borrow money or to issue negotiable bonds or securities. *Merrill v. Monticello*, 138



may be set up by the maker of it, are, in their nature and in their legal effect, essentially different transactions.<sup>16</sup>

**C. Interest Coupons Attached to Bonds.**—Coupons are simply instruments containing the promise to pay interest,<sup>17</sup> and the express power to issue bonds bearing interest carries with it the power to attach to those bonds interest coupons.<sup>18</sup>

**D. Issuance of Bills as Currency.**—See post, "Issuance of Bills as Currency," III, B. See the title CONSTITUTIONAL LAW, vol. 4, p. 307.

**E. Power to Issue Funding Bonds.**—A state may enact legislation to enable municipalities to fund their matured debts, by issuing bonds.<sup>19</sup>

**F. Curative Laws—Ratification.**—The legislature when not restricted by the constitution may, by retroactive statutes, legalize the unauthorized creation of municipal liabilities by subordinate municipal agencies, where such acts and proceedings would have been valid if done under legislative sanction previously given, and such ratification is the equivalent of original authority.<sup>20</sup>

**Construed According to Intention.**—In the absence of any expression in the laws themselves, evincing such an intention, laws authorizing the issue of bonds do not give any retroactive validity to elections which were without authority, and void, when they were held.<sup>21</sup> What is clearly implied in a statute is as effectual as what is expressed.<sup>22</sup>

**By the amendment of 1874 to the constitution of Louisiana** it was intended to validate and ratify the issue of drainage warrants to the transferee of the contract, not only for the work done but for the property purchased by the city in case it should elect to do the work itself.<sup>23</sup>

U. S. 673, 692, 34 L. Ed. 1069. See ante, this section, notes 10 and 11.

**Missouri act approved Jan. 4, 1860.**—Ogden v. County of Daviess, 102 U. S. 634, 26 L. Ed. 263.

**16.** Merrill v. Monticello, 138 U. S. 673, 686, 34 L. Ed. 1069; Brenham v. German American Bank, 144 U. S. 173, 186, 36 L. Ed. 390; Police Jury v. Britton, 15 Wall. 566, 21 L. Ed. 251. See ante, "In General," I, A.

**17.** Interest coupons attached to bonds.—Atchison Board of Education v. DeKay, 148 U. S. 591, 601, 37 L. Ed. 573. See the title COUPONS, vol. 4, p. 846.

**18.** Power to attach coupons to bonds.—Atchison Board of Education v. DeKay, 148 U. S. 591, 601, 37 L. Ed. 573.

**19.** Power to issue funding bonds.—Kelley v. Milan, 127 U. S. 139, 157, 32 L. Ed. 77. See post, "Funding and Refunding," IV, L, 8.

**Tennessee act March 23, 1872.**—The object of the Tennessee statute of March 23, 1872, was to enable certain municipalities to fund their matured debts by issuing bonds of the character specified in the act. Kelley v. Milan, 127 U. S. 139, 157, 32 L. Ed. 77.

**20.** Curative laws—Ratification.—Quiney v. Cooke, 107 U. S. 549, 27 L. Ed. 549; Bissell v. Jeffersonville, 24 How. 287, 16 L. Ed. 664; Commissioners v. Thayer, 94 U. S. 631, 24 L. Ed. 133; Utter v. Franklin, 172 U. S. 416, 424, 43 L. Ed. 498; National Bank v. Yankton County, 101 U. S. 129, 25 L. Ed. 1046; United States v. Babbit, 1 Black 55, 17 L. Ed. 94; Pompton v. Cooper Union, 101 U. S. 196, 202, 25 L. Ed. 803; Anderson v. Santa Anna, 116

U. S. 356, 364, 29 L. Ed. 633. See, also, Elmwood Tp. v. Marcy, 92 U. S. 289, 23 L. Ed. 710. See the title CONSTITUTIONAL LAW, vol. 4, pp. 457, 458, 459.

**Bonds issued pursuant to statute curing defective subscription.**—Quiney v. Cooke, 107 U. S. 549, 27 L. Ed. 549; National Bank v. Yankton County, 101 U. S. 129, 25 L. Ed. 1046. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID, ante, p. —.

**21.** Construed according to institution.—South Ottawa v. Perkins, 94 U. S. 260, 271, 24 L. Ed. 154.

An intention of the legislature to confirm and ratify cannot be ascertained, with certainty, from language too vague to form the basis of so important an authority. The legislature must make such a confirmation openly, intelligibly and in language not to be misunderstood, and as a doubtful or obscure declaration is not justifiable, so it is not to be imputed. Hayes v. Holly Springs, 114 U. S. 120, 126, 29 L. Ed. 81. See State v. Stoll, 17 Wall. 425, 436, 21 L. Ed. 650.

**22.** Effect of implied ratification.—Pompton v. Cooper Union, 101 U. S. 196, 202, 25 L. Ed. 803; United States v. Babbit, 1 Black 55, 17 L. Ed. 94.

**23.** Amendment of Louisiana constitution of 1874.—New Orleans v. Warner, 175 U. S. 120, 137, 44 L. Ed. 96.

The decree of the United States supreme court in New Orleans v. Warner, 175 U. S. 120, 137, 44 L. Ed. 96, did not permit of any distinction being made and none was made between warrants issued in purchase of the drainage canal property and such as were used in purchase of

## II. Municipal Warrants, Orders, Certificates of Indebtedness, etc.

**A. Definition and Nature.**—Municipal warrants are orders upon the treasurer of the municipality to pay out of its funds for municipal purposes, not otherwise appropriated, the amount specified.<sup>24</sup> Municipal warrants which are a mere method of payment in money, for the convenience of a city in carrying on its financial business, may be treated as a promise to pay in money.<sup>25</sup>

**B. Requisites and Validity**—1. *SEAL*.—Warrants issued on the county treasurer subsequently to the year 1860 by order of the board of supervisors of a county in Iowa, and duly signed by their clerk, were not, unless sealed with the county seal, genuine and regularly issued, and the treasurer was not authorized to pay them.<sup>26</sup>

2. *DELIVERY*.—The act of delivery is essential to the existence of any deed, bond or note, and, although drawn and signed, so long as it is undelivered it is a nullity; not only does it take effect only by delivery, but also only on delivery.<sup>27</sup>

**C. Operation and Effect.**—Municipal warrants establish, *prima facie*, the validity of the claims allowed and authorize their payment, but they have no other effect. Their issue determines nothing as to other demands of the payee against the county, or of the county against him. If there are other claims to be adjusted and settled between the parties, the warrants, if lawfully issued, will be taken as approved items in the account—nothing more.<sup>28</sup> Although vouchers for money due, certificates of indebtedness for services rendered, or for property furnished for the uses of the city, orders or drafts drawn by one city officer upon another, or any other device of the kind, used for liquidating the amounts legitimately due to public creditors, are necessary instruments for carrying on the machinery of municipal administration, and for anticipating the collection of taxes, yet such documents are not vested with the character and incidents of commercial paper, so as to render them in the hands of bona fide holders absolute obligations to pay not subject to equitable defenses.<sup>29</sup>

**D. Negotiability and Transfer**—1. *IN GENERAL*.—Municipal warrants, orders, vouchers, certificates of indebtedness, etc., in form negotiable, are transferable by delivery so far as to authorize the holder to demand payment of them and to maintain, in his own name, an action upon them. But they are not negotiable instruments in the sense of the law merchant, so that, when held by a bona fide purchaser, evidence of their invalidity or defenses available against the original payee would be excluded. The transferee takes them subject to all legal and equitable defenses which existed to them in the hands of such payee.<sup>30</sup>

the franchise or in settlement of the claim for damages urged by the canal company and Van Norden against New Orleans. *New Orleans v. Warner*, 180 U. S. 199, 202, 45 L. Ed. 493.

**24. Definition and nature.**—*Wall v. Monroe County*, 103 U. S. 74, 77, 26 L. Ed. 430.

**25. Warrants treated as promise to pay.**—*Superior City v. Ripley*, 138 U. S. 93, 97, 34 L. Ed. 911.

**26. Requisites and validity.**—*Smeltzer v. White*, 92 U. S. 390, 23 L. Ed. 508.

**27. Delivery.**—*Young v. Clarendon Tp.*, 132 U. S. 340, 353, 33 L. Ed. 356. See, generally, the title *BILLS, NOTES AND CHECKS*, vol. 3, p. 276.

**28. Operation and effect.**—*Wall v. Monroe County*, 103 U. S. 74, 77, 26 L. Ed. 430.

All the courts agree that the instruments are mere *prima facie* and not conclusive evidence of the validity of the allowed claims against the county by which

they were issued. The county is not estopped from questioning the legality of the claims; and when this is conceded the instrument concludes nothing as to other demands between the parties. *Wall v. Monroe County*, 103 U. S. 74, 78, 26 L. Ed. 430.

**29. Commercial characteristics of warrants.**—*The Mayor v. Ray*, 19 Wall. 468, 22 L. Ed. 164; *Wall v. Monroe County*, 103 U. S. 74, 78, 26 L. Ed. 430.

**30. Negotiability and transfer.**—*Wall v. Monroe County*, 103 U. S. 74, 77, 26 L. Ed. 430; *New Orleans v. Warner*, 180 U. S. 199, 45 L. Ed. 493; *District of Columbia v. Cornell*, 130 U. S. 655, 661, 32 L. Ed. 1041; *The Mayor v. Ray*, 19 Wall. 468, 477, 22 L. Ed. 164; *Claiborne County v. Brooks*, 111 U. S. 400, 408, 28 L. Ed. 470; *The Mayor v. Lindsey*, 19 Wall. 485, 22 L. Ed. 180.

Certificates of indebtedness made and payable in a state, out of a particular fund, and purporting to be the obligations of a



Though negotiable instruments, they belong to a peculiar class of such instruments, being made by a municipal corporation, and having no validity unless issued for a purpose authorized by law,<sup>31</sup> and the same reasons which deny to them negotiability in the sense of the law merchant, allow any matter of set off to them which the county held against the original parties.<sup>32</sup>

**Drainage Warrants of the City of New Orleans.**—Certain drainage warrants issued by New Orleans are held to be neither bills of exchange, notes payable to order or bearer, nor effects negotiable or transferable by indorsement or by delivery within the meaning of art. 3540 of the Civil Code of Louisiana, prescribing the limitation upon certain action.<sup>33</sup>

2. **ENDORSEMENT.**—Where certificates of the public debt of Texas were transferable only by the owner, or his legal representative or attorney, and there is no sufficient evidence of the existence of a power of attorney, a mere indorsement in blank by the owner is not sufficient to justify a purchaser in drawing a conclusion that the holder is entitled to sell or discount it.<sup>34</sup>

3. **DISPOSITION AT DISCOUNT.**—Officers of a municipality who are forbidden to transfer its certificates to a creditor at a discount cannot indirectly accomplish the same result by accepting a bill made out and certified to, at rates increased to an amount which will produce in the aggregate an amount, which in depreciated securities is equivalent to the true amount of the bill in cash.<sup>35</sup>

4. **CANCELLATION AND REVIVAL**—a. *In General.*—See post, "Redemption and Reissue," II, G. See the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 308.

b. *Transference of Stolen Extinguished Certificates.*—Municipal certificates having been lawfully extinguished by stamping across their face marks of cancellation as clear and permanent as the original signature, the liability of the municipality upon them as negotiable paper could not be revived by its omission to take additional precautions against their being stolen and fraudulently re-

municipal corporation existing under public laws and endowed only with restricted powers granted for special and purely local purposes of a noncommercial character, are not governed by the law merchant, and are open in the hands of subsequent holders to the same defenses as existed against the original payee. *Indiana v. Glover*, 155 U. S. 513, 517, 39 L. Ed. 243; *Merrill v. Monticello*, 138 U. S. 673, 34 L. Ed. 1069.

**A county order executed by a board of supervisors**, directing the treasurer of the county, on a day named, to "pay to John Murphy or bearer" a certain sum "out of the funds appropriated for bounties to volunteers, with interest at the rate of eight per cent per annum from this date, upon the presentation of the annexed coupons," is an instrument of writing not negotiable in the sense of the law merchant, so as to exclude defenses or evidence of invalidity, even when held by a bona fide purchaser. *Wall v. Monroe County*, 103 U. S. 74, 26 L. Ed. 430; *Ottawa v. National Bank*, 105 U. S. 342, 345, 26 L. Ed. 1127.

**Interest bearing certificates—Auditor's certificates.**—In *Looney v. District of Columbia*, 113 U. S. 258, 260, 28 L. Ed. 974, it was held that the sewer certificates and other interest-bearing securities of the District of Columbia were negotiable instruments, but the auditor's certificates were not negotiable, but were merely evidence of the debt of the district to the claimant under its contract with him.

**Notice of illegality—Estoppel of municipality to deny validity.**—The officers of a municipal corporation cannot, like the officers of a private corporation, create, by their acts, an estoppel against the corporation, its taxpayers, or people, so as to render illegal, issues of ordinary city drafts or vouchers (not authorized by law) valid in the hands of holders for value; such holders are affected with notice of the illegality. *The Mayor v. Ray*, 19 Wall. 468, 22 L. Ed. 164; *The Mayor v. Lindsey*, 19 Wall. 485, 22 L. Ed. 180.

31. *District of Columbia v. Cornell*, 130 U. S. 655, 661, 32 L. Ed. 1041; *The Mayor v. Ray*, 19 Wall. 468, 477, 22 L. Ed. 164; *Wall v. Monroe County*, 103 U. S. 74, 78, 26 L. Ed. 430; *Claiborne County v. Brooks*, 111 U. S. 400, 408, 28 L. Ed. 470. See ante, "In General," I, B.

32. *Wall v. Monroe County*, 103 U. S. 74, 78, 26 L. Ed. 430.

33. See the title **LIMITATION OF ACTION AND ADVERSE POSSESSION**, vol. 7, p. 925.

34. *Endorsement—Combs v. Hodge*, 21 How. 397, 16 L. Ed. 115.

35. *Disposition at discount.*—*Shipman v. District of Columbia*, 119 U. S. 148, 30 L. Ed. 337.

If such certificates are given for the whole of the fictitious bill, they must be taken to be a cash payment of the full amount of securities transferred. *Shipman v. District of Columbia*, 119 U. S. 148, 30 L. Ed. 337.



stored to their original condition by such means as ingenious wickedness might devise.<sup>36</sup>

5. **GUARANTY OF COUNTY WARRANTS.**—See the title **GUARANTY**, vol. 6, p. 584.

**E. Payment, Funding and Discharge from Liability**—1. **TO WHOM PAYMENT MAY BE MADE.**—If the owner of certificates of the auditor of the board of public works of the District of Columbia places them in the hands of third persons, indorsed in blank, so as to give him apparent authority for their collection, payment by the district to the person so invested with apparent authority, without notice of a want of actual authority, will discharge the debt.<sup>37</sup>

2. **PLEDGE OF SPECIAL ASSESSMENT TO DISCHARGE LIABILITY.**—Where a municipality issues warrants or certificates of indebtedness to pay for a public improvement and pledges special assessments to pay the same, it is not a guarantor of the warrants but a statutory trustee for the collection of the assessment.<sup>38</sup> If a municipality neglects its duty respecting the creation and collection of a particular fund against which warrants are drawn, the holders of such warrants are entitled to enforce them as a general liability of the municipality.<sup>39</sup>

3. **DEFENSE TO LIABILITY ON WARRANTS.**—A municipality purchasing property and contracting to pay for it out of a certain fund, and issuing warrants payable out of such fund, cannot deliberately abandon that duty, take steps to prevent the further creation of that fund, and plead in defense to a liability on the warrants a judgment providing that where the city abandoned the contemplated work it could no longer collect the tax therefor.<sup>40</sup>

4. **FUNDING.**—See post, "Funding and Refunding," IV, N, 7.

5. **DISCHARGE OF LIABILITY ON CERTIFICATES.**—Where the plaintiff purchased lots at a void tax sale by the District of Columbia and in order to protect his interest in certificates of indebtedness given to him by the District of Columbia as contractor to pay for certain work done for it, surrendered the certificates in payment of his bid at the tax sale, he could reclaim his certificates and recover thereon, the sale having been set aside for invalidity of the assessment for which the tax was levied, such invalidity being due to the delay of the city in making the assessment.<sup>41</sup>

36. **Transferee of stolen extinguished certificates.**—*District of Columbia v. Cornell*, 130 U. S. 655, 660, 32 L. Ed. 1041.

In *District of Columbia v. Cornell*, 130 U. S. 655, 661, 32 L. Ed. 1041, the court after considering the nature of the certificates, the method in which they had been canceled, and the means by which they were afterwards put in circulation, decided that there was no ground for holding the District of Columbia liable to the claimant.

37. **To whom payment may be made.**—*Laughlin v. District of Columbia*, 116 U. S. 485, 29 L. Ed. 701; *Cowdrey v. Vandenberg*, 101 U. S. 572, 25 L. Ed. 923; *Looney v. District of Columbia*, 113 U. S. 258, 28 L. Ed. 974.

A letter by the attorney of the owner of certificates of the auditor of the board of public works of the District of Columbia, sent to the treasurer of such board, requesting him not to pay the certificates, and placed on file with the papers of the board, does not make the district answerable for the amount due on the certificates, notwithstanding the payment to the holder upon the allowance by the board of audit. *Laughlin v. District of Columbia*, 116 U. S. 485, 29 L. Ed. 701.

38. **Pledge of special assessment to discharge liability.**—*New Orleans v. Warner*, 175 U. S. 120, 44 L. Ed. 96. See, also, *Warner v. New Orleans*, 167 U. S. 467, 477, 42 L. Ed. 239.

39. **Warrants becoming general liability.**—*Warner v. New Orleans*, 167 U. S. 467, 42 L. Ed. 239; *New Orleans v. Warner*, 175 U. S. 120, 44 L. Ed. 96.

40. **Defense to liability on warrants.**—*New Orleans v. Warner*, 175 U. S. 120, 129, 44 L. Ed. 96; *Warner v. New Orleans*, 167 U. S. 467, 42 L. Ed. 239. See the title **ESTOPPEL**, vol. 5, p. 913.

41. **Discharge of liability on certificates.**—*District of Columbia v. Lyon*, 161 U. S. 200, 40 L. Ed. 670.

The city and then the district received the benefits of the contract and having failed to make the assessments within the requisite time, the invalidity arose through its own negligence and the fact that the lots have passed into the hands of bona fide purchasers for value which renders it impossible for the district to levy the assessments, does not relieve the city from its liability on the certificate. *District of Columbia v. Lyon*, 161 U. S. 200, 40 L. Ed. 670.

**F. Interest**—1. **RUNNING OF INTEREST.**—Municipal warrants or certificates of indebtedness, when expressly provided by a statute or ordinance, bear interest from the date of the presentation for payment and refusal thereof.<sup>42</sup>

**The commencement of a suit** is a sufficient demand to charge the defendant with interest from that day.<sup>43</sup>

2. **RATE.**—Where there is a promise to pay upon a certain day with interest at an exorbitant rate, the creditor is only entitled to interest after that time by operation of law and not by any provision in the contract; although if the local law be different, the federal courts will follow it.<sup>44</sup> If the parties themselves have fixed a rate to be paid to the time of payment, that rate will be respected. Thus where the statute and municipal warrants issued thereunder provided that such warrants shall bear interest at the rate of eight per cent "until paid," the complainant is entitled to that rate until payment.<sup>45</sup>

3. **RIGHT TO UNPAID BALANCE OF LEGAL INTEREST.**—Right of the holders of certificates issued by the board of audit of the District of Columbia, or their assignees, to an unpaid balance of legal interest thereon, is statutory.<sup>46</sup>

**G. Redemption and Reissue.**—**Redemption.**—The statutes in some jurisdiction provide for the redemption of warrants and certificates.<sup>47</sup>

**Reissue.**—Treasury warrants drawn by the mayor and recorder on the city treasurer, payable to bearer, originally delivered to various persons for work done for the city and afterwards received by the tax collector in payment of

**42. Running of interest.**—New Orleans *v. Warner*, 175 U. S. 120, 44 L. Ed. 96. See the title **INTEREST**, vol. 7, p. 227.

**43. Commencement of suit.**—New Orleans *v. Warner*, 175 U. S. 120, 147, 44 L. Ed. 96. See, generally, the title **INTEREST**, vol. 7, pp. 227, 229, 230.

**44. Rate—After time for payment.**—New Orleans *v. Warner*, 175 U. S. 120, 147, 44 L. Ed. 96, citing *Brewster v. Wakefield*, 22 How. 118, 16 L. Ed. 301; *Burnhisel v. Firman*, 22 Wall. 170, 22 L. Ed. 766; *Holden v. Trust Co.*, 100 U. S. 72, 25 L. Ed. 567; *Cromwell v. Sac County*, 96 U. S. 51, 61, 24 L. Ed. 681; *Ohio v. Frank*, 103 U. S. 697, 26 L. Ed. 531.

**45. Provision as to rate "up to time of payment."**—New Orleans *v. Warner*, 175 U. S. 120, 147, 44 L. Ed. 96. See the title **INTEREST**, vol. 7, pp. 232, 233.

**46. Right to unpaid balance of legal interest.**—*Roberts v. United States*, 176 U. S. 221, 226, 44 L. Ed. 443.

An assignee of certificates issued by the board of audit of the District of Columbia pursuant to the provision of § 6 of the act of congress of June 20, 1874, who took an assignment of the same after the payment of the certificates by the treasurer, is entitled to a balance of unpaid legal interest thereon, under the act of congress of August 13, 1894. *Roberts v. United States*, 176 U. S. 221, 226, 44 L. Ed. 443.

The evident purpose of the act of 1894 (c. 279) was to give the balance of interest between 3.65 and 6 per cent to those persons, or their assignees, to whom certificates had been given and the interest upon which had been paid only at the former rate. In all such cases where the certificates had been redeemed by the treasurer, the additional interest was to be paid. The act of 1894 did not limit

the payment to those who had succeeded in exchanging their certificates for bonds bearing interest at the rate of 3.65 per cent. *Roberts v. United States*, 176 U. S. 221, 228, 44 L. Ed. 443.

**47. What amounts to redemption of board of audit certificates.**—Certificates issued by the board of audit of the District of Columbia pursuant to the provision of § 6 of the act of congress approved June 20, 1874, were redeemed by the treasurer within the meaning of the act of 1894 providing for the payment of a residue of unpaid legal interest thereon, when pursuant to a judgment of the court of claims thereon, the treasurer paid the amount thereof, together with interest on the certificates from the date of their issue to the day before their payment. *Roberts v. United States*, 176 U. S. 221, 226, 44 L. Ed. 443.

**Effect of prohibition of payment after suit brought.**—An action was commenced in 1880 in the court of claims against the District of Columbia, to recover judgment for certain audit certificates of the plaintiff, held by the treasury of the United States, under the act of June 16, 1880, 21 Stat. 284, c. 243, providing for the redemption of audit certificates created by the act of 1874. In 1884 congress passed a law providing that no payment should be made of any certificate issued under the act of 1874 which should not be presented for payment within one year from the approval of the act of 1884. This action remained pending until 1889 (the certificates still remaining in the hand of the United States treasury). It was held that a judgment of the court of claims under the act of 1880 was not affected by the act of 1884. Full effect can be given to the act of 1884, by confining it to the prohibition of payment of certificates which



taxes, could not be sold for such price as they would bring to raise money for city purposes.<sup>48</sup>

**H. Remedies.**—See post, "Remedies on Warrants, Orders, etc.," VI, A.

### III. Bills and Notes.

**A. In General.**—As to power of a municipality to issue bills and notes, see ante, "Power to Issue," I. As to issuance of small bills to circulate as currency, see post, "Issuance of Bills as Currency," III, B.

**B. Issuance of Bills as Currency.**—1. **POWER OF MUNICIPALITY TO ISSUE.**—Where the issue of bills as a currency (except by banking institutions) is prohibited, a municipal corporation has no power, without express authority, to issue such bills;<sup>49</sup> it is certainly not one of the implied powers of a municipal corporation to issue such bills.<sup>50</sup>

2. **RIGHTS OF HOLDER.**—Persons dealing with the officers and agents of municipal corporations are chargeable with notice of the powers which the corporation possesses, and are to be held responsible accordingly. The issuing of bills as a currency by such a corporation without authority is not only contrary to positive law, but, being ultra vires, is an abuse of the public franchises which have been conferred upon it; and the receiver of the bills, being chargeable with notice of the wrong, is in pari delicto with the officers, and should have no remedy, even for money had and received, against the corporation upon which he has aided in inflicting the wrong.<sup>51</sup> Especially is this so where the receiving, as well as issuing, of unlawful bills is expressly prohibited.<sup>52</sup>

### IV. Municipal, State and Territorial Bonds.

**A. Definition, Nature and Power to Issue.**—**In General.**—Neither municipal coupon bonds nor certificates of loan with interest warrants attached nor the coupons have any of the legal characteristic of a common-law bond.<sup>53</sup>

**Power to Issue.**—See ante, "Power to Issue," I.

**B. Issue by De Facto County.**—See post, "Conclusiveness of Official Determination and Certificate," IV, S.

**C. Funding and Renewal Bonds.**—See ante, "Power to Issue Funding Bonds," I, E; post, "Purposes for Which Issuable," IV, D; "Funding and Refunding," IV, N, 7.

**D. Purposes for Which Issuable.**—A municipal corporation can only be

might after that year be presented in that form for payment, leaving the provision for payment or suit brought under the act of 1880 in full force. *Roberts v. United States*, 176 U. S. 221, 44 L. Ed. 443.

**48. Reissue.**—As the city had no express power to borrow money or to issue commercial paper, and no general power by which it was necessarily implied, the warrants when once paid in for taxes were nothing but redeemed vouchers, and functus officio, and ceased to have any validity, and the city officers had no authority to reissue them; it was an unauthorized use of the city's credit, and an attempt to borrow money and to issue commercial paper without any power or authority to do so; and the plaintiff's claim of being a bona fide holder could not avail him. *The Mayor v. Ray*, 19 Wall. 468, 22 L. Ed. 164; *Claiborne County v. Brooks*, 111 U. S. 400, 407, 28 L. Ed. 470; *Wall v. Monroe County*, 103 U. S. 74, 78, 26 L. Ed. 430.

**49. Power of municipality to issue.**—*Thomas v. Richmond*, 12 Wall. 349, 20 L. Ed. 453.

**50. Implied power.**—*Thomas v. Richmond*, 12 Wall. 349, 352, 20 L. Ed. 453.

Power to borrow money and to issue bond or certificates therefor does not authorize the issue of bills to circulate as currency. *Thomas v. Richmond*, 12 Wall. 349, 20 L. Ed. 453.

**51. Rights of holder.**—*Thomas v. Richmond*, 12 Wall. 349, 356, 20 L. Ed. 453.

Although the state of Virginia, to aid the cause of secession, gave the city of Richmond power to issue currency, and required said city to redeem such currency, the United States courts will not compel the city to redeem such currency, on the ground that it was issued for an illegal purpose. *Thomas v. Richmond*, 12 Wall. 349, 20 L. Ed. 453.

A law authorizing and requiring the redemption of such bills, passed by the legislature of one of the late Confederate States in aid of the rebellion, cannot be recognized or enforced. *Thomas v. Richmond*, 12 Wall. 349, 20 L. Ed. 453.

**52. Receiving expressly forbidden.**—*Thomas v. Richmond*, 12 Wall. 349, 20 L. Ed. 453.

**53. Definition, nature and power to issue.**—*Amey v. Allegheny City*, 24 How



authorized to issue bonds for some corporate purposes, there being a constitutional prohibition against taxation by the city, except for such purposes.<sup>54</sup> Where the charter of a city confers upon the council power to borrow money, upon the credit of the city, and to issue bonds therefor, but imposes no restriction as to the objects or purposes for which they may be issued, it is clear, that the council, having secured the assent of the requisite majority of voters, may rightfully borrow money upon bonds of the city for every purpose which could fairly be deemed municipal or corporate.<sup>55</sup> Where a county is authorized by an act of the state legislature to compromise and settle with the holders of its bonds and coupons, the intention of the legislature must be to authorize the execution of obligations negotiable in form and law in order to secure a settlement.<sup>56</sup>

**Redemption of Bonds Illegally Issued.**—A city having issued its obligations for its lawful debts in an illegal form, may cancel the illegal securities and bind itself by bonds to which there are no legal objections, issued and delivered to the holders of such notes.<sup>57</sup> Thus where bonds were issued in violation of law, yet when the city accepts their surrender and redeems them by giving other bonds in lieu of a portion and a credit on the books of the city for another portion of them so surrendered, such transaction is valid, and the holder of the bonds so given in lieu of the illegal ones, can recover on them, and also upon a credit given on the books of the city.<sup>58</sup>

**E. Limitation of Amount.**—Where a municipality has contracted debts up to the full limit permitted by the law under which it exists, any bonds issued over that limit are void,<sup>59</sup> even though they are to be sold and the proceeds ap-

364, 371, 16 L. Ed. 614. See the title **BONDS**, vol. 3, p. 382.

**54. Purposes for which issuable.**—*Ottawa v. Carey*, 108 U. S. 110, 122, 27 L. Ed. 669; *Lewis v. Shreveport*, 108 U. S. 282, 27 L. Ed. 728; *Hackett v. Ottawa*, 99 U. S. 86, 93, 25 L. Ed. 363; *Comanche County v. Lewis*, 133 U. S. 198, 207, 33 L. Ed. 604.

Generally, for purposes for which a municipality may issue bonds, see ante, "In General," I, B, 1; "Power Implied from Grant of Other Express Powers," I, B, 3.

Municipal or public corporation cannot issue bonds for purposes which are not germane to the general scope of the object for which the corporation was created. *Weightman v. Clark*, 103 U. S. 256, 26 L. Ed. 392.

**A public school corporation or a congressional township** which is merely a corporation for school purposes cannot issue bonds for any other than school purposes in the absence of legislative authority. *Weightman v. Clark*, 103 U. S. 256, 26 L. Ed. 392.

**"Statutes authorizing towns and cities to pay bounties to soldiers** have been upheld, because the raising of soldiers is a public duty. *Middleton v. Mullica Tp.*, 112 U. S. 433, 28 L. Ed. 785;" *Cole v. La Grange*, 113 U. S. 1, 7, 28 L. Ed. 896.

**55. Municipal and corporate purposes.**—*Hackett v. Ottawa*, 99 U. S. 86, 93, 25 L. Ed. 363.

**56. Compromise and settlement with bondholders.**—*Carter County v. Sinton*, 120 U. S. 517, 525, 30 L. Ed. 701. See ante, "Power to Issue Funding Bonds," I, E; "Funding and Refunding," IV, N, 7.

**57. Redemption of bonds illegally is-**

**sued.**—*Little Rock v. National Bank*, 98 U. S. 308, 25 L. Ed. 108. See post, "Funding and Refunding," IV, N, 7.

**58. Little Rock v. National Bank**, 98 U. S. 308, 25 L. Ed. 108; *Houston, etc., R. Co. v. Texas*, 177 U. S. 66, 93, 44 L. Ed. 673.

**59. Limitation of amount.**—*Doon Tp. v. Cummins*, 142 U. S. 366, 378, 35 L. Ed. 1044; *Nesbit v. Riverside Independent Dist.*, 144 U. S. 610, 617, 36 L. Ed. 562; *Read v. Plattsmouth*, 107 U. S. 568, 574, 27 L. Ed. 414; *Maish v. Arizona*, 164 U. S. 599, 609, 41 L. Ed. 567; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138; *Hedges v. Dixon County*, 150 U. S. 182, 190, 37 L. Ed. 1044; *Daviess County v. Dickinson*, 117 U. S. 657, 663, 29 L. Ed. 1026; *Merchants' Bank v. Bergen County*, 115 U. S. 384, 29 L. Ed. 430.

In *Dixon County v. Field*, 111 U. S. 83, 28 L. Ed. 360, the bonds in question were directly involved, and were held to be void because they exceeded in the aggregate the sum of ten per cent of the assessed valuation of the property of the county at the time of their issue. *Hedges v. Dixon County*, 150 U. S. 182, 185, 37 L. Ed. 1044.

Whenever the standard of validity of bonds of a municipality is created by the constitution and in that standard two factors are to be considered—one the amount of assessed value and the other the ratio between that assessed value and the debt proposed—these being exactions of the constitution itself, it is not within the power of a legislature to dispense with them either directly or indirectly by the creation of a ministerial commission whose finding shall be taken in lieu of the

plied to the payment of an old debt.<sup>60</sup> But if the issue is valid in other respects, the part within the debt limit, if separable from the remainder, is valid and may be enforced against the municipality.<sup>61</sup> There can, however, be no scaling of an entire issue so as to bring it within the limits of the authority of the municipality.<sup>62</sup>

**Interest to Accrue Not Considered.**—Where by the constitution of Colorado the debt limit of a county was fixed at a certain amount, the interest to accrue on bonds issued by a county was not to be taken into consideration in a calculation as to whether that limit had been passed by their issuance.<sup>63</sup>

**Validity—How Determined.**—In case of an issue of municipal bonds in excess of the amount limited by law, the question which of the bonds are valid and which invalid arises and the test is which were first delivered, if that can be ascertained, and without regard to the classification of bonds according to times of payment in the order of the county court.<sup>64</sup>

**Funding Bonds.**—Bonds issued to fund a valid indebtedness or to be exchanged for outstanding bonds, by which the new bonds, soon as issued to the holders of the old ones, would be a substitute for and an extinguishment of

facts. *Lake County v. Graham*, 130 U. S. 674, 683, 32 L. Ed. 1065.

Bonds issued April 27, 1869, by the supervisor and town clerk of the township by way of payment for an additional subscription of \$40,000 of stock of a railroad company, over and above the amount authorized by the original charter of said company, are not binding on the township. *Elmwood Tp. v. Marcy*, 92 U. S. 289, 23 L. Ed. 710.

A city having authority to issue bonds under a general power conferred upon it as a municipal body, "to borrow money for any purpose within its discretion," cannot lawfully borrow money or issue bonds to build a school house without reference to the limit, as to the amount, imposed by the act, expressly authorizing it to build schoolhouses. Whatever implications of power as to school buildings might have been admissible, if the law conferring municipal powers had stood alone, must give place to the express declarations, with the accompanying qualifications contained in the statute that dealt by name with this very subject. *Read v. Plattsmouth*, 107 U. S. 568, 574, 27 L. Ed. 414.

In the supreme court of Iowa, it is settled law that the constitutional restriction includes not only municipal bonds, but all forms of indebtedness, except warrants for money actually in the treasury, and perhaps contracts for ordinary expenses within the limits of the current revenues. And a school district has been adjudged to be a political or municipal corporation within the meaning of the constitution. *Doon Tp. v. Cummins*, 142 U. S. 366, 376, 35 L. Ed. 1044.

**No limit to rate of taxation.**—"In *Harshman v. Knox County*, 122 U. S. 306, 30 L. Ed. 1152 \* \* \* it was determined that the bonds sued on were issued under the authority of a statute which prescribed no limit to the rate of taxation for their payment. In such cases, the law which authorizes the issue of bonds gives also

the means of payment by taxation." *Knox County v. Harshman*, 133 U. S. 152, 155, 33 L. Ed. 586.

**60. Payment of old debt.**—*Doon Tp. v. Cummins*, 142 U. S. 366, 35 L. Ed. 1044.

Bonds issued by a municipal corporation which is indebted to the constitutional limit are void although they are issued to be sold and the proceeds of the sale applied to the payment of outstanding valid bonds. If the new bonds are issued without a cancellation or surrender of the old ones, the aggregate debt outstanding and on which the corporation is liable to be sued, is at once increased, and if new bonds equal in amount to the old ones are so issued at one time, it doubles; and it will remain at the increased amount until the proceeds of the new bonds are applied to the payment of the old ones or until some of the obligations are otherwise discharged. *Doon Tp. v. Cummins*, 142 U. S. 366, 372, 35 L. Ed. 1044.

**61. Validity of part within debt limit.**—*Daviess County v. Dickinson*, 117 U. S. 657, 29 L. Ed. 1026; *Maish v. Arizona*, 164 U. S. 599, 609, 41 L. Ed. 567; *Hedges v. Dixon County*, 150 U. S. 182, 188, 37 L. Ed. 1044.

**62. Scaling of overissue.**—*Hedges v. Dixon County*, 150 U. S. 182, 188, 37 L. Ed. 1044, distinguishing *Daviess County v. Dickinson*, 117 U. S. 657, 29 L. Ed. 1026. See post, "Scaling Overissue—Cancellation," VI, B, 1, c.

**63. Interest not considered.**—*Chaffee County v. Potter*, 142 U. S. 355, 35 L. Ed. 1040.

**64. Determination of validity.**—*Daviess County v. Dickinson*, 117 U. S. 657, 664, 29 L. Ed. 1026.

The court say: "As the county court was authorized to determine at what time the bonds should be payable, any one, taking a bond signed by the presiding judge and the clerk and bearing the seal of the county, had the right to presume that it was valid, provided the county court had not already issued bonds to

them, creates no new indebtedness nor increases the debt of the municipal corporation which issued them.<sup>65</sup>

**Subscription to Stock Expressly Excluded.**—Municipal bonds issued in payment of a subscription for stock in a railroad company, are not void under a statute limiting the amount of indebtedness the city may incur by act of city council, but expressly excluding the subscription to said stock.<sup>66</sup>

**Striking Down Levy of Taxes to Pay Interest on Bond.**—Without a full disclosure of all the facts concerning the indebtedness, the time when it arose and the circumstances under which it was created, a court cannot strike down a levy of taxes for the payment of interest on bonds issued for the purpose of funding such indebtedness.<sup>67</sup> Even if the bonds are regarded as a new indebtedness, it would not follow that the whole series were invalid, for the circumstances of the transaction might, if fully disclosed, show that even as new indebtedness they were valid for a certain amount, that is, an amount equal to 4 per cent of the value of the county's taxable property.<sup>68</sup>

**A State** cannot lawfully issue bonds in excess of its constitutional debt limit; and bonds issued in excess of such limit are void.<sup>69</sup>

**F. Conditions Precedent to Issuance**—1. **IN GENERAL.**—The provision of the statute authorizing municipal bonds must be strictly pursued.<sup>70</sup> If any of the essential proceedings prescribed by law for investing municipal officers with power to subscribe for stock, and issue bonds in payment thereof, be dispensed with, the bonds will be invalid in the hands of all who cannot claim protection as bona fide holders.<sup>71</sup> The officers of a municipality issuing municipal bonds had no power to depart from the terms of an ordinance, by varying the time limited for redemption.<sup>72</sup>

**Creation of Ministerial Commission.**—Exactions of the constitution itself cannot be dispensed with by the legislature, either directly or indirectly, by the creation of a ministerial commission whose finding shall be taken in lieu of the facts.<sup>73</sup>

the amount limited by the statute and by the vote."

**65. Funding bonds.**—*Doon Tp. v. Cummins*, 142 U. S. 366, 372, 35 L. Ed. 1044.

**66. Subscription to stock expressly excluded.**—*Amey v. Allegheny City*, 24 How. 364, 16 L. Ed. 614.

**67. Striking down levy of taxes to pay interest on bond.**—*Maish v. Arizona*, 164 U. S. 599, 609, 41 L. Ed. 567.

**68.** *Maish v. Arizona*, 164 U. S. 599, 609, 41 L. Ed. 567.

**69.** *Williams v. Louisiana*, 103 U. S. 637, 26 L. Ed. 595; *Durkee v. Board of Liquidation*, 103 U. S. 646, 26 L. Ed. 598.

Where a state is under obligations to merely indorse bonds of a railroad, with a fair security against loss and reasonable grounds of belief that the right to call for this guaranty will never arise and then later passes a statute whereby it becomes absolute debtor for the railroad company's bonds, such latter enactment and assumption of indebtedness is void as against a constitutional amendment adopted after the contract of suretyship but before the assumption of the absolute indebtedness providing that the state debt should not be increased beyond a certain amount, inasmuch as the new debt exceeded the amount allowed by the constitutional amendment. *Williams v. Louisiana*, 103 U. S. 637, 644, 26 L. Ed. 595, reaffirmed in *Durkee v. Board of Liquidation*, 103 U. S. 646, 26 L. Ed. 598.

**The Louisiana act of 1871** authorizing the issue of bonds to purchase stock of a railroad company on whose bonds the state was surety, is void as assuming an absolute indebtedness in excess of that limited by the constitutional amendment of 1870. *Williams v. Louisiana*, 103 U. S. 637, 644, 26 L. Ed. 595, reaffirmed in *Durkee v. Board of Liquidation*, 103 U. S. 646, 26 L. Ed. 598.

**70. Conditions precedent to issuance.**—*Barnett v. Denison*, 145 U. S. 135, 139, 36 L. Ed. 652.

**71.** *McClure v. Oxford Tp.*, 94 U. S. 429, 24 L. Ed. 129.

While courts may properly see to it that proceedings for casting burdens upon a community comply with all the substantial requisitions of a statute in order that no such burden may be recklessly or fraudulently imposed, yet such statutes are not of a criminal character, and proceedings are not to be so technically construed and limited as to make them a mere snare to those who are encouraged to invest in the securities of the municipality. *Andes v. Ely*, 158 U. S. 312, 321, 39 L. Ed. 996.

**72. Varying time limit.**—*Brenham v. German American Bank*, 144 U. S. 173, 188, 36 L. Ed. 390.

**73.** *Lake County v. Graham*, 130 U. S. 674, 683, 32 L. Ed. 1065. See post, "Conclusiveness of Official Determination and Certificate," IV, S.



2. **ORDINANCE OR RESOLUTION.**—Consent of council to authorize an issuance of bonds may, in the absence of the statute requiring the council to authorize an issuance by ordinance, be given by resolution.<sup>74</sup> Bonds issued by a city, in accordance with an act of the legislature, under an ordinance not published or recorded as required by its charter, are not void.<sup>75</sup>

3. **WRITTEN ASSENT OF RESIDENT TAXPAYERS.**—In some instances the law requires the written assent of a certain part of the resident taxpayer, and such requirement is to be construed and carried out according to the intention of the lawmakers.<sup>76</sup>

4. **PETITION FOR ELECTION.**—**Allegations in Petition.**—A petition of the taxpayers of the town for an issue of town bonds should allege that the petitioners were a majority of the taxpayers, and represented a majority of the taxable property or whatever facts the statute makes necessary to invoke the action of the county court.<sup>77</sup>

**Attaching Condition to Petition.**—Attaching a condition to a petition does not always and necessarily vitiate it.<sup>78</sup> A petition for the issue of town bonds to aid in the construction of a railroad is not invalidated by a petitioner attaching a condition to his signature requiring the road to be located along a certain route where such condition is fulfilled before the filing of the petition.<sup>79</sup>

74. **Ordinance or resolution.**—Atchison Board of Education *v.* DeKay, 148 U. S. 591, 37 L. Ed. 573.

75. *Amey v. Alleghany City*, 24 How. 364, 16 L. Ed. 614.

76. **Written assent of resident taxpayers.**—Bernards Tp. *v.* Morrison, 133 U. S. 523, 526, 33 L. Ed. 726.

A prerequisite to the issue of bonds by town authorities, that the written assent of two-thirds of the resident persons taxed in said town, as appearing on the assessment roll made next previous to the time such money may be borrowed, shall be obtained, verified, and filed in the clerk's office of the county, is intended as a protection against a town debt rather than against the form it might assume after it had been incurred, or when the security for it should be given. And where such prerequisite was coupled with authority to subscribe to the capital stock of a railroad company a sum equal to the amount of the bonds issued, held, that they are not invalid because not issued until after the date when the assessment roll referred to was by law required to be completed, the assent having been filed, and the subscription for the stock of the company made, the bonds executed and some of them sold and the proceeds paid on account of the subscription before that date. *Scipio v. Wright*, 101 U. S. 665, 25 L. Ed. 1037.

77. **Allegations in petition.**—*Andes v. Ely*, 158 U. S. 312, 39 L. Ed. 996.

Where taxpayers petitioned a county judge to issue bonds and the petition alleged that they were a "majority of the taxpayers" and represented a "majority of the taxable property," it was held not to conform with the New York laws of 1869 as amended by the laws of 1871 which provided that a petition should allege it was made by "a majority of the taxpayers" of the municipality, "not including those

taxed for dogs or highway tax only." Hence it did not call for the exercise of judicial judgment on the part of the county judge, and the adjudication was equally defective. *Rich v. Mentz Tp.*, 134 U. S. 632, 33 L. Ed. 1074.

By New York laws of 1869 as amended by laws of 1872, an application of "a majority of the taxpayers" of the municipality "not including those taxed for dogs or highway tax only" was necessary in order to confer power upon a town to make and issue bonds, and the adjudication of the county judge should show that the statute had been complied with. *Rich v. Mentz Tp.*, 134 U. S. 632, 634, 33 L. Ed. 1074.

78. **Attaching condition to petition.**—*Andes v. Ely*, 158 U. S. 312, 39 L. Ed. 996.

79. *Andes v. Ely*, 158 U. S. 312, 39 L. Ed. 996.

A petition of the taxpayers of a town for the issue of town bonds is not void because some of the petitioners attached a condition to their signature. Where the petition contained the jurisdictional averments the duty of judicial inquiry arose; at least, when such petition was presented it was within the competency of the county judge to hear and determine whether or no the conditions named had been performed. He was compelled to examine and determine whether the verification was in proper form, whether there were in fact the signature of any petitioners on the paper, and whether there was an application for the issue of bonds, and if there were any limitation or qualification to a signature whether such limitation or qualification affected substantially the merits of the application. If he found a condition of substantial character he was then called upon to ascertain and decide whether the condition had been waived or so far performed since the signature as to cease to be any limitation upon the petition. An

**Verification of Petition.**—A petition consisting of nineteen sheets with but a single verification and that at the bottom of the last one of the nineteen sheets, is sufficient. The nineteen sheets though in form separate will be regarded as really constituting but one petition, and the single verification as applicable to such petition as a whole.<sup>80</sup>

**Notice of Hearing of Petition.**—Where a notice of the hearing of a petition of the taxpayers of a town to issue bonds of the town does not specify the place at which the hearing on the petition is to be had, it will be presumed that the place intended is the regular office of the county judge. No particular specification is required unless the hearing is to be had at some place other than that at which his judicial work is customarily done.<sup>81</sup>

**Question of Law or Fact.**—Whether three-fourths of the legal voters had petitioned or not, was a question of fact.<sup>82</sup>

5. **ELECTION**—a. *Necessity for Election.*—In most cases the question of issuing bonds is required to be submitted to the voters of the municipality.<sup>83</sup> But the vote of the electors is not essential to the validity of bonds issued, under legislative sanction, by the corporate authorities of the city.<sup>84</sup> Bonds issued by counties in Missouri during the years 1870 and 1871, after the adoption of the new constitution, in payment of subscriptions to the stock of railroad companies, without a vote of the people, are not invalid if the subscription was made under authority of charters granted in 1857, which did not require such a vote to be taken.<sup>85</sup>

b. *Election Prior to Act Authorizing Bond Issue.*—The fact that the election was had prior to the passing of the act authorizing the issue of bonds in a particular instance, does not invalidate the issue where such act gives the municipal board authority to accept any previous expression of willingness by the voters to the issue.<sup>86</sup>

c. *Constitutional Provision Prospective.*—The Mississippi constitution of 1869 providing for subscriptions, etc., and the issue of bonds, in pursuance of an election according to the tenor of the constitution is held to be prospective and not to abrogate previous acts of the legislature conferring authority to make such subscriptions, etc.<sup>87</sup>

error in his rulings upon any of these matters did not oust him of jurisdiction. *Andes v. Ely*, 158 U. S. 312, 319, 39 L. Ed. 996.

80. **Verification of petition.**—*Andes v. Ely*, 158 U. S. 312, 39 L. Ed. 996.

81. **Notice of hearing of petition.**—*Andes v. Ely*, 158 U. S. 312, 323, 39 L. Ed. 996.

82. **Question of law or fact.**—*Bissell v. Jeffersonville*, 24 How. 287, 298, 16 L. Ed. 664.

83. **Necessity for election.**—*Wilkes County v. Coler*, 190 U. S. 107, 47 L. Ed. 971; *Ritchie v. Franklin County*, 22 Wall. 67, 74, 22 L. Ed. 825; *Supervisors v. Galbraith*, 99 U. S. 214, 25 L. Ed. 410.

**Mississippi constitution of 1869, § 14—Act of Feb. 10, 1860.**—*Supervisors v. Galbraith*, 99 U. S. 214, 25 L. Ed. 410.

**North Carolina ordinance of March 8, 1868.**—*Wilkes County v. Coler*, 190 U. S. 107, 47 L. Ed. 971.

The acts of the general assembly of Missouri of 1865 and 1866 gave authority to the county courts to borrow money and issue bonds for road purposes where "the amount of proposed expenditure had been submitted to a vote of the people." It was held that the power conferred upon

the county courts could not be exercised unless the proposed expenditure was approved by the voters. *Ritchie v. Franklin County*, 22 Wall. 67, 74, 22 L. Ed. 825.

**The Missouri act of March 24th, 1868,** and the general railroad law of the state are both controlled as to their construction by the state constitution, which prevents the issue of any bonds by a town of the state without the previous assent of two-thirds of its voters expressed at an election, general or special, called for that purpose. *Hill v. Memphis*, 134 U. S. 198, 206, 33 L. Ed. 887.

84. *Quiney v. Cooke*, 107 U. S. 549, 556, 27 L. Ed. 549.

85. **Bonds issued under charter not requiring vote.**—*County of Ralls v. Douglass*, 105 U. S. 728, 729, 26 L. Ed. 957; *Dallas County v. McKenzie*, 110 U. S. 686, 687, 28 L. Ed. 285.

86. **Election prior to act authorizing bond issue.**—*County of Leavenworth v. Barnes*, 94 U. S. 70, 24 L. Ed. 63.

87. **Constitutional provision prospective.**—*Supervisors v. Galbraith*, 99 U. S. 214, 220, 25 L. Ed. 410, citing *Henry County v. Nicolay*, 95 U. S. 619, 24 L. Ed. 394; *County of Callaway v. Foster*, 93 U. S. 567, 23 L. Ed. 911; *County of Scotland v.*

**So also the Illinois constitution of 1870.**<sup>88</sup>

d. *Second Submission*.—Where an act requires a submission of the question to the voters, and contains no prohibition against more than one submission, a second submission of the question is not unlawful.<sup>89</sup>

e. *Notice*.—The election must be held pursuant to such notice as is required by the law providing for and allowing the bond issue.<sup>90</sup>

f. *Order of Election*.—Municipal bonds are not void because the order for the election in which the majority of the qualified voters of the county voted to subscribe for the stock of the railroad company and purchase the shares, was made by the county court, and not by the supervisors of the county.<sup>91</sup>

g. *Validation of Issue by Legislature*.—See the title CONSTITUTIONAL LAW, vol. 4, p. 459.

h. *Sufficiency and Regularity*—(1) *In General*.—Where the question of issuing bonds is required to be submitted to the voters of the municipality, the submission must be conducted as prescribed by law and the assent of the required number of voters are necessary to the validity of the bonds.<sup>92</sup>

Thomas, 94 U. S. 682, 24 L. Ed. 219; County of Macon v. Shores, 97 U. S. 272, 24 L. Ed. 889.

**88. Illinois constitution of 1870.**—The second section of article 14 of the Illinois constitution, prohibiting municipal corporations of that state to subscribe to the stock of a railroad, etc., which went into operation on the 2nd day of July, 1870, did not invalidate township bonds issued in aid of railroad corporations, pursuant to an election held on that day, at an hour prior to the closing of the polls of the general election at which the people of the state voted on the adoption of the constitution, the bonds, so issued, to be applied in discharge of a donation, previously voted, to be paid by special tax. Louisville v. Savings Bank, 104 U. S. 469, 26 L. Ed. 775. See, to the same effect, Concord v. Robinson, 120 U. S. 165, 169, 30 L. Ed. 885; Citizens' Sav., etc., Ass'n v. Perry County, 156 U. S. 692, 698, 39 L. Ed. 585.

**89. Second submission.**—Supervisors v. Galbraith, 99 U. S. 214, 25 L. Ed. 410.

**90. Notice.**—The bonds issued by the township of Oxford, Kansas, bearing date April 15, 1872, and reciting that they are issued under an act of the legislature of Kansas, approved March 1, 1872, authorizing the township to subscribe for stock in the Oxford Bridge Company, and, in pursuance of a vote of the qualified electors of said township, at an election held therein, April 8, 1872, are void, because, as that act by its terms took effect only from its publication in the "Kansas Weekly Commonwealth," and it was not published until March 21, the election was not held pursuant to a notice of thirty days, as required by the act. McClure v. Oxford Tp., 94 U. S. 429, 24 L. Ed. 129. See post, "Matters Apparent on Face of Bonds," IV, Q. 2, a. (3), (c), dd.

**91. Order of election.**—Supervisors v. Schenck, 5 Wall. 772, 778, 18 L. Ed. 556.

**92. Wilkes County v. Coler,** 190 U. S. 107, 47 L. Ed. 971. See Concord v. Robinson, 121 U. S. 165, 170, 30 L. Ed. 885.

The submission to the voters of a county, under the Code of Iowa, of the question "whether the county judge at the time of levying the annual taxes shall levy a special tax of a specified number of mills on a dollar of valuation, for the purpose of constructing a courthouse in the county; the tax to be levied from year to year until a sufficient amount is raised for said purpose, not to exceed," etc., is (by implication) a submission of the question whether money shall be borrowed to build the courthouse, and negotiable bonds be sold as the means of borrowing; this, though the same section of the code enacts that the county judge may submit to the voters the question "whether money may be borrowed to aid in the erection of public buildings;" and though the question submitted to the voters as above mentioned be submitted only in virtue of an enactment immediately following, that "when the question so submitted involves the expenditure of money, the proposition of the question must be accompanied by a provision to levy a tax for the payment thereof in addition to the usual taxes." This, at least as respects the holders, bona fide and for value, of bonds so issued, when the bonds declare on their face that "all of said bonds are issued in accordance with a vote of the people of said county." Lynde v. The County, 16 Wall. 6, 21 L. Ed. 272. See Claiborne County v. Brooks, 111 U. S. 400, 409, 28 L. Ed. 470.

A statute for the purpose of authorizing a bond issue which requires the "approval of the inhabitants of the town," and further provided that the election should be called "in the same manner that other elections for said city \* \* \* are called, for the purpose," etc., was construed to mean approved by a majority of the legal voters because calls for "other elections" are made to legal voters, and only such are allowed to vote. Walnut v. Wade, 103 U. S. 683, 694, 26 L. Ed. 526; Ohio v. Frank, 103 U. S. 697, 26 L. Ed. 531.

Where an election to authorize the is-



(2) *Presumed Assent of Absent Voters.*—The rule seems to be well settled that all qualified voters, who absent themselves from an election duly called, are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares. Any other rule would be productive of the greatest inconvenience, and ought not to be adopted, unless the legislative will to that effect is clearly expressed.<sup>93</sup> A law requiring the assent of two-thirds of the qualified voters of a municipality, at an election lawfully held for that purpose, to a proposed issue of municipal bonds, means the vote of two-thirds of the qualified voters present and voting at such election in its favor, as determined by the official returns of the result.<sup>94</sup>

(3) *Irregularities and Informalities.*—Irregularities or informalities, not involving the question of jurisdiction nor affecting the result of the vote, do not impair the validity of the bonds issued pursuant to the election.<sup>95</sup>

(4) *Transposition of Words in Petition or Notice.*—In the petition for and notice of the election, the transposition of two of the words of which the name of the corporation to which the aid was to be voted in part composed, cannot render the election invalid and void.<sup>96</sup>

(5) *Misrepresentation by Interested Parties.*—Bonds issued under the authority of a popular election cannot be set aside simply because all that may have been said by interested parties, in public speeches during the canvass which preceded the election, does not turn out to be in every respect true.<sup>97</sup>

**G. Execution of Bonds.**—1. IN GENERAL.—There can be no doubt that it is within the power of a state to prescribe the form in which municipal bonds shall be executed in order to bind the public for their payment. If not so executed they create no legal liability. Other circumstances may exist which will give the holder of them an equitable right to recover from the municipality the money which they represent, but he cannot enforce the payment, or put them on the market as commercial paper.<sup>98</sup> In the execution of

suance of bonds by an Illinois town was held in the manner of an election of town officers, it was held, that this was an election under the act of 1869, which provided that "the election shall be held and conducted and return thereof made as is provided by law," and not "as is provided by law for general election." *Oregon v. Jennings*, 119 U. S. 74, 95, 30 L. Ed. 323.

93. *Presumed assent of absent voters.*—*Carroll County v. Smith*, 111 U. S. 556, 562, 28 L. Ed. 517; *St. Joseph Tp. v. Rogers*, 16 Wall. 644, 21 L. Ed. 328; *County of Cass v. Johnston*, 95 U. S. 360, 24 L. Ed. 416; *Cass County v. Jordan*, 95 U. S. 373, 24 L. Ed. 419.

94. *County of Cass v. Johnston*, 95 U. S. 360, 24 L. Ed. 416, overruling *Harshman v. Bates County*, 92 U. S. 569, 23 L. Ed. 747. See *Cass County v. Jordan*, 95 U. S. 373, 375, 24 L. Ed. 419; *Carroll County v. Smith*, 111 U. S. 556, 28 L. Ed. 517.

Where two-thirds of those voting assent to a municipal subscription to railroad stock, this is sufficient to authorize the subscription where the statute provides that two-thirds of the qualified voters shall assent. *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 37 L. Ed. 93.

In *St. Joseph Tp. v. Rogers*, 16 Wall. 644, 21 L. Ed. 328, the federal supreme court gave the same construction to the phrase, "a majority of the legal voters of a township," as used in an Illinois municipal aid statute; and Mr. Justice Clif-

ford, in delivering the opinion, uses this language: "It is insisted by the plaintiff that the legislature, in adopting the phrase, 'a majority of the legal voters of the township,' intended to require only a majority of the legal voters of the township voting at an election notified and held to ascertain whether the proposition to subscribe for the stock of the company should be accepted or rejected; and the court is of the opinion that such is the true meaning of the enactment, as the question would necessarily be ascertained by a count of the ballot." *County of Cass v. Johnston*, 95 U. S. 360, 368, 24 L. Ed. 416.

95. *Irregularities and informalities.*—*Commissioners v. Thayer*, 94 U. S. 631, 24 L. Ed. 133.

A defect which does not go to the question of jurisdiction and does not affect the results of the election, does not impair the validity of the bonds. *Commissioners v. Thayer*, 94 U. S. 631, 640, 24 L. Ed. 133.

96. *Transposition of words in petition or notice.*—*Moultrie County v. Fairfield*, 105 U. S. 370, 377, 26 L. Ed. 945.

97. *Misrepresentation by interested parties.*—*County of Greene v. Daniel*, 102 U. S. 187, 196, 26 L. Ed. 99.

98. *Execution of bond.*—*Anthony v. Jasper County*, 101 U. S. 693, 696, 25 L. Ed. 1005; *Young v. Clarendon Tp.*, 132 U. S. 340, 348, 33 L. Ed. 356; *Coler v. Claeburne*, 131 U. S. 162, 33 L. Ed. 146; *Bissell*

municipal bonds all questions must be referred to the statute which authorized their issue, tested by it, and decided in strict conformity with its terms. It is an enabling act, conferring a power not before existent, and any departure from its requirements cannot be allowed.<sup>99</sup> Each and every one of the integral parts of the execution is essential to the validity of the bond.<sup>1</sup>

2. PARTIES TO AND BY WHOM ISSUED—a. *Obligor*.—A bond implies an obligor to do what it is agreed shall be done.<sup>2</sup> Precincts are but political subdivisions of a county and have no corporate existence. They cannot contract or be contracted with nor can they sue or be sued.<sup>3</sup> Hence, the precinct cannot become the obligor of precinct bonds, and it would seem to follow that the county which does have a corporate existence, and can contract and be contracted with, and upon whose officers is imposed the duty not only of issuing the bonds, but of providing for the payment of them, is the political entity bound by the obligation and charged with the debt created thereby.<sup>4</sup> Special bonds which the county commissioners issue for the precincts are, in legal effect, the special bonds of the county payable out of a special fund to be raised in a special way.<sup>5</sup> The only difference between the two kinds of debt is, that in the one all taxable property of the county is charged with payment and in the other only a part.<sup>6</sup> Although in such bonds and coupons the precinct is the promisor, a suit to recover on such coupons is properly brought against the county.<sup>7</sup>

*v. Spring Valley Tp.*, 110 U. S. 162, 169, 28 L. Ed. 105.

"When special authority is given to the people of a county to do these acts, and bind themselves by the issue of such bonds, the legislature may properly direct the mode in which it shall be effected. The persons specially appointed to act as agents for the people have a ministerial duty to perform in issuing the bonds, after the people, at an election held for the purpose, have assented that they shall be bound." *Young v. Clarendon Tp.*, 132 U. S. 340, 347, 33 L. Ed. 356, quoting from *Sheboygan Co. v. Parker*, 3 Wall. 93, 96, 18 L. Ed. 33.

Bonds issued in conformity to an act of the legislature, by which act the bonds issued in pursuance of it are made "full and complete evidence, both in law and equity, to establish the indebtedness of the county according to their tenor and effect," are valid and the county cannot repudiate them; but if they are not so executed they are void. Such an act is within the power of the legislature and constitutional. *Sheboygan Co. v. Parker*, 3 Wall. 93, 96, 18 L. Ed. 33.

**Construction of word "executed."**—See *Young v. Clarendon Tp.*, 132 U. S. 340, 348, 33 L. Ed. 356.

99. *Young v. Clarendon Tp.*, 132 U. S. 340, 347, 33 L. Ed. 356; *Harshman v. Bates County*, 92 U. S. 569, 23 L. Ed. 747.

1. *McGarranhan v. Mining Co.*, 96 U. S. 316, 24 L. Ed. 630; *Young v. Clarendon Tp.*, 132 U. S. 340, 353, 33 L. Ed. 356; *Anthony v. Jasper County*, 101 U. S. 693, 25 L. Ed. 1005; *Coler v. Claeburne*, 131 U. S. 162, 33 L. Ed. 146.

2. **Parties and by whom issued.**—*Davenport v. County of Dodge*, 105 U. S. 237, 241, 26 L. Ed. 1018.

3. *Davenport v. County of Dodge*, 105

U. S. 237, 241, 26 L. Ed. 1018; *County of Cass v. Johnston*, 95 U. S. 360, 24 L. Ed. 416.

4. *Davenport v. County of Dodge*, 105 U. S. 237, 241, 26 L. Ed. 1018.

Although the form of expression in the Nebraska statute is somewhat different from that in Missouri, which was considered in *County of Cass v. Johnston*, 95 U. S. 360, 24 L. Ed. 416, the legal effect of it is the same. In Missouri it was provided that the bonds should be in the name of the county; but in Nebraska there can be no bond except it be of the county, and as a bond is to be made, it necessarily follows that the county must make it. In express terms it is stated that precinct bonds shall be the same as other bonds, that is to say, county bonds, but must contain a statement of their special nature, which confines the area of taxable property to a part rather than the whole of the county. *Davenport v. County of Dodge*, 105 U. S. 237, 241, 26 L. Ed. 1018.

Where bonds purport, on their face, to be issued by the board of county commissioners, on behalf of the precinct, and are signed by the chairman of the board, and attested by its clerk, who is also the clerk of the county, and are sealed with the seal of the county, and the coupons are signed by such clerk, and the bonds refer to the coupons as annexed, the bonds and coupons are issued by the county commissioners. *Blair v. Cumming County*, 111 U. S. 363, 28 L. Ed. 457.

5. *Davenport v. County of Dodge*, 105 U. S. 237, 241, 26 L. Ed. 1018; *County of Cass v. Johnston*, 95 U. S. 360, 24 L. Ed. 416.

6. *Davenport v. County of Dodge*, 105 U. S. 237, 241, 26 L. Ed. 1018.

7. *Davenport v. County of Dodge*, 105 U. S. 237, 241, 26 L. Ed. 1018; *Blair v.*



b. *Obligee*.—Bonds which should have been made payable to the railroad company and "their successors and assigns," and not to the company "or bearer," although not in accord with the prescribed formula, are valid, where the statutory requirement in this particular is only directory.<sup>8</sup> The defect is one of form and not of substance, and as it was committed by the servants of the county, the county is estopped to take advantage of it.<sup>9</sup>

c. *By Whom Issued*.—(1) *In General*.—The properly constituted authorities of a municipal corporation may bind the corporation by an issue of bonds whenever they have power to act in the premises.<sup>10</sup> Where the bonds of a town issued in payment of a subscription for stock in a railroad company were signed by the town officers designated for that purpose by the charter of the company which authorized the issue of the bonds, after the requisite popular vote and the subscription, it is not necessary that the board of auditors or the other corporate authorities should participate in their issue and delivery.<sup>11</sup>

**Officers in Exercise of General Powers.**—The commissioners or board of supervisors of a county, in the exercise of their general powers as such, have no authority to bind the people of the county to pay bonds issued for that purpose without special authority conferred upon them by the legislature.<sup>12</sup>

(2) *Special Appointee*.—The person specially appointed to act as agents for the people in issuing bonds, is in no proper sense a "county officer,"<sup>13</sup> and any other persons appointed by the legislature and the people of the county, would be as competent to execute the bonds of the corporation as the supervisors.<sup>14</sup>

(3) *Action of De Facto Mayor*.—See post, "Signing," IV, G, 4, a.

(4) *Delivery and Endorsement by Treasurer*.—See ante, "Delivery," II, B, 2; "Endorsement," II, D, 2.

3. PLACE OF EXECUTION AND DATE—*a. Place of Execution*.—Under the Code

Cuming County, 111 U. S. 363, 28 L. Ed. 457; County of Cass v. Johnston, 95 U. S. 360, 24 L. Ed. 416.

8. *Obligee*.—Supervisors v. Galbraith, 99 U. S. 214, 217, 25 L. Ed. 410, citing Indianapolis, etc., R. Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898; Rock Creek Tp. v. Strong, 96 U. S. 271, 24 L. Ed. 815.

9. *Moran v. Commissioners*, 2 Black 722, 17 L. Ed. 342; *Supervisors v. Galbraith*, 99 U. S. 214, 217, 25 L. Ed. 410.

10. *By whom issued*.—Cincinnati City v. Morgan, 3 Wall. 275, 18 L. Ed. 146.

The township committee are altogether the most appropriate officers of the township for the performance of such a duty as the issuing of township bonds, whenever such bonds are authorized to be issued, where the township has no permanent presiding officer, or head, but only a temporary chairman, called a moderator, who simply presides over the town meeting by which he is appointed. *Middleton v. Mullica Tp.*, 112 U. S. 433, 437, 28 L. Ed. 785.

By the terms of the statute of New Jersey of 1868, the commissioners, though not elected by the township, but otherwise appointed as provided by the statute, act in issuing the bonds, as the agents of the township. *Bernards Tp. v. Stebbins*, 109 U. S. 341, 349, 27 L. Ed. 956.

In New York under a similar statute, the effect is the same. *Draper v. Springport*, 104 U. S. 501, 26 L. Ed. 812. See *Bernards Tp. v. Stebbins*, 109 U. S. 341, 349, 27 L. Ed. 956.

Under the Illinois law authorizing townships to vote on bond issues for subscriptions to stocks in public corporations, the supervisor and clerk are the proper parties to issue the bonds and subscribe to the stock. *Walnut v. Wade*, 103 U. S. 683, 684, 26 L. Ed. 526; *Ohio v. Frank*, 103 U. S. 697, 26 L. Ed. 531.

The bonds of a county of Illinois, organized under the act of April 1st, 1851 (Laws of 1851, p. 35), are properly issued by the county commissioners. *County of Kankakee v. Aetna Life Ins. Co.*, 106 U. S. 668, 671, 27 L. Ed. 309.

Under the law of the state of Missouri authorizing counties "to fund any and all debts they may owe," the presiding justice of the county court and the clerk of Cass County, Missouri, were by the terms of the order of October 20, 1871, of the said county court authorized to execute bonds which bind the county for their payment. *County of Cass v. Shores*, 95 U. S. 375, 24 L. Ed. 419.

**Issuance by clerk under authority and direction of principal.**—*County of Warren v. Marcy*, 97 U. S. 96, 104, 24 L. Ed. 977.

11. *Brooklyn v. Insurance Co.*, 99 U. S. 362, 25 L. Ed. 416.

12. **Officers in exercise of general powers.**—*Sheboygan Co. v. Parker*, 3 Wall. 93, 96, 18 L. Ed. 33. See ante, "Negotiable Securities," I, B.

13. **Special appointee.**—*Sheboygan Co. v. Parker*, 3 Wall. 93, 96, 18 L. Ed. 33.

14. *Sheboygan Co. v. Parker*, 3 Wall. 93, 96, 18 L. Ed. 33.



of Iowa, which enacts that in case of the "absence" of the county judge the county clerk shall supply his place, the said judge is not, when, owing to his absence from the state, the county clerk is acting as county judge, so wholly superseded in his office as that he may not, when beyond the limits of the county, do certain ministerial acts, as ex. gr., execute and issue bonds, whose purpose is to advance the concerns of the county; and for that purpose buy, at the place where he is, a new county seal; the Code having authorized the county judge to procure one.<sup>15</sup> At most the execution in the case in question was only an irregular execution of a power of the existence of which there is no doubt. Admitting an irregularity to have occurred, it certainly cannot affect the rights of a holder for value without notice.<sup>16</sup>

b. *Date*.—See post, "Signing and Countersigning," IV, G, 4.

**Antedating.**—Where a statute requires that bonds shall be issued within sixty days after the election, bonds issued after the expiration of sixty days but dated before that time are valid.<sup>17</sup>

4. **SIGNING AND COUNTERSIGNING**—a. *Signing*—(1) *In General*.—Where a statute makes the signature of a particular officer essential, bonds issued without that signature are not the bonds of the town, and the municipality is not estopped to deny them.<sup>18</sup> A statute which provides that the bonds of a municipality shall be signed by a certain officer, clearly means that they shall be signed by the person who fills that office when they are signed, and not by any other person. The legislature having declared who shall sign them, it was not open to the city council to provide that they should be signed by some other person.<sup>19</sup> A municipality is estopped from proving that bonds were actually signed by a former clerk after he went out of office, when the clerk in office adopted the signature as his own when he united in delivering the bonds to the obligee.<sup>20</sup> But the rule is otherwise where it appears that the bonds were not completed in form when they were issued, and that it was only by a false date that they were apparently so.<sup>21</sup>

15. **Place of execution.**—*Lynde v. The County*, 16 Wall. 6, 21 L. Ed. 272.

All the judge did was purely ministerial in its character, and there is no sufficient reason for holding that to this extent he did not take with him his official character and exercise his official authority. He did not for the time being wholly abdicate his office. Certain powers with which it was clothed fell into abeyance, and continued in that state until his absence ceased. *Lynde v. The County*, 16 Wall. 6, 14, 21 L. Ed. 272.

It was competent for the county judge to visit New York for purposes connected with the proper disposal of the bonds. A statute of the state authorized him to procure a seal, and prescribed certain regulations to which all such seals should conform. While there, he might well take up bonds which had been previously issued but not put on the market, and give others in their place, affixing to them a seal there procured for that purpose. No principle of general jurisprudence was violated by such a proceeding, and certainly the county sustained no injury by the change, and it has therefore no right to complain. *Lynde v. The County*, 16 Wall. 6, 13, 21 L. Ed. 272.

16. *Lynde v. The County*, 16 Wall. 6, 13, 21 L. Ed. 272.

17. *Chickaming v. Carpenter*, 106 U. S. 663, 666, 27 L. Ed. 307. See post, "Con-

clusiveness of Official Determination and Certificate," IV, S.

18. **Signing and countersigning.**—*Bissell v. Spring Valley Tp.*, 110 U. S. 162, 28 L. Ed. 105; *Northern Bank v. Porter Tp.*, 110 U. S. 608, 618, 28 L. Ed. 258; *Merchant Bank v. Bergen County*, 115 U. S. 384, 390, 29 L. Ed. 430; *Coler v. Claeburne*, 131 U. S. 162, 174, 33 L. Ed. 146; *Young v. Clarendon Tp.*, 132 U. S. 340, 342, 348, 33 L. Ed. 356; *Anthony v. Jasper County*, 101 U. S. 693, 25 L. Ed. 1005.

19. *Coler v. Claeburne*, 131 U. S. 162, 171, 33 L. Ed. 146; *Anthony v. Jasper County*, 101 U. S. 693, 25 L. Ed. 1005. See *Young v. Clarendon Tp.*, 132 U. S. 340, 348, 33 L. Ed. 356.

20. *Weyauwega v. Ayling*, 99 U. S. 112, 25 L. Ed. 470; *Anthony v. Jasper County*, 101 U. S. 693, 25 L. Ed. 1005; *Coler v. Claeburne*, 131 U. S. 162, 175, 33 L. Ed. 146.

21. *Anthony v. Jasper County*, 101 U. S. 693, 25 L. Ed. 1005; *Coler v. Claeburne*, 131 U. S. 162, 33 L. Ed. 146.

In *Anthony v. Jasper County*, 101 U. S. 693, 25 L. Ed. 1005, municipal bonds were signed and issued in October, 1872, on a subscription made in March, 1872, to the stock of a railroad company, and bore date the day of the subscription. The presiding justice who signed the bonds did not become such until October, 1872. Thus the person who was in office when

The action of a *de facto* mayor in signing the bond of a municipality are as binding upon the municipality as the acts of a *de jure* officer.<sup>22</sup>

(2) *Signing by a Majority of Commissioners.*—Where the act authorizing a bond issue declares that two of the commissioners shall form a board for the transaction of business, and makes the bonds valid if made by a majority of the commissioners of the county, bonds signed by two of the three commissioners are valid and binding obligations of the county.<sup>23</sup>

b. *Countersigning.*—Municipal bonds may be required to be countersigned by a municipal board,<sup>24</sup> or by the state auditor in some cases,<sup>25</sup> before they become complete evidences of debt against the municipality.

5. *SEALING.*—The mere fact that the commissioners only signed, without sealing bonds, does not exempt the town from liability to a purchaser thereof in good faith and for valuable consideration. Where it is apparent from the law that the substantial thing authorized to be done on behalf of the town was to pledge the credit of the town in aid of the railroad company in the construction of its road, by subscribing to its capital stock, and issuing the obligations of the town in payment thereof, and that the technical form of the obligations was a matter of form rather than of substance; the issue of bonds under seal, as contradistinguished from bond or obligations without a seal being merely a directory requirement.<sup>26</sup> The fact that the principal securities delivered to that company were not sealed is immaterial, where the act under which they were issued expressly authorized those charged with the duty of making the subscription to "issue bonds bearing interest, or otherwise pledge the faith of the city."<sup>27</sup>

the bonds were actually signed, signed them, but they were antedated to a day when he was not in office. In *Coler v. Claeburne*, 131 U. S. 162, 33 L. Ed. 146, the bonds were not signed by an officer who was in office when they were signed, but by a person who was in office on the antedated day on which they bore date. In the former case there was a false date inserted in the bonds in order to avoid the effect of a registration act which took effect between the antedated date and the actual date of signing. In the latter case, there was a false signature. But the principle declared in both cases is equally applicable. See, also, *Young v. Clarendon Tp.*, 132 U. S. 340, 348, 33 L. Ed. 356.

22. *Waite v. Santa Cruz*, 184 U. S. 302, 46 L. Ed. 552, distinguishing *Coler v. Claeburne*, 131 U. S. 162, 33 L. Ed. 146.

The acts of a *de facto* mayor and common council in relation to the issue of bonds, are to be treated, so far as concerns the public and third persons having an interest in what was done by them, as the acts of the *de jure* mayor and common council of the city. *Waite v. Santa Cruz*, 184 U. S. 302, 322, 46 L. Ed. 552.

23. *Signing by a majority of commissioners.*—*Curtis v. Butler County*, 24 How. 435, 16 L. Ed. 745.

24. *Countersigning.*—Board of Liquidation *v. Louisiana*, 179 U. S. 622, 639, 45 L. Ed. 347.

25. *Anthony v. Jasper County*, 101 U. S. 693, 696, 25 L. Ed. 1005.

For this purpose after being executed by the corporate authorities, it must be presented to that officer, and he must inquire and determine whether all the require-

ments of the law authorizing its issue have been observed, and whether all the conditions of the contract in consideration of which it was to be put out have been complied with. To enable him to do this, evidence must be submitted which he is required to file and preserve. If he is satisfied, the registry is made, and the requisite certificate indorsed on the bonds. This being done the execution of the bond is complete, and, under the law, it may then be negotiated, that is to say, put on the market as valid commercial paper. *Anthony v. Jasper County*, 101 U. S. 693, 696, 25 L. Ed. 1005.

26. *Sealing.*—*Draper v. Springport*, 104 U. S. 501, 26 L. Ed. 812. See *Bernards Tp. v. Stebbins*, 109 U. S. 341, 350, 27 L. Ed. 956. See post, "Reformation—Omission of Seal," VI, B, 1, b, (4).

"The town, indeed, had no seal; and the individual seals of the commissioners would have had no legal efficacy; for the bonds were not their obligations, but the obligations of the town, and their seals could have added nothing to the solemnity of the instruments." *Bernards Tp. v. Stebbins*, 109 U. S. 341, 350, 27 L. Ed. 956; *Draper v. Springport*, 104 U. S. 501, 503, 26 L. Ed. 812.

Where a town in New York subscribed for stock in a railroad company, and the commissioners, authorized to execute bonds in payment therefor, issued unsealed obligations, whereon a bona fide holder for value brought suit, held, that the absence of a seal on the paper does not affect his right to recover. *Draper v. Springport*, 104 U. S. 501, 26 L. Ed. 812.

27. *San Antonio v. Mehaffy*, 96 U. S. 312, 24 L. Ed. 816.



6. DELIVERY.—The act of delivery is essential to the validity of a municipal bond. Although drawn and signed, so long as it is undelivered, it is a nullity, not only does it take effect only by delivery, but also only on delivery.<sup>28</sup>

The eleventh section of the Kansas act of March 2, 1872, in so far as it requires a delivery of bonds to the state treasurer, has no application except in cases where, to the subscription of stock, or to the donation, are annexed conditions to be complied with before that officer may rightfully surrender the bonds intrusted to him.<sup>29</sup> The object of that section is to prescribe a mode in which the people of a county may, if they pursue the statute, be protected, in some degree, against a premature delivery of county bonds by local officers in advance of the performance of conditions imposed by the popular vote.<sup>30</sup>

Michigan Act of March 22, 1869.—The delivery which the municipal officers were directed to make by the act of March 22, 1869, of Michigan, of aid bonds to the treasurer in his capacity of statutory trustee, was only such as amounted to a "giving up" or the "committing" of them to the treasurer for his safe-keeping. The word was used in its ordinary and popular sense, not in the technical one.<sup>31</sup> The governor was given the power to determine whether the bonds should ever in fact issue, and, if issued, when they should issue,<sup>32</sup> and the treasurer could deliver the bonds only on presentation of the certificate from the governor.<sup>33</sup> Under the above act an endorsement by the treasurer upon each bond of the date of delivery and to whom delivery was made, was necessary to

28. *Young v. Clarendon Tp.*, 132 U. S. 340, 33 L. Ed. 356.

29. *Delivery*.—*Lewis v. Commissioners*, 105 U. S. 739, 747, 26 L. Ed. 993.

"The last proviso of the eleventh section expressly declares that that section—the only one which refers to the custody of the bonds by the state treasurer—'shall not apply when the people have named some party as trustee in their vote upon the proposition, and the contractor (that is, as we suppose, the railroad company proposing to do the work of construction) may thereafter agree to the same.' If the people on one side, and the company on the other, agree upon a trustee to hold the bonds until certain contingencies happen, or certain terms or conditions are performed, the statute explicitly declares the eleventh section shall not apply." *Lewis v. Commissioners*, 105 U. S. 739, 746, 26 L. Ed. 993.

30. *Lewis v. Commissioners*, 105 U. S. 739, 747, 26 L. Ed. 993.

31. Michigan act of March 22, 1869.—*Young v. Clarendon Tp.*, 132 U. S. 340, 351, 33 L. Ed. 356.

"The bonds were to be 'executed,' that is to say, written or printed, signed and sealed by the supervisor and clerk of the township. Here the powers of those persons ceased. They could not perfect the instruments by delivery. The word 'executed,' used in the statute in connection with the acts mentioned, manifestly does not import the final delivery; for that is expressly directed to be done by the treasurer. Such delivery as they could make was clearly not the technical delivery needed to complete the bonds as negotiable instruments, because the power to hand over to the payee was not conceded to them in any event." *Young v. Clarendon Tp.*, 132 U. S. 340, 351, 33 L. Ed. 356.

32. *Young v. Clarendon Tp.*, 132 U. S. 340, 341, 33 L. Ed. 356.

To the governor was committed the decision of the important question whether the railroad had performed its part of the common undertaking and his certificate was to be the evidence of that fact, and the only admissible authentication of it to the trustee, the depository. *Young v. Clarendon Tp.*, 132 U. S. 340, 351, 33 L. Ed. 356. In this case the court said: "So far as the investigation and determination of that question were concerned and the certifying of it, the governor was to discharge that function in the process of issuing the bonds which was imposed on the auditor in the case of *Anthony v. Jasper County*, 101 U. S. 693, 25 L. Ed. 1005, the difference being that in that case the certificate was to be endorsed on the bonds themselves, but not so in this case."

33. *Young v. Clarendon Tp.*, 132 U. S. 340, 341, 33 L. Ed. 356. Any delivery without such certificate would have been beyond the scope of his authority and the bonds would have been void in the hands of the company to which they were delivered.

So far as the question of the statutory power of the treasurer is concerned, the fact that the failure of the company to produce the certificate may not be because of any fault in the company cannot matter. A failure might be due to the governor's mistaken view of the law, or to his misconception of the facts, or even to his willful refusal to discharge his official duty—all is immaterial to this aspect of the statutory scheme. *Young v. Clarendon Tp.*, 132 U. S. 340, 341, 33 L. Ed. 356.

The railroad company contracted with the township through the statute, and could so contract with it in no other way. Availing itself of the statute, it must take



make it a complete bond,<sup>34</sup> and bonds that were never endorsed and delivered by the treasurer never became operative.<sup>35</sup> These requirements are not novel nor are they matters of administrative detail, which the court can declare merely directory or annul by construction of law.<sup>36</sup>

7. REGISTRATION AND CERTIFICATION—*a. Necessity for, Sufficiency of, and by Whom Made.*—**The Missouri act of March 30, 1872**, declares that before a municipal bond thereafter issued shall obtain validity or be negotiated, it shall be presented to the state auditor, who shall register it and certify by endorsement that all the conditions of the laws and of the contract under which it was ordered to be issued have been complied with, and unless the bonds are so endorsed, a holder of them cannot maintain an action thereon.<sup>37</sup> The act of the general assembly of Missouri, entitled "An act to provide for the registration of bonds issued by counties, cities, and incorporated towns, and to limit the issue thereof," approved March 30, 1872, applies to bonds issued under the act approved March 23, 1868, commonly known as "The Township Aid Act."<sup>38</sup> A municipal bond, on the back of which is endorsed the certificate of the auditor of the state that it has been duly registered in his office according to law, is not invalid because he failed to make in his office an entry of his action.<sup>39</sup>

**Kansas Acts of 1870 and March 2, 1872.**—The state treasurer may properly surrender bonds deposited with him under the Kansas act of March 2, 1872, for delivery only upon the performance of specified conditions, but such delivery does not render them binding upon the municipality, in whose name they are executed, as the holder is under a necessity, by the statute, to present them for registration to another officer, the auditor of the state, in whose office (if the county authorities obey the statute) is kept a record of the number, amount, and character of the bonds, to whom issued, and for what purpose. And that officer is not under a duty to admit the bonds to registration, as a matter of course but is to make inquiry as to their regularity and legality, and unless satisfied that they are issued according to the act, he is bound to deny application for registration.<sup>40</sup> To him, therefore, is committed, by the state, the important function of finally determining whether the law has been, in all respects, obeyed, and, consequently, whether the bonds have been regularly and legally issued. His determination, necessarily, involves an investigation as to every fact essential to their validity.<sup>41</sup>

**The requirement of the Kansas act of 1870** must be complied with to

it cum onere. If the governor failed to give the certificate when he should, and could not be reached by a mandamus, those were but features of the company's risk. *Young v. Clarendon Tp.*, 132 U. S. 340, 355, 33 L. Ed. 356.

34. *Young v. Clarendon Tp.*, 132 U. S. 340, 341, 33 L. Ed. 356, citing *Anthony v. Jasper County*, 101 U. S. 693, 25 L. Ed. 1005.

35. *Young v. Clarendon Tp.*, 132 U. S. 340, 341, 33 L. Ed. 356.

36. *Young v. Clarendon Tp.*, 132 U. S. 340, 352, 33 L. Ed. 356.

**A delivery of negotiable county bonds left in escrow.**—See the title ESCROW, vol. 5, p. 900.

37. **Necessity for, sufficiency of, and by whom made.**—*Anthony v. Jasper County*, 101 U. S. 693, 25 L. Ed. 1005. *Hoff v. Jasper County*, 110 U. S. 53, 54, 28 L. Ed. 68.

When the bonds now in question were put out, the law required that to be valid they must be certified to by the auditor of state. In other words, that officer was to certify them before their execution was

complete, so as to bind the public for their payment. *Anthony v. Jasper County*, 101 U. S. 693, 697, 25 L. Ed. 1005.

38. *Anthony v. Jasper County*, 101 U. S. 693, 25 L. Ed. 1005.

"The act in question is not confined to the bonds of counties, but embraces all issued by counties. As there can be no township bonds except they are issued by counties, it seems to us that they come within the descriptive words used in the fourth section, and we have been unable to find anything in the other parts of the act manifesting an intention to give these words any other than their usual and ordinary signification. The object of the new legislation undoubtedly was to guard against unauthorized issues of this class of public securities." *Anthony v. Jasper County*, 101 U. S. 693, 696, 25 L. Ed. 1005.

39. *Rock Creek Tp. v. Strong*, 96 U. S. 271, 24 L. Ed. 815.

40. **Kansas act of March 2, 1872.**—*Lewis v. Commissioners*, 105 U. S. 739, 749, 26 L. Ed. 993.

41. *Lewis v. Commissioners*, 105 U. S. 739, 749, 26 L. Ed. 993.

entitle municipal bonds to be considered registered bonds.<sup>42</sup>

b. *By Whom Forwarded for Registration.*—The officer designated to register bonds, can only receive them from the municipal officer upon whom is placed the duty of forwarding them for registration.<sup>43</sup>

c. *Statement Furnished Registration Officer.*—Where a statute makes it the duty of the mayor, who signs municipal bonds and not that of any other person, at the time of forwarding the bonds to the comptroller for registration, to furnish him with a certain statement, specified in the statute, no other person can furnish the statement.<sup>44</sup>

d. *Conclusiveness of Certificate.*—See post, "Conclusiveness of Official Determination and Certificate," IV, S.

**H. Form, Contents and Validity**—1. **IN GENERAL.**—All statutory requirements concerning the form of execution of municipal securities, are mandatory.<sup>45</sup>

2. **ERRORS AND IRREGULARITIES.**—An error in copying into a municipal bond a single word in the title of a statute does not vitiate the deliberate acts of the proper officers of a municipality as expressed in the promise to pay, which they have issued for money borrowed.<sup>46</sup>

**Misrecital of Name of Obligor.**—A mere misrecital of the name of the obligor in a bond executed by a municipal corporation will not vitiate the obligation.<sup>47</sup>

3. **RECITALS**—a. *Recital of Authority for Issuance.*—It is the right and duty of municipal boards countersigning and issuing bonds for the purpose of sale to state thereon the authority in virtue of which they are issued, and a judgment requiring such board to issue certain bonds because of the existence of a legal duty arising from a specified provision of a state constitution should not be construed to preclude such board when countersigning the bonds in question from affixing to them a statement that they were issued in virtue of the author-

42. Where a statute of Kansas of 1870 required that, in order to have certain benefits, the holder of township bonds should have them registered in the office of the state auditor, and upon such registration it should become the duty of the auditor, within ten days thereafter to notify the officers issuing the same of such registration, and that such fact should be entered by such officers in a book wherein the record of such bonds were kept, and that thereafter such bonds should be considered registered bonds; it was held that without showing compliance with these requisitions the bonds could not be considered registered bonds, nor entitled as such to the benefits of the act. *Bissell v. Spring Valley Tp.*, 110 U. S. 162, 171, 28 L. Ed. 105.

43. **By whom forwarded for registration.**—*Coler v. Claeburne*, 131 U. S. 162, 33 L. Ed. 146.

Under the Kansas act of March 2, 1882, bonds issued by counties for improvements need not in all cases be first delivered to the state treasurer and by him delivered to the state auditor for registration. *Lewis v. Commissioners*, 105 U. S. 739, 746, 26 L. Ed. 993.

44. **Statement furnished registration officer.**—*Coler v. Claeburne*, 131 U. S. 162, 171, 33 L. Ed. 146.

45. **Form, contents and validity.**—*Young v. Clarendon Tp.*, 132 U. S. 340, 349, 33 L. Ed. 356.

**Manner and terms of paying subscription for which bonds issued.**—See ante, "Power to Issue," I.

46. **Errors and irregularities.**—*Atchison Board of Education v. DeKay*, 148 U. S. 591, 596, 37 L. Ed. 573.

Bonds purporting to have been issued under authority of an act entitled "An act to organize cities," etc., approved February 28, 1868, are valid although no such act is to be found in the statutes of that year, but where there was an act giving authority to the board of education to borrow money and issue bonds, and whose title was exactly as described in the bonds, except in place of the word "organize" the word "incorporate" was used. Falsa demonstratio non nocet. *Atchison Board of Education v. DeKay*, 148 U. S. 591, 595, 37 L. Ed. 573. See *Commissioners v. January*, 94 U. S. 202, 24 L. Ed. 110.

47. **Misrecital of name of obligor.**—*Atchison Board of Education v. DeKay*, 148 U. S. 591, 37 L. Ed. 573.

The school district and the city were coterminous; and the board of education was authorized by act of the legislature to borrow on the credit of the school property, with the consent of the city council, and to issue bonds in payment therefor. They proceeded as appears from the recital in the bonds, under authority given by that act to issue bonds payable by the city instead of the school district. Proceeding strictly under that act, they bound



ity of the state constitution and as a result of the command of the supreme court of the state.<sup>48</sup>

b. *Recital of Election*.—A full and minute detail of all the proceedings is not essential to the validity of a recital of an election. The main thing is that the municipality has promised to pay, and that the people by their vote have authorized such a promise for one of the purposes for which, under the statute, they may bind themselves.<sup>49</sup>

c. *Recitals as to Purposes of Issue*.—The law authorizing municipal bonds may require them to specify the purpose for which they are issued.<sup>50</sup>

I. **Cancellation and Reissue**.—Some statutes provide that bonds delivered to an officer, shall, if not, within a certain time, demanded in compliance with the terms of the statute, be canceled by such officer.<sup>51</sup>

**Implied Power to Cancel**.—A power given to a county to issue bonds, carries with it, also, a right to cancel bonds previously given to a contractor with the county, but not yet put by him on the market, and to issue to him new ones in a different form.<sup>52</sup>

J. **Denomination**.—The court of county commissioners may cause the bonds to be executed in such denominations as may be agreed upon by it and the payee, provided the total amount for which they are issued does not exceed that set forth in the proposal accepted by the vote of the qualified electors of the county.<sup>53</sup> When two or more acts authorize the issuance of the bonds, but of different denominations, the acts not involving in and of themselves substantial contradiction, they may be issued of either denomination.<sup>54</sup>

the corporation whose officers they were and for which they assumed to act, and whether the name of that corporation was technically one name or another, by the issue of bonds they bound that corporation. *Atchison Board of Education v. DeKay*, 148 U. S. 591, 597, 37 L. Ed. 573.

48. **Recital of authority for issuance**.—*Board of Liquidation v. Louisiana*, 179 U. S. 622, 639, 45 L. Ed. 347.

It would be beyond reason to assume that a judgment which commanded the performance of a particular act, because of the existence of a legal duty arising from a specified provision of a state constitution, should be construed as excluding the right and duty to refer in issuing the bonds in obedience to its command to the authority by which alone the power exercised could be brought into play. *Board of Liquidation v. Louisiana*, 179 U. S. 622, 640, 45 L. Ed. 347.

49. **Recital of election**.—*Comanche County v. Lewis*, 133 U. S. 198, 206, 33 L. Ed. 604.

So held where the particular bridge for which the bonds were issued was not specified. *Comanche County v. Lewis*, 133 U. S. 198, 206, 33 L. Ed. 604.

50. **Recitals as to purposes of issue**.—*Barnett v. Denison*, 145 U. S. 135, 36 L. Ed. 652; *Comanche County v. Lewis*, 133 U. S. 198, 33 L. Ed. 604. See post, "Recitals as to Purpose of Issue," IV, V, 10.

When bonds are issued by a county under authority of an act empowering it to issue bonds for the purpose of building bridges, it is not necessary that the particular bridge to be built be specified by the recitals in the bond. *Comanche*

*County v. Lewis*, 133 U. S. 198, 206, 33 L. Ed. 604.

51. **Cancellation and reissue**.—*Young v. Clarendon Tp.*, 132 U. S. 340, 354, 33 L. Ed. 356.

52. **Implied power to cancel**.—*Lynde v. The County*, 16 Wall. 6, 21 L. Ed. 272.

53. **Denomination**.—*County of Greene v. Daniel*, 102 U. S. 187, 26 L. Ed. 99.

The bonds from which the coupons were cut were not void because they were not of the same denomination as those specified in the proposition of a railroad company for subscription, submitted to and voted on by the county. *County of Greene v. Daniel*, 102 U. S. 187, 192, 26 L. Ed. 99.

54. The findings of the court is that the bonds are of the denomination of \$1,000 each, as authorized under and by the law of 1849, and not by the denomination of \$500 each, as required by the charter of the railroad company. But there is nothing in the nature of things preventing the city from exercising all the powers conferred by two or more acts, where the acts do not involve in and of themselves substantial contradictions. It is not a vital matter whether the bonds should be of \$500 or \$1,000 each; and as the charter of the railroad company expressly authorized the issue of bonds payable in the city of New York, there is no reason why such stipulation could not be incorporated into a bond of the denomination of \$1,000, and the certificate of the mayor to the auditor is that the bonds were issued under the authority of both acts. *Cairo v. Zane*, 149 U. S. 122, 142, 37 L. Ed. 673; *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 37 L. Ed. 93.



**K. Operation and Effect.**—The obligation of local municipal corporations upon bonds issued by them in conformity to law are secured by all the guarantees which protect the engagements of private individuals.<sup>55</sup> A bond issued by a municipality, especially its negotiable bond, is a *prima facie* obligation of the municipality, if it has capacity to make it; and is binding according to the terms and conditions apparent on its face until the contrary be shown.<sup>56</sup>

**Law Governing.**—The law of the place of performance governs the construction and effect of negotiable municipal bonds.<sup>57</sup>

**L. Sale or Disposal.**—Where a county delivers bonds in discharge of precedent liability, it has no legal right to prescribe their future disposition or use; and the mere fact that the county authorities expected or intended that the bonds shall be applied to a particular disposition or use does not make such an application of them a condition precedent to the vesting of title.<sup>58</sup>

**Amending Contract as to Rate of Discount.**—A board of commissioners, authorized by statute to make contracts for the building of levees, and to borrow money, issue bonds and sell and negotiate them in any market, but not at a greater rate of discount than ten per cent, may make a contract for the work at certain prices, payable in such bonds; and may afterwards amend that contract by inserting "at the rate of ninety cents on the dollar," and issue bonds to the contractors accordingly, upon being satisfied that such was the agreement actually made between the parties; although the work is actually done by subcontractors for lower prices in cash.<sup>58a</sup>

**M. Pledge or Collateral Security.**—A statutory pledge by way of collateral security for the payment of bonds, does not import that the holders of the bonds are to be thereby precluded from looking to the municipality, or that they are obliged to have recourse, in the first instance, to the pledge. The municipality, by the terms of the bonds, is primarily liable; and where nothing in the language of the act in any respect affects this primary liability, the bondholder is not compelled to look to the security, but may proceed directly against the municipality without regard to it.<sup>59</sup>

**Municipality Not a Guarantor.**—Where a municipality issues bonds for a public improvement and pledges special assessments to pay the same, it is not a guarantor of the bonds but a statutory trustee for the collection of the same.<sup>60</sup>

**N. Payment, Redemption and Discharge**—1. **RIGHT TO PURCHASE OR REDEEM BONDS.**—Beyond doubt, a city may lawfully buy its own bonds. And

55. *Mobile v. Watson*, 116 U. S. 289, 305, 29 L. Ed. 620; *Broughton v. Pensacola*, 93 U. S. 266, 23 L. Ed. 896; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 25 L. Ed. 699.

When a municipal corporation having power, issue bonds to aid a railroad company, it is to that extent to be deemed a private corporation, and its obligations are secured by all the guarantees which protect the engagements of private individuals. *Mobile v. Watson*, 116 U. S. 289, 305, 29 L. Ed. 620.

56. *Lincoln v. Iron Co.*, 103 U. S. 412, 416, 26 L. Ed. 518.

57. *Supervisors v. Galbraith*, 99 U. S. 214, 218, 25 L. Ed. 410; *Brabston v. Gibson*, 9 How. 263, 13 L. Ed. 131; *Cook v. Moffat*, 5 How. 295, 12 L. Ed. 159.

58. *Morgan County v. Allen*, 103 U. S. 498, 26 L. Ed. 498.

So held where the authorities of the county delivered its bonds in discharge of a precedent liability upon its subscription to the stock of a railroad company, and expected that the bonds should be used only for the payment for work done in

that county and no such work was done by the company. *Morgan County v. Allen*, 103 U. S. 498, 26 L. Ed. 498.

58a. **Amending contract as to rate of discount.**—*Hemingway v. Stansell*, 106 U. S. 399, 27 L. Ed. 245.

59. **Statutory pledge by way of collateral security.**—*United States v. New Orleans*, 98 U. S. 381, 396, 25 L. Ed. 225; *Wolff v. New Orleans*, 103 U. S. 358, 360, 26 L. Ed. 395. See the title PLEDGE AND COLLATERAL SECURITY.

**Pledge of stock received upon subscription to railroad company.**—Bonds of the city of New Orleans, issued upon a subscription to the stock of a railroad company, under an ordinance which declared that the stock "should remain for ever pledged for the payment of the bonds," are an absolute obligation of the city, the ordinance creating only a pledge of the stock by way of collateral security for their payment, which did not release the city. *United States v. New Orleans*, 98 U. S. 381, 25 L. Ed. 225.

60. **Municipality not a guarantor.**—*New*

it can make no difference whether the purchase is made directly or indirectly from the first holder of the bonds, assuming that there was no fraud.<sup>61</sup>

2. **TIME OF PAYMENT OR REDEMPTION**—a. *In General.*—As commonly understood, the word “maturity,” in its application to bonds and other similar instruments, applies to the time fixed for their payment, which is the termination of the period they have to run.<sup>62</sup> Municipal bonds, dated Sept. 10, 1872, and payable thirty years from Oct. 15, 1872, with interest thereon at the rate of seven per cent per annum, payable semiannually on the fifteenth days of April and October of each year, registered by the auditor of the state Oct. 17, 1872, are held to have precisely the same legal effect they would have had had the date inserted been Oct. 15, instead of Sept. 10, 1872.<sup>63</sup>

b. *Where Time of Redemption Limited by Law.*—Where the law under which municipal bonds were issued limited the time when they were redeemable, the officers of the municipality have no power to depart from the terms of the ordinance by varying the time limited for redemption.<sup>64</sup>

**Compliance with Statutory Provision Essential.**—A provision in a state constitution, statute or ordinance that municipal bonds shall be redeemable after a certain date or shall not extend beyond a specified number of years from the date of issuance, is a limitation of the power to issue bonds, which must be complied with, and bonds having a longer term than that prescribed are invalid.<sup>65</sup> The provisions of an act authorizing municipalities to issue bonds, that the bonds

Orleans v. Warner, 175 U. S. 120, 44 L. Ed. 96.

61. **Right to purchase or redeem bonds.**—New Albany v. Burke, 11 Wall. 96, 104, 20 L. Ed. 155.

In New Albany v. Burke, 11 Wall. 96, 20 L. Ed. 155, a city subscribed to the stock of a railroad, and issued bonds for a part of the subscription, agreeing to issue them for the rest of it, when the road should be built to a certain point. The road relied mainly upon these bonds to raise the necessary money. The validity of the bonds being denied by taxpayers, who had filed bills to enjoin the raising of a tax to pay the interest, their value in the market was largely impaired, and it was found they could not be sold without sacrifice. Under these circumstances the company applied to the city to pay a certain sum which had been borrowed by the road upon the pledge of the bonds already issued, with sundry other moneys, and in consideration thereof the city obtained from the company a large number of bonds which had not been negotiated, and a cancellation of the subscription. In a suit brought by a judgment creditor to enforce the original subscription, it was held that the compromise was legal, and the payment of such subscription would not be enforced, although it subsequently turned out that the bonds were worth more than they could have been sold for. Said Mr. Justice Strong, speaking for the court: “Had the company sold to a stranger, and then the city become a purchaser from the stranger, it will not be contended that any creditor of the company could complain. And it can make no difference whether the purchase was made directly or indirectly from the first holder of the bonds, assuming that there was no fraud. The transaction \* \* \* was, in substance, plainly

nothing more than a purchase by the city of its own bonds, some of which had been issued and others of which it was under obligation to issue, at the call of the vendor. \* \* \* Looking at it in the light of subsequent events, it was no doubt an advantageous purchase for the city; and, if the uncontradicted evidence is to be believed, it was deemed at the time an advantageous sale or arrangement for the company. \* \* \* We may add, the evidence is convincing that the contract between the city and the company was made in the utmost good faith, with no intention to wrong creditors of the latter; that it was at the time considered advantageous to the company, and it is not proved that all was not paid for the bonds issued and to be issued that they could have been sold for in the market.” Handley v. Stutz, 139 U. S. 417, 431, 35 L. Ed. 227.

62. **Time of payment or redemption.**—United States v. Union Pac. R. Co., 91 U. S. 72, 23 L. Ed. 224.

63. Rock Creek Tp. v. Strong, 96 U. S. 271, 24 L. Ed. 815.

64. **Where time of redemption limited by ordinance.**—Brenham v. German American Bank, 144 U. S. 173, 188, 36 L. Ed. 390.

So held where an ordinance of June 7, 1879, provided that the city should have the right to redeem the bonds “at any time after five years from date,” while each bond on its face stated that it is redeemable by the city “after the expiration of ten years from date hereof.” Brenham v. German American Bank, 144 U. S. 173, 188, 36 L. Ed. 390.

65. **Compliance with statutory provision essential.**—Brenham v. German American Bank, 144 U. S. 173, 188, 36 L. Ed. 390.

Bonds issued under the Mississippi act of March 25, 1871, having more than ten



shall be payable in not less than five nor more than thirty years from the date thereof, with interest not to exceed ten per cent per annum, all in the discretion of the officers issuing the same, are directory, and not of the essence of the power to issue.<sup>66</sup>

3. **PLACE OF PAYMENT.**—The question whether a municipal corporation, authorized to issue bonds, may or may not make them payable at a place other than its own treasury (there being no statutory direction on the subject), is one of general jurisprudence, in reference to which the courts of the different states may take different views.<sup>67</sup> It has been held that a municipal corporation cannot lawfully make its obligations payable at any other place than the office of its treasurer; but the court also held that the making of them payable elsewhere does not affect their validity.<sup>68</sup> And again it has been held that a power given to issue county bonds carries with it a power to make them payable beyond the limits of the county for which they are issued, as also beyond the limits of the state in which the county is, and to sell them beyond such limits.<sup>69</sup> While it has been said that where no place of payment of the bonds being designated by the statute, it is competent for the officers whose duty it is to issue them to make them payable in New York; and such is the general usage.<sup>70</sup>

4. **PRESENTATION.**—It is not necessary to present the bonds of a municipal corporation to the court which issued them, for allowance before commencing suit to enforce their payment.<sup>71</sup>

**Presentation for Payment.**—See the title **COUPONS**, vol. 4, p. 857.

5. **MEDIUM OF PAYMENT.**—Express and general power to issue negotiable municipal bonds, in the absence of legislative restrictions, carries the implied or incidental power to make them payable generally, that is, in currency, which is constitutionally a legal tender, or payable in the particular coin which constitutes the legal and commercial standard by which the value of other kinds of currency is measured; hence where the act authorizing a municipality to issue bonds is silent as to the kind of currency in which such bonds shall be paid, the municipality has power to make them payable in gold coin of the United States, and such bonds will not be void because the principal and interest was made payable in such coin, when the act authorizing their issue and sale did not specify a medium in which they were to be made payable.<sup>72</sup>

6. **FUNDS FROM WHICH PAYABLE.**—a. *In General.*—Limitations upon a special

years to run, are void; and in order to reach that conclusion it was necessary to hold that the limitation of ten years for the running of the bonds contained in the fourth section was applicable to bonds issued by towns under the fifth section. *Barnum v. Okolona*, 148 U. S. 393, 396, 37 L. Ed. 495.

If the legislature of Mississippi, in authorizing the town of Okolona to subscribe for stock in a railroad company and to pay for the same by an issue of bonds, prescribed that such bonds should not extend beyond ten years from the date of issuance, such limitation must be regarded as in the nature of a restriction on the power to issue bonds. *Norton v. Dyersburg*, 127 U. S. 160, 32 L. Ed. 85; *Brenham v. German American Bank*, 144 U. S. 173, 188, 36 L. Ed. 390; *Barnum v. Okolona*, 148 U. S. 393, 395, 37 L. Ed. 495.

66. *Rock Creek Tp. v. Strong*, 96 U. S. 271, 24 L. Ed. 815.

67. **Place of payment.**—*Enfield v. Jordan*, 119 U. S. 680, 694, 30 L. Ed. 523. See, generally, the title **PAYMENT**.

68. *Enfield v. Jordan*, 119 U. S. 680, 693, 30 L. Ed. 523.

**So held under the Illinois law.**—*Enfield v. Jordan*, 119 U. S. 680, 694, 30 L. Ed. 523.

69. **Iowa.**—*Lynde v. The County*, 16 Wall. 6, 21 L. Ed. 272.

70. **No place of payment designated.**—*Supervisors v. Galbraith*, 99 U. S. 214, 218, 25 L. Ed. 410; *Meyer v. Muscatine*, 1 Wall. 384, 17 L. Ed. 564; *Van Hostrup v. Madison City*, 1 Wall. 291, 17 L. Ed. 538.

71. **Presentation.**—*County of Greene v. Daniel*, 102 U. S. 187, 26 L. Ed. 99; *Lincoln County v. Luning*, 133 U. S. 529, 533, 33 L. Ed. 766. See the title **COUPONS**, vol. 4, p. 856.

72. **Medium of payment.**—*Woodruff v. Mississippi*, 162 U. S. 291, 299, 40 L. Ed. 973.

The power to borrow money and issue bonds therefor was expressly granted, unaccompanied by any definition of the word "money," which might operate as a restriction on the power, and, according to the general rule, if there were more than one kind of money, a discretion as to the particular kind would be necessarily incident to the execution of the power granted and might be exercised by the



fund provided to aid in the payment of municipal bonds are in no sense restrictions of the liability of the municipality. A special tax for such purpose is regarded as merely an additional provision made for the payment of the debt rather than a denial to the bondholders of any resort to the ordinary sources from which payment of municipal debts is to be made.<sup>73</sup> The holders of bonds which are debts of a municipality are, for a balance remaining due thereon after the application of the proceeds of a special tax, entitled to payment out of the general funds of the county.<sup>74</sup>

**Township and Precinct Bonds.**—See post, "In General," VI, B, 3, b, (1); "Bonds Issued in Name of Precinct," VI, B, 3, b, (2).

b. *Subjection of Property Liable for Municipal Debts.*—Even if the county, by reason of the limit on its taxing power, could not levy a tax to pay the bonds, nevertheless, such bonds having been authorized, the holder is entitled to judgment on them, and to collect it out of any property of the county which could be subjected to the payment of its debts.<sup>75</sup>

7. FUNDING AND REFUNDING—a. *In General.*—A state may provide for funding, consolidating and reducing its floating and bonded indebtedness, by exchanging new consolidated bonds for its outstanding obligation at a stipulated number of cents on the dollar,<sup>76</sup> but after such act has been passed and accepted

corporation. *Woodruff v. Mississippi*, 162 U. S. 291, 299, 40 L. Ed. 973.

A municipality, having authority to borrow money and issue bonds therefor, issued and sold negotiable bonds which were not expressly payable in gold coin, but which acknowledge an indebtedness in gold coin. Semiannual interest coupons payable specifically "in currency" were attached to said bonds. It was held, that as the agreement to pay the designated sums did not specify any particular kind of money, the obligation was to pay what the law recognized as money when the payment was to be made. The bonds were, therefore, legally solvable in the money of the United States, whatever its description, and not in any particular kind of that money, and it is impossible to hold that they were void because of want of power. *Woodruff v. Mississippi*, 162 U. S. 291, 299, 40 L. Ed. 973.

A levee board having power to borrow money and issue negotiable bonds therefor, has power to borrow gold coin and issue bonds payable in the same medium. *Woodruff v. Mississippi*, 162 U. S. 291, 299, 40 L. Ed. 973.

73. *Funds from which payable.*—*United States v. Clark County*, 96 U. S. 211, 24 L. Ed. 628.

74. *Payment of balance out of general funds.*—*United States v. Fort Scott*, 99 U. S. 152, 25 L. Ed. 348; *Knox County Court v. United States*, 109 U. S. 229, 27 L. Ed. 914; *United States v. Macon County*, 99 U. S. 582, 589, 25 L. Ed. 331; *Macon County v. Huidekoper*, 99 U. S. 592, 25 L. Ed. 333. And see, *East St. Louis v. Zebley*, 110 U. S. 321, 324, 28 L. Ed. 162.

When a city charter authorizes a certain yearly tax to defray the ordinary and current expenses of its government, exclusive of payments on account of bonds, and further provides another certain spe-

cial tax for the purpose of paying interest on bonds and creating a fund for the redemption of the same, it is not competent for a court to order that the fund from the taxes for general government be applied to the bonded debt. *East St. Louis v. Zebley*, 110 U. S. 321, 324, 28 L. Ed. 162.

In *United States v. Clark County*, 96 U. S. 211, 24 L. Ed. 628, it was decided that bonds issued by counties under § 13 of the act to incorporate the Missouri and Mississippi Railroad Company were debts of the county, and that for any balance remaining due on account of principal or interest after the application of the proceeds of the special tax authorized by that section, the holders were entitled to payment out of the general funds of the county. *United States v. Macon County*, 99 U. S. 582, 589, 25 L. Ed. 331. See *Knox County Court v. United States*, 109 U. S. 229, 27 L. Ed. 914, citing *United States v. Macon County*, 99 U. S. 582, 589, 25 L. Ed. 331; *Macon County v. Huidekoper*, 99 U. S. 592, 25 L. Ed. 333.

The holder of bonds, which a city was authorized to issue for public improvement, to be paid by special assessment upon the property specifically improved and benefited thereby, is not confined to the special assessment of the property benefited. He is entitled to have a general tax, levied on all the taxable property within the city, to pay such judgment. *United States v. Fort Scott*, 99 U. S. 152, 25 L. Ed. 348; *Fort Scott v. Hickman*, 112 U. S. 150, 162, 28 L. Ed. 636.

75. *Subjection of property liable for municipal debts.*—*Moultrie County v. Fairfield*, 105 U. S. 370, 380, 26 L. Ed. 945.

76. *Funding and refunding.*—*Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. Ed. 623. See ante, "Power to Issue Funding Bonds," I, E; "Purposes for Which Issuable," IV, D.

by part of the bondholders, the state cannot destroy all the benefits anticipated from the funding by funding a class of its debt at par.<sup>77</sup>

**Congress may provide for refunding the bonds of a territory**, and the act of congress of June 6, 1896, is held to be within the power of congress and valid.<sup>78</sup>

**Bonds Included within Act of 1896.**—Bonds issued in exchange for bonds of a railroad in compliance with a territorial act which did not make the completion of the road a condition precedent or make their validity depend upon the conduct of the company subsequent to their issuance, are not excluded from the provisions of an act of congress authorizing the refunding of all bonds "sold or exchanged on good faith in compliance with terms of the act of the legislature by which they were authorized," because the original holders failed to complete the line of road and the county received no benefits.<sup>79</sup> Territorial bonds issued by Arizona under the act of June 6, 1896, 29 Stat. 262, to refund railroad bonds issued by a county to aid a railroad, are not illegal because issued without demand having been made therefor by the county, as no request by the county was necessary under the funding act of Arizona of March 19, 1891, but the holders of the bonds could themselves make the demand for the funding.<sup>80</sup>

**The loan commissioners of Arizona** obtained their authority from the territorial legislature of Arizona and not from congress, notwithstanding that the act creating the board was amended and then approved by congress, and hence comes within the provisions of the Arizona statute providing that where a joint authority is given to three or more public officers, it shall be construed as giving authority for a majority of such officers or persons to act.<sup>81</sup>

b. *Withdrawal of Offer.*—A board of liquidation may, under authority of the state and before the bondholders have accepted the offer, withdraw its offer to convert and fund all outstanding valid obligations of the state.<sup>82</sup>

c. *Effect on Power to Borrow Money to Take Up Bonds.*—Power to borrow money, which the charter gives, is left unimpaired, by a new provision, under which registered bonds may be issued in place of old ones, if the city and the holders of the old bonds can agree on terms and the people give their assent.<sup>83</sup>

**77. Board of Liquidation v. McComb**, 92 U. S. 531, 23 L. Ed. 623. See the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 785.

Where a proposed funding of the levee debt at par in the consolidated bonds would break up the whole scheme of the funding act for funding the entire state debt and destroy all benefits anticipated from the funding, on which benefits those who accepted its terms had a right to rely, and makes an unjust discrimination between one class of creditors and another; an injunction, so far as it restrained the funding of said debt in consolidated bonds issued, or to be issued, under the said funding act, was properly granted. **Board of Liquidation v. McComb**, 92 U. S. 531, 23 L. Ed. 623.

**78. Territory.**—**Schuerman v. Arizona**, 184 U. S. 342, 345, 46 L. Ed. 580; **Utter v. Franklin**, 172 U. S. 416, 43 L. Ed. 498.

Congress had power to pass the act of June 6, 1896, 29 Stat. 262, authorizing the refunding of the territorial debt of Arizona and the bonds therein described are made valid. **Schuerman v. Arizona**, 184 U. S. 342, 345, 46 L. Ed. 580; **Utter v. Franklin**, 172 U. S. 416, 43 L. Ed. 498. See ante, "Power to Issue Funding Bonds," I, E; "Curative Laws—Ratifica-

tion," I, F. See the title **CONSTITUTIONAL LAW**, vol. 4, p. 457.

The act of congress of June 6, 1896, 29 Stat. at Large 262, ch. 339, providing for the funding of certain indebtedness prior to Jan. 1, 1897, had reference to the funding of that indebtedness which had been created before Jan. 1, 1897, and not to the time when the funding bonds were actually to be exchanged. **Schuerman v. Arizona**, 184 U. S. 342, 46 L. Ed. 580.

**79. Bonds included within act of 1896.**—**Murphy v. Utter**, 186 U. S. 95, 97, 46 L. Ed. 1070.

This act of congress June 6, 1896, was held in **Utter v. Franklin**, 172 U. S. 416, 43 L. Ed. 498, to require the refunding of the bonds involved in the case under consideration. **Murphy v. Utter**, 186 U. S. 95, 108, 46 L. Ed. 1070.

**80. Schuerman v. Arizona**, 184 U. S. 342, 46 L. Ed. 580.

**81. Schuerman v. Arizona**, 184 U. S. 342, 46 L. Ed. 580.

**82. Withdrawal of offer.**—**Durkee v. Board of Liquidation**, 103 U. S. 646, 26 L. Ed. 598.

**83. Effect on power to borrow money to take up bonds.**—**Louisiana v. Wood**, 102 U. S. 294, 299, 26 L. Ed. 153.

The power of the city conferred by her



d. *Impairment of Obligation of Contracts*.—See the title *IMPAIRMENT OF OBLIGATION OF CONTRACTS*, vol. 6, p. 785. See, also, ante, "In General," IV, N, 7, a.

8. *FAILURE OF CONSIDERATION*.—See post, "Failure of Consideration," IV, Q, 2, b, (12).

**O. Tax to Pay Bonds, Sinking Fund, etc.**—Power in a municipal corporation to borrow money and issue bonds therefor implies power to levy a tax for the payment of the obligation that is incurred, unless the contrary clearly appears.<sup>84</sup>

**Invalidation of Bonds**.—Under the constitution of Texas a total failure to provide a tax to meet the interest on the bonds and an installment of the principal invalidates the bonds.<sup>85</sup>

**Waiver**.—A reception of bonds without the guaranty to provide a sinking fund for the payment of the bonds having been fulfilled, any negotiation of them as valid debts of the city, waives the claim for the guaranty, and any claim for damages for not providing a guaranty (if any exist) belongs to the holders of the bonds and not to the contractor.<sup>86</sup>

**The measure of damages** arising from the failure of a city to provide a sinking fund in compliance with its contract with its bondholders, is not capable of legal computation, since it is the difference in the value of the bonds.<sup>87</sup>

**P. Interest—Coupons**.—See the title *INTEREST*, vol. 7, p. 221. See, also, ante, "Time of Payment or Redemption," IV, N, 2.

**Q. Negotiation and Transfer**—1. *NEGOTIABILITY GENERALLY*.—When power to borrow money and to issue bonds or other securities of a commercial character therefor is given to a municipal corporation, such securities will possess the usual qualities attaching to like securities issued by private corporations.<sup>88</sup>

charter to borrow money to take up her bonded indebtedness was not repealed by the eleventh section of the act of March 28, 1872, which enacts that "any county, city, or town that desires to place its outstanding indebtedness, under the provisions of this act, may do so by funding the same, and issuing new bonds in lieu of the present ones, upon such terms and bearing such interest, with such length of time to run, as may be agreed upon between the county, city, or town and the holders of its bonds." *Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153.

84. *Ralls County Court v. United States*, 105 U. S. 733, 26 L. Ed. 1220; *Ottawa v. Carey*, 108 U. S. 110, 122, 27 L. Ed. 669, reaffirmed in *Lewis v. Shreveport*, 108 U. S. 282, 27 L. Ed. 728. See the title *TAXATION*.

85. *Sinking fund—Tax to pay bonds*.—*Wade v. Travis County*, 174 U. S. 499, 43 L. Ed. 1060.

86. *Waiver*.—*Memphis v. Brown*, 20 Wall. 289, 290, 22 L. Ed. 264.

87. *Memphis v. Brown*, 20 Wall. 289, 22 L. Ed. 264.

Where a city contracts with persons to do work for it, agreeing to pay them in bonds, having some years to run, and with interest warrants or coupons attached, "principal and interest guaranteed and provided for by a sinking fund set aside for that purpose," and the contractor takes the bonds, but the city does not provide any sinking fund for the payment of either

principal or interest, the contractor to do the work cannot, in a suit against the city to recover what it owes him, adduce evidence of bankers and stockdealers to show what damage, in their judgment, he has suffered by the city's violation of its contract in providing the sinking fund; the witnesses making the value of the sinking fund depend upon the conditions: 1st, that it should be actually collected; 2d, that it should be placed in the hands of trustees; and 3d, that the trustees should be persons of integrity—conditions which made no part of the city's contract in the matter. There is no legal standard by which damages founded on such a claim can be fixed. They are speculative. There can be no standard market value of that which never existed. *Memphis v. Brown*, 20 Wall. 289, 290, 22 L. Ed. 264.

88. *Negotiability*.—*The Mayor v. Ray*, 19 Wall. 468, 22 L. Ed. 164; *The Mayor v. Lindsey*, 19 Wall. 485, 22 L. Ed. 180; *Orleans v. Platt*, 99 U. S. 676, 682, 25 L. Ed. 404; *Murray v. Lardner*, 2 Wall. 110, 17 L. Ed. 857.

Where such bonds are authorized by statute, the quality of negotiability inheres in county bonds between the maker and any bona fide holder as well as between successive holders. *Provident Life, etc., Co. v. Mercer County*, 170 U. S. 593, 606, 42 L. Ed. 1156.

**Bonds issued in aid of railroad**.—Such bonds issued, pursuant to legislative authority, by a municipal corporation in aid



**Municipal bonds, in the customary form, payable to bearer**, are commercial securities, possessing the same qualities and incidents that belong to what are, strictly, promissory notes negotiable by the law merchant, and pass by delivery.<sup>89</sup>

**Municipal bonds payable to a named payee or bearer** are transferable by delivery.<sup>90</sup>

**Bonds Indorsed in Blank.**—Municipal bonds, issued under the authority of law, and made payable to a named person, or order, after being indorsed in blank, are treated by the courts as having the same qualities and incidents that belong to negotiable promissory notes, and they are so regarded by the commercial world upon being indorsed in blank by the original payee; the title passes from one holder to another by mere delivery without any formal assignment.<sup>91</sup>

of a railroad company, are negotiable instruments. Such bonds are valid commercial instruments. *Commissioners v. Clark*, 94 U. S. 278, 24 L. Ed. 59.

**89. Bonds payable to bearer.**—*Ackley School Dist. v. Hall*, 113 U. S. 135, 140, 28 L. Ed. 954; *Manufacturing Co. v. Bradley*, 105 U. S. 175, 26 L. Ed. 1034; *Lexington v. Butler*, 14 Wall. 282, 296, 20 L. Ed. 809; *Moran v. Commissioners*, 2 Black 722, 17 L. Ed. 342; *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548; *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. Ed. 520; *Meyer v. Muscatine*, 1 Wall. 384, 17 L. Ed. 564; *Grand Chute v. Winegar*, 15 Wall. 355, 372, 21 L. Ed. 170; *Ottawa v. National Bank*, 105 U. S. 342, 344, 26 L. Ed. 1127; *Roberts v. Bolles*, 101 U. S. 119, 25 L. Ed. 880; *Woods v. Lawrence County*, 1 Black 386, 17 L. Ed. 122; *Board of Comm'rs v. Aspinwall*, 21 How. 539, 16 L. Ed. 208; *White v. Vermont, etc., R. Co.*, 21 How. 575, 16 L. Ed. 221; *Cromwell v. Sac County*, 96 U. S. 51, 24 L. Ed. 681; *Pana v. Bowler*, 107 U. S. 529, 542, 27 L. Ed. 424. In *Otis v. Cullum*, 92 U. S. 447, 23 L. Ed. 496, and *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534, 545, 31 L. Ed. 537, it is said, "They pass from hand to hand like bank notes."

Municipal bonds and coupons payable to bearer, by universal usage and consent, have all the qualities and incidents of commercial paper. *Aurora City v. West*, 7 Wall. 82, 105, 19 L. Ed. 42; *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548; *Meyer v. Muscatine*, 1 Wall. 384, 17 L. Ed. 564; *White v. Vermont, etc., R. Co.*, 21 How. 575, 16 L. Ed. 221; *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. Ed. 520; *Walnut v. Wade*, 103 U. S. 683, 696, 26 L. Ed. 526; *Ohio v. Frank*, 103 U. S. 697, 26 L. Ed. 531; *Thomson v. Lee County*, 3 Wall. 327, 18 L. Ed. 177; *Moran v. Commissioners*, 2 Black 722, 17 L. Ed. 342. See the title COUPONS, vol. 4, p. 848.

So held as to bonds issued in aid of a railroad company. *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. Ed. 520; *Meyer v. Muscatine*, 1 Wall. 384, 17 L. Ed. 564.

**The corporate seal** upon them does not change the case. *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548; *Board of Comm'rs v. Aspinwall*, 21 How. 539,

16 L. Ed. 208; *Woods v. Lawrence County*, 1 Black 386, 17 L. Ed. 122, affirmed in *White v. Vermont, etc., R. Co.*, 21 How. 575, 16 L. Ed. 221.

**90. Roberts v. Bolles**, 101 U. S. 119, 25 L. Ed. 880.

Bonds of a county, payable to a railroad company or holder, if "transferred by the signature of the president of the company," are negotiable after transfer by such indorsement. *County of Wilson v. National Bank*, 103 U. S. 770, 771, 776, 26 L. Ed. 488.

"By the law of Illinois municipal bonds, whether payable to bearer, or to some person or bearer, are negotiable by delivery, so that the holder, even in the courts of Illinois, can sue thereon in his own name, although they have not been previously assigned or indorsed by the named payee." *Ottawa v. National Bank*, 105 U. S. 342, 345, 26 L. Ed. 1127; *Roberts v. Bolles*, 101 U. S. 119, 25 L. Ed. 880.

In *Roberts v. Bolles*, 101 U. S. 119, 25 L. Ed. 880, the municipal bonds involved were payable to a railroad company or bearer, and there appeared on them no assignment or indorsement by the company.

In *Ottawa v. National Bank*, 105 U. S. 342, 344, 26 L. Ed. 1127, the bonds in suit were made payable at the St. Nicholas National Bank in the city of New York to W. H. W. Cushman or bearer, and, without his written assignment or indorsement, were taken by the First National Bank of Portsmouth, New Hampshire. The city paid the interest maturing on the second days of August, 1870 and 1871. It was held that an assignment or indorsement of the bonds by the payee named therein, although they are also made payable to bearer, is not, by the laws of Illinois, where the original contract was made, a prerequisite to pass the legal title.

**91. Bonds indorsed in blank.**—*Manufacturing Co. v. Bradley*, 105 U. S. 175, 26 L. Ed. 1034; *Ackley School Dist. v. Hall*, 113 U. S. 135, 140, 28 L. Ed. 954; *Lexington v. Butler*, 14 Wall. 282, 296, 20 L. Ed. 809; *Moran v. Commissioners*, 2 Black 722, 17 L. Ed. 342; *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548; *White v. Vermont, etc., R. Co.*, 21 How. 575,

The coupons annexed to such bonds, where they are made payable to bearer or are indorsed to bearer by the original obligees or payees, pass from one holder to another by delivery without any formal assignment.<sup>92</sup>

**Must Be Payable at All Events.**—Municipal bonds to be negotiable must be payable at all events and not upon a contingency.<sup>93</sup>

**Effect of Recitals upon Negotiability.**—A recital, on their face, that they were issued on the authority of a popular election, held in conformity with a local statute, does not take from them the qualities and incident of commercial securities.<sup>94</sup>

2. BONA FIDE HOLDERS—a. *Who Are Bona Fide Holders.*—See the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 297, et seq.

(1) *In General.*—A purchaser of municipal bonds to be a bona fide holder, must purchase before maturity, in the usual course of business, without knowledge of any defense, for a valuable consideration by him paid. To cut off the

576, 16 L. Ed. 221; Thomson v. Lee County, 3 Wall. 327, 18 L. Ed. 177. See the title **COUPONS**, vol. 4, p. 848.

"They are promises in writing to pay, at all events, a fixed sum of money, at a designated time therein limited, to named persons or their order." Ackley School Dist. v. Hall, 113 U. S. 135, 139, 28 L. Ed. 954.

"Upon being indorsed in blank by the original payees, the title passes by mere delivery, precisely as it would had they been made payable to a named person or bearer. After such indorsement, the obligation to pay is to the holder." Ackley School Dist. v. Hall, 113 U. S. 135, 139, 28 L. Ed. 954.

92. Lexington v. Butler, 14 Wall. 282, 293, 20 L. Ed. 809; White v. Vermont, etc., R. Co., 21 How. 575, 576, 16 L. Ed. 221; Thomson v. Lee County, 3 Wall. 327, 331, 18 L. Ed. 177; Moran v. Commissioners, 2 Black 722, 17 L. Ed. 342; Mercer County v. Hackett, 1 Wall. 83, 17 L. Ed. 548. See the title **COUPONS**, vol. 4, p. 848.

93. **Must be payable at all events.**—Humboldt Tp. v. Long, 92 U. S. 642, 23 L. Ed. 752; Ackley School Dist. v. Hall, 113 U. S. 135, 139, 28 L. Ed. 954; Chicago R. Equipment Co. v. Merchants' Bank, 136 U. S. 268, 285, 34 L. Ed. 349.

A bond of the tenor following: "Be it known that Humboldt Tp. in the county of Allen and State of Kansas, is indebted to the Fort Scott and Allen County Railroad Company, or bearer, in the sum of \$1,000, lawful money of the United States, with interest at the rate of seven per cent per annum, payable annually on the first days of January in each year, at the banking house of Gilman, Son & Co., in the city of New York, on the presentation and surrender of the respective interest coupons hereto annexed. The principal of this bond shall be due and payable on the thirty-first day of December, A. D. 1901, at the banking house of Gilman, Son & Co., in the city of New York. This bond is issued for the purpose of subscribing to the capital stock

of the Fort Scott and Allen County Railroad, and for the construction of the same through said township, in pursuance of and in accordance with an act of the legislature of the state of Kansas, entitled 'An act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same,' approved Feb. 25, A. D. 1870; and for the payment of said sum of money and accruing interest thereon, in manner aforesaid, upon the performance of the said condition, the faith of the aforesaid Humboldt Township, as also its property, revenue, and resources, is pledged. 'In testimony whereof, this bond has been signed by the chairman of the board of county commissioners of Allen County, Kan., and attested by the county clerk of said county, this twelfth day of October, 1871.' Z. Wisner, Chairman County Commissioners. Attest: W. E. Waggoner, County Clerk."—is negotiable. Humboldt Tp. v. Long, 92 U. S. 642, 23 L. Ed. 752.

The words, "upon the performance of said condition," refer to the part of the bond, where the annual interest is stipulated to be payable at a banker's, "or presentation and surrender of the respective interest coupons." That stipulation presents no such contingency as destroys the negotiability of the instrument. Humboldt Tp. v. Long, 92 U. S. 642, 644, 23 L. Ed. 752.

"In Ackley School Dist. v. Hall, 113 U. S. 135, 140, 28 L. Ed. 954, it was held that municipal bonds, issued under a statute providing that they should be payable at the pleasure of the district at any time before due, were negotiable; for, the court said: 'By their terms, they were payable at a time which must certainly arrive; the holder could not exact payment before the day fixed in the bonds; the debtor incurred no legal liability for nonpayment until that day passed.'" Chicago R. Equipment Co. v. Merchants' Bank, 136 U. S. 268, 285, 34 L. Ed. 349.

94. **Effect of recitals upon negotiability.**—Ackley School Dist. v. Hall, 113 U. S. 135, 139, 28 L. Ed. 954.



defense, all these facts must exist; the absence of any of them destroys the endeavor to exclude the defense. In other words if the purchaser receive the bonds after their maturity, or if he had knowledge constituting the defense to them, or if he did not pay value on their purchase, the defense is admissible and its effect distinctly presented.<sup>95</sup>

**Question of Fact.**—The question whether a holder of bonds does in law and in fact occupy the position of a bona fide holder, is substantially a question of fact only.<sup>96</sup>

(2) *Consideration*—(a) *In General.*—The purchaser must pay real in contradistinction from apparent value.<sup>97</sup>

**A party who purchases municipal bonds at less than par value may be a bona fide holder.**<sup>98</sup>

**A purchaser of such bonds on credit**, who has not paid the purchase price, is not a bona fide purchaser for value, so as to be protected.<sup>99</sup>

**The negotiable promissory notes, payable at different times**, given by a purchaser of municipal bonds, for the purchase price, are a sufficient consideration for the sale.<sup>1</sup>

(b) *Pledgee.*—A pledgee of municipal bonds is protected as a bona fide holder to the amount of his advances.<sup>2</sup>

(c) *Bonds Received in Exchange for County Warrants.*—A holder of county warrants who exchanges them directly with the county for county bonds must be

**95. Bona fide holders.**—*Grand Chute v. Winegar*, 15 Wall. 355, 373, 376, 21 L. Ed. 170; *Commissioners v. Clark*, 94 U. S. 278, 287, 24 L. Ed. 59. See, to the same effect, *Railroad Co. v. National Bank*, 102 U. S. 14, 26 L. Ed. 61; *New Buffalo v. Iron Co.*, 105 U. S. 73, 26 L. Ed. 1024; *Cromwell v. Sac County*, 96 U. S. 51, 24 L. Ed. 681; *Commissioners v. Bolles*, 94 U. S. 104, 109, 24 L. Ed. 46; *Converse v. Fort Scott*, 92 U. S. 503, 509, 23 L. Ed. 621.

So held as to bonds issued by a municipality in aid of a railroad. *Commissioners v. Clark*, 94 U. S. 278, 287, 24 L. Ed. 59.

**"The essential elements** which constitute a bona fide purchase are, therefore, three: a valuable consideration, the absence of notice, and presence of good faith." *United States v. California, etc., Land Co.*, 148 U. S. 31, 42, 37 L. Ed. 354.

**The owner of the bonds of a state**, payable to bearer, signed by her governor and treasurer, and sealed with her seal, which were issued in aid of a railroad company and sold by the active efforts of the governor, to the subjects of a foreign government, a people largely unacquainted with the English language, most of the sales being made in that country, will be treated as purchases for value and in good faith and given relief accordingly, although such bonds were fraudulent in this inception. *Railroad Cos. v. Schutte*, 103 U. S. 118, 26 L. Ed. 327.

**96. Question of fact.**—*Trask v. Jacksonville, etc., R. Co.*, 124 U. S. 515, 516, 31 L. Ed. 521.

**97.** It was established beyond question that the bonds had previously passed into the hands, or become pledged for the benefit, of the contractor who built the road. He acquired an interest, or a lien,

on the bonds, to secure payment of the amount due him for his work and labor. It was held that he became a holder for value in the sense that he paid real, in contradistinction from apparent, value, without notice of any fraud or illegality affecting the bonds. *Railroad Co. v. National Bank*, 102 U. S. 14, 26 L. Ed. 61; *Montclair v. Ramsdell*, 107 U. S. 147, 161, 27 L. Ed. 431.

**98.** *Woods v. Lawrence County*, 1 Black 386, 17 L. Ed. 122; *Richardson v. Lawrence County*, 154 U. S., appx., 536, 17 L. Ed. 558; *Cromwell v. Sac County*, 96 U. S. 51, 24 L. Ed. 681.

**99.** *Lytle v. Lansing*, 147 U. S. 59, 37 L. Ed. 78.

**1.** *Orleans v. Platt*, 99 U. S. 676, 25 L. Ed. 404.

**2. Pledgee.**—*Lytle v. Lansing*, 147 U. S. 59, 63, 37 L. Ed. 78.

Bankers to whom municipal bonds, issued in aid of a railroad, were pledged as security for a loan to the railroad company, who also received them with power from the railroad to sell them, are protected as bona fide holders to the amount of their advances, but they never took title to the bonds and when they transferred them as the property of the railroad company and received the amount of their advances from the transferee, their interest in them from that time wholly ceased. *Lytle v. Lansing*, 147 U. S. 59, 63, 37 L. Ed. 78.

Bankers who took up the loan of the prior firm upon the written order of the treasurer of the company, stood in the same position they had occupied. They subsequently sold the bonds for the railroad company, paid their loan and credited the company with a balance. It does not appear to whom they sold them, but



regarded as as much an innocent holder of such bonds as of the bonds of the same issue purchased by him in open market.<sup>3</sup>

(3) *Notice*—(a) *Necessity for Want of Notice*.—To be a bona fide holder, one must be himself a purchaser for value without notice, or the successor of one who was.<sup>4</sup> Thus a purchaser having knowledge that such bonds were illegally issued or issued in fraud of law,<sup>5</sup> that a suit affecting the title or validity of the bonds is pending,<sup>6</sup> that such bonds were unlawfully disposed of,<sup>7</sup> is not a bona fide holder.

(b) *What Constitutes Notice*.—**Time of Receiving Notice**.—A purchaser of negotiable municipal bonds without notice, to be entitled to protection, must not only be so at the time of the contract, but at the time of the payment of

it does appear that they never took title to themselves. *Lytle v. Lansing*, 147 U. S. 59, 63, 37 L. Ed. 78.

3. **Bonds received in exchange for county warrants**.—*Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 275, 43 L. Ed. 689.

4. **Necessity for want of notice**.—*McClure v. Oxford Tp.*, 94 U. S. 429, 432, 24 L. Ed. 129.

5. The fact that the purchaser of state bonds knows their issuance to have been illegal, prevents him from acquiring any title to the bonds which he could enforce as a bona fide holder. *Trask v. Jacksonville, etc., R. Co.*, 124 U. S. 515, 519, 31 L. Ed. 521.

A purchaser of bonds having knowledge of fraud or illegality in this issue, cannot acquire a title thereto which he can enforce as a bona fide holder. *Trask v. Jacksonville, etc., R. Co.*, 124 U. S. 515, 31 L. Ed. 521.

**Notice of want of authority and fraudulent issue**.—A purchaser having notice that the bonds were issued without authority and in fraudulent violation of the duty of those having the subject in charge, is not a bona fide purchaser and such facts furnish as complete a defense to a suit at law by him to recover the amount of the bonds as they do in equity. *Grand Chute v. Winegar*, 15 Wall. 373, 376, 21 L. Ed. 174. See to the same effect *Cromwell v. Sac County*, 96 U. S. 51, 24 L. Ed. 681.

**The mere agent** of persons engaged in perpetrating a fraud upon a railroad company, by getting state bonds issued to it to a place where they might be sold and the proceeds applied to the payment of personal debts of one of the guilty parties, cannot acquire a lien on the bonds as security for his services and liabilities as agent, those for whom he is acting having no title as against the company. *Trask v. Jacksonville, etc., R. Co.*, 124 U. S. 515, 31 L. Ed. 521.

6. **Pending suit**.—*Scotland County v. Hill*, 132 U. S. 107, 115, 33 L. Ed. 261; *Scotland County v. Hill*, 112 U. S. 183, 28 L. Ed. 692; *Lytle v. Lansing*, 147 U. S. 59, 70, 37 L. Ed. 78; *Warren County v. Marcy*, 97 U. S. 96, 24 L. Ed. 977; *Carroll County v. Smith*, 111 U. S. 556, 562, 28 L. Ed. 517; *County of Macon v. Shores*, 97

U. S. 272, 24 L. Ed. 889; *Brooklyn v. Insurance Co.*, 99 U. S. 362, 25 L. Ed. 416.

**Actual notice**.—Those who buy negotiable municipal securities from litigating parties with actual notice of a suit, do so at their peril, and must abide the result, the same as the parties from whom they got their title. *Scotland County v. Hill*, 112 U. S. 183, 185, 28 L. Ed. 692; *Scotland County v. Hill*, 132 U. S. 107, 113, 33 L. Ed. 261; *Lytle v. Lansing*, 147 U. S. 59, 70, 37 L. Ed. 78; *Warren County v. Marcy*, 97 U. S. 96, 24 L. Ed. 977; *Carroll County v. Smith*, 111 U. S. 556, 562, 28 L. Ed. 517; *County of Macon v. Shores*, 97 U. S. 272, 24 L. Ed. 889; *Brooklyn v. Insurance Co.*, 99 U. S. 362, 25 L. Ed. 416.

"In *Stewart v. Lansing*, 104 U. S. 505, 26 L. Ed. 866, the county judge, assuming to act under authority of a law of the state, rendered a judgment appointing commissioners to execute bonds of the town of Lansing. This judgment was carried by certiorari to the supreme court, and there reversed. The county judge, the commissioners, and the railroad company, to which the bonds were ordered to be issued, all had notice of the certiorari and the subsequent proceedings under it. Before the judgment of reversal, however, the commissioners, notwithstanding the pendency of the writ, issued the bonds in suit in the case, taking from the company an obligation for their personal indemnity. This court held that, as between the company and the town, the judgment of reversal was equivalent to a refusal by the county judge to make the original order, and invalidated the bonds." *Pana v. Bowler*, 107 U. S. 529, 543, 27 L. Ed. 424. See, also, *Lytle v. Lansing*, 147 U. S. 59, 62, 37 L. Ed. 78.

**Purchaser from prior holder**.—See post, "Purchasers from Prior Holders," IV, Q, 2, a, (4).

7. **Bonds unlawfully disposed of**.—*Thompson v. Perrine*, 103 U. S. 806, 817, 26 L. Ed. 612.

A purchaser of city bonds, knowing that they were given in exchange for railroad stock instead of being sold at par value as prescribed by statute, is not a bona fide purchaser and not entitled to enforce payment thereof. *Thompson v. Perrine*, 103 U. S. 806, 817, 26 L. Ed. 612.

the purchase money.<sup>8</sup>

**Mere suspicion that there may be a defect of title** in its holder, or knowledge of circumstances which would excite suspicion as to his title in the mind of a prudent man, is not sufficient to impair the title of the purchaser. That result will only follow where there has been bad faith on his part.<sup>9</sup>

**Bad Faith, Willful Ignorance.**—No rule of law protects a purchaser of such bonds, who willfully closes his ears to information, or refuses to make inquiry when circumstances of grave suspicion imperatively demand it.<sup>10</sup>

**Notice to Trustee in Deed of Trust to Secure Municipal Aid Bonds.**—Notice to one of the trustees appointed by the company in its deed mortgaging its property, including the county bonds, to secure the payment of its bonds, issued and negotiated for value to third parties, does not, in a suit by the trustees

8. **Time of receiving notice.**—*Lytle v. Lansing*, 147 U. S. 59, 70, 37 L. Ed. 78.

9. **Suspicion of defect.**—*Cromwell v. Sac County*, 96 U. S. 51, 57, 24 L. Ed. 681; *Murray v. Lardner*, 2 Wall. 110, 17 L. Ed. 857.

10. **Bad faith, willful ignorance.**—*Lytle v. Lansing*, 147 U. S. 59, 70, 37 L. Ed. 78; *Goodman v. Simonds*, 20 How. 343, 15 L. Ed. 934; *Murray v. Lardner*, 2 Wall. 110, 17 L. Ed. 857.

Where the purchaser was informed that the town issuing negotiable coupon bonds was contesting its liability, and that his vendor himself was in litigation with it over the payment of the coupons, receiving this information, not only from his vendor, but from his own attorneys, from whom he could have learned all the facts by inquiry, it is mere quibbling to say, that he had no notice that the bonds were invalid. *Lytle v. Lansing*, 147 U. S. 59, 37 L. Ed. 78. See *Scotland County v. Hill*, 112 U. S. 183, 28 L. Ed. 692.

Under the circumstances, it was bad faith or willful ignorance under the rule laid down in *Goodman v. Simonds*, 20 How. 343, 15 L. Ed. 934, and *Murray v. Lardner*, 2 Wall. 110, 17 L. Ed. 857, to forbear making further inquiries. *Lytle v. Lansing*, 147 U. S. 59, 70, 37 L. Ed. 78.

**Bonds offered at large discount a great distance from place of issue.**—The very fact that bonds to a large amount were offered for sale at a large discount, half their face value at a great distance (a place two thousand miles) from where they were issued, is of itself a circumstance calculated to arouse suspicion of their validity in the mind of any person of ordinary intelligence. *Lytle v. Lansing*, 147 U. S. 59, 66, 37 L. Ed. 78.

In *Stewart v. Lansing*, 104 U. S. 505, 26 L. Ed. 866, it was held that it was clearly shown that, although Elliott, Collins & Co. "parted with" the bonds, they did not sell them, nor was the sale negotiated by the firm, and that the bonds only passed through their hands upon terms which had been agreed upon by others; that Stewart, the plaintiff, was not known to any of the witnesses examined; that no one had ever seen him; and that the sale, if actually made, was at an enormous discount. Under these circumstances, it was held that

there was no such evidence of bona fide ownership in the plaintiff as would require the case to be submitted to the jury. The only additional testimony in this case with regard to the ownership of Stewart tends to show that he was an actual person, well known in New Orleans, and living there. Although he appears to have been living when the testimony was taken, no effort seems to have been made to secure his deposition. There is nothing tending to show that he was a bona fide purchaser for value. *Lytle v. Lansing*, 147 U. S. 59, 64, 37 L. Ed. 78.

**An overdue and unpaid coupon for interest, attached to a municipal bond which has several years to run**, does not render the bond and the subsequently maturing coupons dishonored paper, so as to subject them, in the hands of a purchaser for value, to defenses good against the original holder. *Cromwell v. Sac County*, 96 U. S. 51, 24 L. Ed. 681.

The nonpayment of an installment of interest when due could not affect the negotiability of the bonds or of the subsequent coupons. Until their maturity, a purchaser for value, without notice of their invalidity as between antecedent parties, would take them discharged from all infirmities. The nonpayment of the installment of interest represented by the coupons due at the commencement of the month in which the purchase was made by Clark, was a slight circumstance, and, taken in connection with the fact that previous coupons had been paid, was entirely insufficient to excite suspicion even of any illegality or irregularity in the issue of the bonds. *Cromwell v. Sac County*, 96 U. S. 51, 57, 24 L. Ed. 681.

**State bonds.**—The mere fact that no interest has ever been paid on state bonds furnishes the strongest presumptive evidence that they were dishonored. *Trask v. Jacksonville, etc., R. Co.*, 124 U. S. 515, 517, 31 L. Ed. 521.

Where state bonds had been running ten years and more, and no interest had ever been paid on them, it is the strongest presumptive evidence to a purchaser at an auction sale that they were dishonored. *Trask v. Jacksonville, etc., R. Co.*, 124 U. S. 515, 517, 31 L. Ed. 521.



to enforce the payment of the county bonds, operate to destroy the bona fide holding of such parties.<sup>11</sup>

(c) *Constructive or Implied Notice*—aa. *Authority to Issue*—(aa) *In General*.—Every purchaser or holder of municipal bonds is chargeable with notice or knowledge of the provisions or requirements of the law by which the issue of his bond was authorized. If there was no law for the issue there can be no valid bond. The holder is, therefore, chargeable with notice of the want of legal authority for their issue.<sup>12</sup>

**Municipal Aid Bonds.**—Every purchaser of municipal bonds issued without legislative authority in aid of railroad or other corporations or enterprises, and bearing evidence of the purpose on their face, is chargeable in law with notice of the want of power in the municipal authorities to bind the body politic in that way.<sup>13</sup>

**11. Notice to trustee in deed of trust to secure municipal aid bonds.**—Commissioners *v.* Thayer, 94 U. S. 631, 24 L. Ed. 133.

**12. Constructive notice.**—Barnett *v.* Denison, 145 U. S. 135, 139, 36 L. Ed. 652; Ogden *v.* County of Daviess, 102 U. S. 634, 26 L. Ed. 263; Marsh *v.* Fulton County, 10 Wall. 676, 19 L. Ed. 1040; South Ottawa *v.* Perkins, 94 U. S. 260, 24 L. Ed. 154; Northern Bank *v.* Porter Tp., 110 U. S. 608, 28 L. Ed. 258; Hayes *v.* Holly Springs, 114 U. S. 120, 29 L. Ed. 81; Merchants' Bank *v.* Bergen County, 115 U. S. 384, 29 L. Ed. 430; Harshman *v.* Knox County, 122 U. S. 306, 30 L. Ed. 1152; Coler *v.* Claeburne, 131 U. S. 162, 33 L. Ed. 146; Lake County *v.* Graham, 130 U. S. 674, 32 L. Ed. 1065; Ottawa *v.* Carey, 108 U. S. 110, 27 L. Ed. 669; Wilkes County *v.* Coler, 180 U. S. 506, 525, 45 L. Ed. 642; McClure *v.* Oxford Tp., 94 U. S. 429, 24 L. Ed. 129; Wells *v.* Supervisors, 102 U. S. 625, 634, 26 L. Ed. 122; United States *v.* Macon County, 99 U. S. 582, 590, 25 L. Ed. 331; Anthony *v.* Jasper County, 101 U. S. 693, 697, 25 L. Ed. 1005; Meyer *v.* Muscatine, 1 Wall. 384, 389, 393, 17 L. Ed. 564; Lewis *v.* Shreveport, 108 U. S. 282, 27 L. Ed. 728; Stanly County *v.* Coler, 190 U. S. 437, 447, 47 L. Ed. 1126; Pendleton County *v.* Amy, 13 Wall. 297, 305, 20 L. Ed. 579; Hoff *v.* Jasper County, 110 U. S. 53, 55, 28 L. Ed. 68; Otis *v.* Cullum, 92 U. S. 447, 448, 23 L. Ed. 496; Loan Ass'n *v.* Topeka, 20 Wall. 655, 22 L. Ed. 455; Moultrie County *v.* Fairfield, 105 U. S. 370, 379, 26 L. Ed. 945; Cole *v.* LaGrange, 113 U. S. 1, 6, 28 L. Ed. 896; Board of Comm'rs *v.* Aspinwall, 21 How. 539, 544, 16 L. Ed. 208. See, also, Stanly County *v.* Coler, 190 U. S. 437, 47 L. Ed. 1126.

The purchase of bonds, issued by a municipal corporation is held to know the constitutional provisions and the statutory restriction bearing on the question of the authority to issue them. Lake County *v.* Graham, 130 U. S. 674, 680, 32 L. Ed. 1065; Gunnison County Comm'rs *v.* Rollins, 173 U. S. 255, 267, 43 L. Ed. 689.

Where the act in pursuance of which the bonds were issued is a public statute of a state, any person dealing in them is

chargeable with a knowledge of it. Board of Comm'rs *v.* Aspinwall, 21 How. 536, 546, 16 L. Ed. 208.

"If there was an absolute want of power to issue the bonds in question every purchaser of them was charged, in law, with notice of that fact, and could not look to the county in whose name they were issued." Wilkes County *v.* Coler, 190 U. S. 107, 113, 47 L. Ed. 971; Wilkes County *v.* Coler, 180 U. S. 506, 45 L. Ed. 642.

**13. Municipal aid bonds.**—Ottawa *v.* Carey, 108 U. S. 110, 27 L. Ed. 669; Lewis *v.* Shreveport, 108 U. S. 282, 286, 27 L. Ed. 728; Pendleton County *v.* Amy, 13 Wall. 297, 20 L. Ed. 579; Kenicott *v.* Supervisors, 16 Wall. 452, 21 L. Ed. 319; St. Joseph Tp. *v.* Rogers, 16 Wall. 644, 21 L. Ed. 328; Coloma *v.* Eaves, 92 U. S. 484, 23 L. Ed. 579; South Ottawa *v.* Perkins, 94 U. S. 260, 262, 24 L. Ed. 154; Parkersburg *v.* Brown, 106 U. S. 487, 27 L. Ed. 238; Cole *v.* LaGrange, 113 U. S. 1, 6, 28 L. Ed. 896.

The company could not, prior to the adoption of the constitution of 1870, have demanded, as of right, that bonds be issued; for the people did not vote for issuing bonds, and the act of March 24, 1869, did not make it imperative upon the township authorities to issue bonds to meet a donation. It only declared that they "may borrow money \* \* \* and issue bonds," and in that way pay the contribution which had been voted. The constitution took away all power to impose upon the township any greater burdens than the people had by vote lawfully assumed under existing statutes. These bonds were issued in 1871. Purchasers were bound to know that neither the act of 1867, under which they were issued, nor the act of February 26, 1869, conferred authority to issue them. If they purchased them in the belief that the recital in the bonds of the act of 1867 was a mere mistake, and that the act of March 24, 1869, gave the requisite authority, they were informed by the latter act that the township authorities were not obliged to issue them, and, by the constitution of 1870, that the power to do so was taken away. They were bound to know that the power of the township, after July 2, 1870, was re-



**Requirements of Law under Which Issued.**—The purchaser or holder of city bonds is chargeable with notice of the requirements of the law under which they are issued.<sup>14</sup>

(bb) *Limitation of Indebtedness.*—The purchaser of municipal bonds in open market is bound to take notice of the constitutional limitation upon municipalities with respect to the indebtedness which they may incur, and also of such facts as the authorized official assessments or tax list discloses concerning the valuation of taxable property within the municipality for the year, the limitation being based upon the amount of taxable property within the corporation.<sup>15</sup> Bonds

stricted by the constitution to a completion of such subscription or donation as had been lawfully voted before that date; if not upon the precise terms and conditions attached thereto by the vote of the people, upon such terms as did not increase the burden. *Concord v. Robinson*, 121 U. S. 165, 170, 30 L. Ed. 885. See, also, *Crow v. Oxford*, 119 U. S. 215, 30 L. Ed. 388.

**Illinois statute as to conditions precedent.**—A savings bank which purchased bonds of a county in Illinois is, notwithstanding recitals on the face of them, chargeable with notice of the act of the Illinois legislature of April 16th, 1869, as to conditions imposed as a condition precedent to a subscription to the stock of a railroad company which had been in force nearly five months before the date named on the face of the bonds as the date of the election, and for more than eight years before the date named on the face of the bonds as the date of their issue. It was also required to take notice of the construction given to such statutory provision by the supreme court of Illinois at a term prior to the issue of these bonds. This interpretation of the act of April 16, 1869, accompanied all bonds subsequently issued into the hands of whoever took them, whether a bona fide holder or not. *German Savings Bank v. Franklin County*, 128 U. S. 526, 537, 32 L. Ed. 519.

**14. Requirements of law under which issued.**—*Barnett v. Denison*, 145 U. S. 135, 139, 36 L. Ed. 652.

All persons taking securities of municipalities having only special power to issue them for a particular purpose must see to it that the conditions prescribed for the exercise of the power existed. As an essential preliminary to protection as a bona fide holder, authority to issue them must appear. If such authority did not exist, the doctrine of protection to a bona fide purchaser has no application. *Merchants' Bank v. Bergen County*, 115 U. S. 384, 391, 29 L. Ed. 430.

**15. Limitation of indebtedness.**—*Buchanan v. Litchfield*, 102 U. S. 278, 287, 26 L. Ed. 138; *Dixon County v. Field*, 111 U. S. 83, 96, 28 L. Ed. 360; *Northern Bank v. Porter Tp.*, 110 U. S. 608, 28 L. Ed. 258; *Nesbit v. Riverside Independent Dist.*, 144 U. S. 610, 617, 36 L. Ed. 562; *Lake County v. Graham*, 130 U. S. 674, 680, 32 L. Ed. 1065; *Doon Tp. v. Cummins*, 142 U. S. 366, 375, 35 L. Ed. 1044; *Chaffee County v. Pot-*

*ter*, 142 U. S. 355, 363, 35 L. Ed. 1040; *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 270, 43 L. Ed. 689; *Sutliff v. Lake County Comm'rs*, 147 U. S. 230, 234, 37 L. Ed. 145; *Hedges v. Dixon County*, 150 U. S. 182, 190, 37 L. Ed. 1044.

In determining whether the constitutional limit of indebtedness has been exceeded by a municipal corporation, an inquiry would always be necessary as to the amount of taxable property within its boundaries. Such inquiry would be solved, not by information derived from individual officers of the municipality, but only in the mode prescribed in the constitution; that is, by reference to the last assessment for state and county taxes for the year preceding the issuing of the bonds. *Buchanan v. Litchfield*, 102 U. S. 278, 288, 26 L. Ed. 138.

"The amount of the assessed value of the taxable property in the county is not stated (in the bonds); but, *ex vi termini*, it was ascertainable in one way only, and that was by reference to the assessment itself, a public record equally accessible to all intending purchasers of bonds, as well as to the county officers." *Dixon County v. Field*, 111 U. S. 83, 95, 28 L. Ed. 360; *Nesbit v. Riverside Independent Dist.*, 144 U. S. 610, 618, 36 L. Ed. 562.

That test was applied in this case. Had there been under or by competent legal authority, an assessment for that year of taxable property within the city, separately from all other property in the county or township to which the city belonged, such assessment would undoubtedly have been controlling. But there was no such official assessment, in fact, or required by law. There were, however, official assessments for state and county taxes for 1873, embracing all taxable property within the county and townships of which the city formed a part, and from which, in connection with the map of the city, could be readily ascertained the location and taxable value of all property within the corporate limits of the city for that year. The purchaser of the bonds was certainly bound to take notice not only of the constitutional limitation upon municipal indebtedness, but of such facts as the authorized official assessments disclosed concerning the valuation of taxable property within the city for the year 1873. *Buchanan v. Litchfield*, 102 U. S. 278, 288, 26 L. Ed. 138.

"The extent of that indebtedness was a

issued in excess of such limitation are unlawful and void in the hand of a purchaser before maturity for value.<sup>16</sup>

bb. *Pending Suit*.—Purchasers of negotiable municipal securities are not chargeable with constructive notice of the pendency of a suit affecting the title or validity of the securities. The rule that all persons are bound to take notice of a suit pending with regard to the title to property, and that they, at their peril, buy the same from any of the litigating parties, does not apply to negotiable municipal securities purchased before maturity.<sup>17</sup>

fact peculiarly within the knowledge of the constituted authorities of the city. It was necessarily left, both by the constitution and the statute of 1873, to their examination and determination, under the constitutional injunction, however, that no municipal corporation should exceed the prescribed amount of indebtedness. It was, nevertheless, a fact which, so far as we are advised by the record, could not at all times and absolutely, or with reasonable certainty, be ascertained from any official documents to which the public had access. A like difficulty, perhaps, would arise in the case of any municipal corporation, possessing the general power of raising money, by taxation and otherwise, to carry on local government." *Buchanan v. Litchfield*, 102 U. S. 278, 289, 26 L. Ed. 138.

If, therefore, it appears, by evidence, of which the city may rightfully avail itself, as against a bona fide holder for value of the coupons in suit, that the bonds, issued Jan. 1, 1874, created an indebtedness in excess of the amount to which municipal indebtedness is restricted by the constitution, there would seem to be no escape from the conclusion that the bonds are void for the want of legal authority to issue them at the time they were issued. *Buchanan v. Litchfield*, 102 U. S. 278, 288, 26 L. Ed. 138.

In determining whether the constitutional limit of the indebtedness of the city had been exceeded by the issue of the bonds, the court permitted—there having been no separate assessment of the property within the city for the preceding year made or required by law—the introduction of the assessments for state and county taxes embracing all taxable property within the county and townships of which the city formed a part, from which, in connection with a map, the location and taxable value of all the property within the limits of the city for that year could be readily ascertained. Held, that the evidence, being the best which the law afforded, was properly admitted. *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138.

**Iowa**.—Article 11, § 3, of the constitution of Iowa of 1857, ordains that "no county, or other political or municipal corporation, shall be allowed to come indebted in any manner, or for any purpose, to an amount in the aggregate exceeding five per centum on the value of the taxable property within such county or corporation—to be ascertained by the last

state and county tax list, previous to the incurring of such indebtedness." Under that section, the limit of indebtedness which the district could incur at the date of the issue of these bonds was \$2,071.30. It was already indebted in a sum exceeding \$3,500, and the five bonds of themselves aggregated \$2,500, or nearly \$500 more than the amount of the debt the district could lawfully create. Aside, therefore, from the fact that they were issued without consideration, they were invalid by reason of the constitutional provision, and created no obligation against the district. They were issued at the same time and as one transaction, and were purchased by plaintiff together and in one purchase. If not charged with knowledge of the prior indebtedness, she was with the fact that, independently of such indebtedness, these bonds alone were an overissue, and beyond the power of the district; for she was bound to take notice of the value of taxable property within the district, as shown by the tax list. *Nesbit v. Riverside Independent Dist.*, 144 U. S. 610, 617, 36 L. Ed. 562.

Under article 11, § 3 of the constitution of Iowa of 1857, negotiable bonds issued in excess of the constitutional debt limit and sold by the treasurer of a school district or district township, the proceeds to be applied to the payment of the indebtedness of the township, are void in the hands of a purchaser to whom they were originally issued by the district and who knew when he took them that the district in issuing them exceeded the constitutional limit, as appeared by public record, notice of which he was bound to take. *Doon Tp. v. Cummins*, 142 U. S. 366, 378, 35 L. Ed. 1044.

**Colorado**.—A purchaser for value and before maturity of county bonds, is charged with the duty of examining the record of indebtedness, provided for in the statute of Colorado, approved March 24, 1877, in order to ascertain whether the bonds he proposed to purchase were lawfully issued or whether the issuance thereof increased the indebtedness of the county beyond the constitutional limit in that state. *Sutliff v. Lake County Comm'rs*, 147 U. S. 230, 235, 37 L. Ed. 145.

**16.** *Daviess County v. Dickinson*, 117 U. S. 657, 29 L. Ed. 1026; *Merchants' Bank v. Bergen County*, 115 U. S. 384, 29 L. Ed. 430.

**17.** *Pending suit*.—*County of Warren v. Marcy*, 97 U. S. 96, 24 L. Ed. 977; *Scotland*



**The pendency of an injunction bill** of which he had no notice, does not affect the title of a holder, as a bona fide holder to the bonds, where they were negotiable. There is no constructive notice of any fraud or illegality by virtue of the doctrine of *lis pendens*.<sup>18</sup> The considerations which exclude the operation of that rule on such securities apply to them, whether they were created during

County *v. Hill*, 112 U. S. 183, 185, 28 L. Ed. 692; *Lytle v. Lansing*, 147 U. S. 59, 71, 37 L. Ed. 78; *Carroll County v. Smith*, 111 U. S. 556, 562, 28 L. Ed. 517; *Cass County v. Gillett*, 100 U. S. 585, 25 L. Ed. 585; *Orleans v. Platt*, 99 U. S. 676, 683, 25 L. Ed. 404; *Brooklyn v. Insurance Co.*, 99 U. S. 362, 25 L. Ed. 416; *Empire v. Darlington*, 101 U. S. 87, 25 L. Ed. 878.

A decree rendered in a county court in a suit against a railroad company and others, declaring that municipal bonds and coupons issued to the company are null and void, does not affect the holders of them who did not appear, and had only constructive notice of the suit. *Brooklyn v. Insurance Co.*, 99 U. S. 362, 25 L. Ed. 416; *Empire v. Darlington*, 101 U. S. 87, 25 L. Ed. 878.

A certiorari was granted to review the order of a county judge directing an issue of county bonds. Before reversal of such order, the commissioners appointed by the county judge subscribed for the stock of a railroad company and issued the bonds of the county therefor. It was held that such bonds are valid in the hands of a bona fide holder, although the order for their issue was afterwards reversed. *Orleans v. Platt*, 99 U. S. 676, 25 L. Ed. 404, following *Warren County v. Marcy*, 97 U. S. 96, 24 L. Ed. 977.

In May, 1871, certain parties claiming to be a majority of the taxpayers, and to own the greater part of the taxable property of a town in New York, petitioned the proper county judge for an order that its bonds, to the amount of \$80,000, should be issued to enable it to subscribe and pay for that amount of the capital stock of A., a railroad company. After hearing, he, July 1, 1871, ordered the bonds to be issued, and, pursuant to the statute, appointed three commissioners to execute and deliver them. Application was thereupon made by sundry taxpayers to the supreme court for a writ of certiorari, which was allowed, September 30, 1871, and served upon him. The proper return was made. June 27, 1872, the supreme court affirmed the judgment. In July following, the case was taken to the court of appeals, where, solely upon the ground that he had refused the application of taxpayers to withdraw their signatures from the petitions, which, had it been granted, would have reduced the numbers and the taxable property represented below the statutory requirement, the previous judgment was, in February, 1873, reversed, with directions to dismiss the proceeding. April 3, 1872, the commissioners subscribed for eight hundred shares of the stock of A., and on the next day issued

and delivered in payment one hundred and sixty of the bonds of the town of \$500 each, and thereupon received from A. scrip for the stock, which the town still holds. On the face of each bond was a certificate that it had been duly registered in the clerk's office of the county. A., February 26, 1872, and May 31, 1873, entered into contracts with another railroad company, and at the latter date delivered as collateral security for the fulfillment of both contracts all the bonds to B., with authority to him to sell them and pay over the proceeds to the latter company. February 4, 1874, the plaintiff purchased some of the bonds in good faith for a valuable consideration. He subsequently brought suit against the town to recover the amount due on the coupons. Held, that the plaintiff is entitled to recover. *Orleans v. Platt*, 99 U. S. 676, 677, 25 L. Ed. 404.

In this case, a preliminary injunction might and should have been procured forbidding the commissioners to issue the bonds, and the railroad company, if it received them, from parting with them, until the case made by the certiorari was finally brought to a close. This would have involved only an ordinary exercise of equity jurisdiction. The omission was gross laches. This negligence is the source of all the difficulties of the plaintiff in error touching the bonds. The loss, if any shall ensue, will be due, not to the law or its administration, but to the supineness of the town and the contestants. *County of Ray v. Vansycle*, 96 U. S. 675, 24 L. Ed. 800; *Orleans v. Platt*, 99 U. S. 676, 681, 25 L. Ed. 404.

18. *Warran County v. Marcy*, 97 U. S. 96, 24 L. Ed. 977; *Scotland County v. Hill*, 132 U. S. 107, 113, 33 L. Ed. 261; *Carroll County v. Smith*, 111 U. S. 556, 562, 28 L. Ed. 517.

In *Lexington v. Butler*, 14 Wall. 282, 283, 20 L. Ed. 809, irregularities had occurred in the preliminary proceedings, and the city authorities refused to issue the bonds. A mandamus was applied for by the railroad company, for whose use the bonds were intended; and a judgment of mandamus was rendered, to compel the city to issue them, and it issued them accordingly. Subsequently, this judgment was reversed by the court of appeals of Kentucky, and an injunction was obtained to prevent the railroad company from parting with the bonds. The injunction was not obeyed; the bonds were negotiated whilst proceedings were still pending, and were purchased by the plaintiff for value before maturity, without any knowledge of these circumstances. The federal su-



the suit or before its commencement, and to controversies relating to their origin or to their transfer.<sup>19</sup>

**Coupons and Coupon Bonds.**—Although a suit for avoiding municipal coupon bonds is pending at the time of their issuance, a subsequent purchaser in open market is not affected by the doctrine of constructive notice arising from the *lis pendens*, and, if he has no actual notice of the suit, may recover the amount of the bonds and attached coupons.<sup>20</sup>

cc. *Matters of Record.*—A purchaser's bonds and coupons "before their maturity, for value, without actual notice of any defense to them, or of any defect or infirmity in the proceedings for issuing them," is, in the absence of such re-

preme court held that the bonds were valid in his hands. The point in question received no discussion in the opinion of the court, it is true; but it appeared on the pleadings, was made in the argument, and must have been passed upon in arriving at the judgment. *Warren County v. Marcy*, 97 U. S. 96, 109, 24 L. Ed. 977.

In *Warren County v. Marcy*, 97 U. S. 96, 24 L. Ed. 977, the board of supervisors claimed to be authorized by a popular vote to subscribe for the stock of a railroad company, and to pay in county bonds to be issued by themselves. A taxpayer filed a bill in the county circuit court, and procured a preliminary injunction prohibiting the issue of the bonds. Before the final hearing this injunction was dissolved; at the final hearing the bill was dismissed. There had been no injunction in force after the preliminary injunction was disposed of. The complainant appealed to the supreme court of the state. There, in due time, the decree of the lower court was reversed, and the case was remanded with directions to enter a decree in conformity to the prayer of the bill. But between the time of the dissolution of the preliminary injunction and the final hearing in the court below, the supervisors subscribed for the stock and issued the bonds. It was held that in the hands of a bona fide holder they were free from objection and could be enforced. *Orleans v. Platt*, 99 U. S. 676, 683, 25 L. Ed. 404.

**Litigation not continuous—No suit pending at issuance.**—In the case of *Lee County v. Rogers*, 7 Wall. 181, 19 L. Ed. 160, a county election had been held to determine on the subscription of stock to a railroad, and the issue of bonds in payment thereof. A bill in equity was filed to prevent such subscription and issue, and was successful. The legislature then passed a healing act, and the bonds were issued. A year after this, another bill was filed to have both the act and the bonds declared void, but was dismissed. Two years after this dismissal, a bill of review was filed to reverse the last decree; and it was reversed, and the bonds and the healing act itself was declared void. The federal supreme court held that, notwithstanding all this, the bona fide holder of the bonds was entitled to recover upon them. It being contended that he was bound to take notice of the *lis pendens*

for avoiding the bonds, the court held otherwise, on the ground that there was no continuous litigation. The first suit was determined before the issue of the bonds, and the second was not commenced until after they had been issued. No suit was pending when they were issued. *Warren County v. Marcy*, 97 U. S. 96, 104, 24 L. Ed. 977.

**Bill to restrain issuance to de facto corporation.**—It is no defense to an action by a bona fide holder against a county, to recover the amount due on coupons detached from bonds issued by it in payment of its subscription to the capital stock of a railroad company that the company was a de facto corporation when the subscription was made, and that it had not been organized within the time prescribed by its charter, and that when the bonds were issued a suit to restrain the issue of them was pending, however it may have ultimately resulted, if the holder had no actual notice thereof, and was a purchaser of them for value before they matured. *County of Macon v. Shores*, 97 U. S. 272, 24 L. Ed. 889.

19. *Warren County v. Marcy*, 97 U. S. 96, 24 L. Ed. 977.

20. **Coupons and coupon bonds.**—*Warren County v. Marcy*, 97 U. S. 96, 24 L. Ed. 977; *Scotland County v. Hill*, 132 U. S. 107, 33 L. Ed. 261; *Cass County v. Gillett*, 100 U. S. 585, 593, 25 L. Ed. 585.

**Detached coupons.**—It is no defense against a county to recover the amount due on coupons detached from bonds issued by it in payment of its subscription to the capital stock of a railroad company, that the company, which was a de facto corporation when the subscription was made, had not been organized within the time prescribed by its charter, and that when the bonds were issued a suit to restrain the issue of them was pending, however it may have ultimately resulted, if the holder had no actual notice thereof, and was a purchaser of them for value before they matured. *County of Macon v. Shores*, 97 U. S. 272, 24 L. Ed. 889.

County bonds were issued pending and in violation of an injunction of the circuit court of the county, and the coupons subsequently came into the hands of an innocent purchaser. It was held that a bona fide purchaser of such coupons is not affected by a judgment in the injunction suit, declaring the bonds and coupons null

citals in the bonds as would protect him, bound by the information open to him in the official records of the officers whose names were signed to the bonds.<sup>21</sup>

**Official Assessment.**—See ante, "Limitation of Indebtedness," IV, Q, 2, a, (3), (c), aa, (bb).

dd. *Matters Apparent on Face of Bonds*—(aa) *In General*.—The purchaser of municipal bonds is charged with notice of all the bonds contain.<sup>22</sup>

Where the coupons upon their face refer to the bonds to which they were attached, and purport to be for the semiannual interest accruing thereon, the purchaser of them is charged with notice of all which the bonds contain.<sup>23</sup>

(bb) *Recitals*.—**In General**.—The purchaser of bonds issued by a municipal corporation is held to know the recitals of the bonds he buys. If a purchaser may be, as he sometimes is, protected by false recitals in municipal bonds, the municipality ought to have the benefit of those that are true.<sup>24</sup>

**Reference to Legal Authority under Which Issued.**—Every dealer in municipal bonds, which, upon their face, refer to the statute under which they were issued, is bound to take notice of the statute and of all its requirements.<sup>25</sup> Wherever the want of legislative authority appears by the face of the bond, taken in connection with the act which the bond mentions, every taker of the bond has notice of the want of power.<sup>26</sup>

and void, if he had no notice of such suit. *Cass County v. Gillett*, 100 U. S. 585, 25 L. Ed. 585.

**21. Matters of record.**—*Crow v. Oxford*, 119 U. S. 215, 222, 30 L. Ed. 388.

**22. Matters apparent on face of bond.**—*Crow v. Oxford*, 119 U. S. 215, 222, 30 L. Ed. 388; *McClure v. Oxford Tp.*, 94 U. S. 429, 24 L. Ed. 129; *Lake County v. Graham*, 130 U. S. 674, 682, 32 L. Ed. 1065; *Livingston County v. First Nat. Bank*, 128 U. S. 102, 118, 32 L. Ed. 359.

**23.** *McClure v. Oxford Tp.*, 94 U. S. 429, 24 L. Ed. 129.

**24. Recitals.**—*Lake County v. Graham*, 130 U. S. 674, 680, 32 L. Ed. 1065; *McClure v. Oxford Tp.*, 94 U. S. 429, 24 L. Ed. 129; *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 267, 43 L. Ed. 689. See post, "Operation and Effect of Recitals," IV, V.

**Amount of bonds issued.**—Where the amount of the bonds issued is stated in the recitals in the bonds, a purchaser is charged with notice thereof. The holder of each bond is apprised of that fact. *Nesbit v. Riverside Independent Dist.*, 144 U. S. 610, 617, 36 L. Ed. 562; *Dixon County v. Field*, 111 U. S. 83, 95, 28 L. Ed. 360; *Lake County v. Graham*, 130 U. S. 674, 682, 32 L. Ed. 1065; *Sutliff v. Lake County Comm'rs*, 147 U. S. 230, 236, 37 L. Ed. 145.

**Purpose of issue.**—Where municipal bonds upon their face show that they were executed in payment of a railroad subscription, purchasers are charged with notice that they were not issued for ordinary municipal purposes under any power conferred by the charter of the city or by an act which authorized the city council "to issue city bonds to any amount not exceeding, at any one time, in the aggregate, the sum of \$75,000," for debts and expenses incurred for ordinary municipal purposes. *Quincy v. Cooke*, 107 U. S. 549, 551, 27 L. Ed. 549.

**25. Reference to legal authority under which issued.**—*McClure v. Oxford Tp.*, 94 U. S. 429, 432, 24 L. Ed. 129.

Where a municipal board when countersigning bonds for the purpose of sale affixed to them a statement that they are issued in virtue of the authority of the constitution of the state and as a result of the command of the supreme court of the state, the takers of such bonds are affected with notice of the legal authority under which they were issued and of the nature of the rights conferred by that authority. *Board of Liquidation v. Louisiana*, 179 U. S. 622, 639, 45 L. Ed. 347.

**26.** *Anderson County Comm'rs v. Beal*, 113 U. S. 227, 238, 28 L. Ed. 966; *McClure v. Oxford Tp.*, 94 U. S. 429, 432, 24 L. Ed. 129; *Northern Bank v. Porter Tp.*, 110 U. S. 608, 618, 28 L. Ed. 258.

In *McClure v. Oxford Tp.*, 94 U. S. 429, 24 L. Ed. 129, it was held, "that, as the (Kansas) act of March 1st, 1872, did not go into effect till it was published, and it was not published till March 21st, 1872, and required 30 days' notice of the election, and as the bonds were dated April 15th, 1872, and stated that the election was held April 8th, 1872, and gave the title of the act, and the date of its approval, their invalidity appeared on their face, in connection with the terms of the act, because 30 days had not elapsed between the time the law took effect and the day of the election." *Crow v. Oxford*, 119 U. S. 215, 221, 30 L. Ed. 388. See, to the same effect, *Anderson County Comm'rs v. Beal*, 113 U. S. 227, 238, 28 L. Ed. 966; *Northern Bank v. Porter Tp.*, 110 U. S. 608, 618, 28 L. Ed. 258.

Where county bonds contained recitals to the effect that they were issued as authorized by N. C. Code, §§ 1996-99, providing that: "The boards of commissioners of the several counties shall have power to subscribe stock to any railroad



(4) *Purchasers from Prior Holders*—(a) *Purchasers from Bona Fide Holders*.—Holders of municipal bonds, whose predecessors in ownership were bona fide holders for value without notice and before maturity, occupy the position of such holder. They succeeded to the rights of those predecessors. A bona fide holder of such security is entitled to transfer to a third party all the rights with which he is vested.<sup>27</sup> Such third party takes a good title, freed from infirmities in its origin as it was in the hands of his predecessor, although he had notice of

company when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest;” the purchasers of such bonds when their validity is questioned cannot assume that the railroad had been begun before the adoption of the constitution of North Carolina of 1868 which antedated the charter of the company. *Stanly County v. Coler*, 190 U. S. 437, 47 L. Ed. 1126. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID, ante, p. 618.

**Bonds issued to company formed by consolidation.**—On April 5, 1870, the county court of Bates County, Missouri, having received the requisite petition, ordered that an election be held May 3, in Mount Pleasant township, for the purpose of determining whether a subscription of \$90,000 should be made on behalf of the township to the capital stock of the Lexington, Chillicothe, and Gulf Railroad Company, to be paid for in the bonds of the county, upon certain conditions and qualifications set forth in the order. The election resulting in favor of the subscription; whereupon the court, June 14, 1870, made an order that said sum “be, and is hereby, subscribed \* \* \* subject to and in pursuance of all the terms, restrictions, and limitations” of the order of April 5, and that the agent of the court be authorized and directed to make said subscription, on behalf of the township, on the stock books of said company, and, in making it, to have copied in full the order of the court as the conditions on which it was made, and that he report his acts to the court. The agent, December 19, 1870, reported that the company had no stock books, for which, and other reasons, he did not make the subscription, concluding his report with the words, “the bonds of said township are, therefore, not subscribed,” which report was formally adopted by the court. January 18, 1871, the county court made another order, reciting that the subscription had been made to said Lexington, Chillicothe, and Gulf Railroad Company; that a consolidation had been made between that and another company, resulting in the Lexington, Lake and Gulf Railroad Company, and directing that \$90,000 of bonds be issued to the latter company in payment and satisfaction of said original subscription. The order concluded by authorizing the agent of the court “to subscribe said stock” to said Lexington, Lake and Gulf Railroad Company. The agent made the subscription on

the books of that company, which was accepted by it, and a certificate of stock issued to the county. The bonds recite on their face that they are issued to the Lexington, Lake and Gulf Railroad Company, in payment of the subscription to the Lexington, Chillicothe and Gulf Railroad Company, authorized by the vote of the people held May 3, 1870, and that the two companies were consolidated, as required by law. Held that there can be no recovery on said bonds, as their invalidity is shown by their recitals. Under the ruling of *Harshman v. Bates County*, 92 U. S. 569, 23 L. Ed. 747, the recitals in the bonds are such that there can be no bona fide holders of them; and to the like effect in principle is *McClure v. Oxford Tp.*, 94 U. S. 429, 24 L. Ed. 129; *County of Bates v. Winters*, 97 U. S. 83, 91, 24 L. Ed. 933. See *Livingston County v. First Nat. Bank*, 128 U. S. 102, 118, 32 L. Ed. 359.

**27. Purchaser from prior holder.**—*Commissioners v. Bolles*, 94 U. S. 104, 109, 24 L. Ed. 46; *McClure v. Oxford Tp.*, 94 U. S. 429, 432, 24 L. Ed. 129; *Montclair v. Ramsdell*, 107 U. S. 147, 159, 27 L. Ed. 431; *Cromwell v. Sac County*, 96 U. S. 51, 24 L. Ed. 681; *Scotland County v. Hill*, 132 U. S. 107, 116, 33 L. Ed. 261; *Stewart v. Lansing*, 104 U. S. 505, 26 L. Ed. 866; *Gunnison County Comm’rs v. Rollins*, 173 U. S. 255, 274, 43 L. Ed. 689; *Commissioners v. Clark*, 94 U. S. 278, 286, 24 L. Ed. 59; *Lytle v. Lansing*, 147 U. S. 59, 62, 37 L. Ed. 78.

If any previous holder of the negotiable municipal bonds in suit was a bona fide holder for value, the plaintiff, without showing that he had himself paid value, can avail himself of the position of such previous holder. *Montclair v. Ramsdell*, 107 U. S. 147, 159, 27 L. Ed. 431.

If, in a suit upon negotiable municipal bonds, the defense be such as to require plaintiff to show that value was paid, it is not, in every case, essential to prove that he paid value; for if any intermediate holder between him and the defendant gave value, such intervening consideration will sustain his title. *Montclair v. Ramsdell*, 107 U. S. 147, 27 L. Ed. 431.

In *Commissioners v. Bolles*, 94 U. S. 104, 24 L. Ed. 46, which involved the rights of parties claiming to be bona fide holders certain municipal bonds, issued to a railroad corporation, and by it passed to the contractor who built its track, the court said: “But the plaintiffs are not forced to rest upon mere presumption to



such infirmities or prior equities between the municipality and original payee,<sup>28</sup> or he may have purchased the bond when overdue.<sup>29</sup>

(b) *Title of Prior Holder Invalid.*—Where the title of the original holder of municipal bonds negotiable in form, which are infected with fraud, invalidity, or illegality, is destroyed, that of every subsequent holder which rests on that foundation, and no other, falls with it.<sup>30</sup>

(5) *Presumption That Holders Are Bona Fide Purchasers.*—The holder of negotiable municipal bonds, in the absence of proof to the contrary, is presumed to have taken it underdue for a valuable consideration, and without notice of any objection to which it was liable.<sup>31</sup> But if in a suit brought by a transferee of such bond, the municipality proves that there was fraud or illegality in the in-

support their claim to be considered as having the rights of purchasers without notice of any defense. They can call to their aid the fact that their predecessors in ownership were such purchasers. To the rights of those predecessors they have succeeded. Certainly the railroad company paid for the bonds and coupons by paying an equal amount of their stock, which the county now holds; and nothing in the special facts found shows that the company knew of any irregularity or fraud in their issue." *Montclair v. Ramsdell*, 107 U. S. 147, 160, 27 L. Ed. 431. See, to the same effect, *Scotland County v. Hill*, 132 U. S. 107, 110, 33 L. Ed. 261.

The court proceeded: "And still more; the contractor for building the railroad received the bonds from the county in payment for his work, either in whole or in part, after his work had been completed. There is no pretense that he had notice of anything that should have made him doubt their validity. Why was he not a bona fide purchaser for value? The law is undoubted, that every person succeeding him in the ownership of the bonds is entitled to stand upon his rights." *Commissioners v. Bolles*, 94 U. S. 104, 24 L. Ed. 46; *Montclair v. Ramsdell*, 107 U. S. 147, 160, 27 L. Ed. 431; *Scotland County v. Hill*, 132 U. S. 107, 116, 33 L. Ed. 261.

When a railroad company took municipal bonds and gave its stock therefor, and could have had no reason to suppose that every condition precedent to their issue had not been performed, a subsequent purchaser, at any time prior to the time fixed for their final payment, must be regarded as a bona fide purchaser. *Venice v. Murdock*, 92 U. S. 494, 502, 23 L. Ed. 583; *Genoa v. Woodruff*, 92 U. S. 502, 23 L. Ed. 586.

**28.** *Commissioners v. Clark*, 94 U. S. 278, 24 L. Ed. 59; *Cromwell v. Sac County*, 96 U. S. 51, 24 L. Ed. 681; *Scotland County v. Hill*, 132 U. S. 107, 116, 33 L. Ed. 261; *Montclair v. Ramsdell*, 107 U. S. 147, 159, 27 L. Ed. 431; *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 275, 43 L. Ed. 689.

**Pending suit.**—The ownership of the bonds and coupons by a prior holder under such circumstances as would protect that holder against any defense by the party issuing them, entitles a subsequent

holder to recover, even if he, when afterwards purchasing for himself or others, had knowledge of the pendency of the suit affecting the title or validity of the bonds. *Scotland County v. Hill*, 132 U. S. 107, 115, 33 L. Ed. 261. See ante, "Necessity for Want of Notice," IV, Q, 2, a, (3), (a).

**29.** *Scotland County v. Hill*, 132 U. S. 107, 116, 33 L. Ed. 261. See, also, *Montclair v. Ramsdell*, 107 U. S. 147, 159, 27 L. Ed. 431.

**30.** *Title of prior holder involved.*—*Commissioners v. Clark*, 94 U. S. 278, 24 L. Ed. 59.

If the last purchaser when he bought and every intermediate buyer and holder from the first delivery of the bonds and coupons had actual notice of a pending suit affecting their validity, there can be no recovery. *Scotland County v. Hill*, 132 U. S. 107, 114, 33 L. Ed. 261; *Scotland County v. Hill*, 112 U. S. 183, 28 L. Ed. 692. See ante, "Necessity for Want of Notice," IV, Q, 2, a, (3), (a).

**31.** *Presumption that holders are bona fide purchasers.*—*San Antonio v. Mehaffy*, 96 U. S. 312, 314, 24 L. Ed. 816, citing *Supervisors v. Schenck*, 5 Wall. 772, 18 L. Ed. 556; *Commissioners v. Bolles*, 94 U. S. 104, 109, 24 L. Ed. 46; *Montclair v. Ramsdell*, 107 U. S. 147, 27 L. Ed. 431; *Goodman v. Simonds*, 20 How. 343, 15 L. Ed. 934; *Murray v. Lardner*, 2 Wall. 110, 17 L. Ed. 857; *Shaw v. Railroad Co.*, 101 U. S. 557, 25 L. Ed. 892; *Swift v. Smith*, 102 U. S. 442, 26 L. Ed. 193; *Bernards Tp. v. Morrison*, 133 U. S. 523, 527, 33 L. Ed. 726. See, also, *Bernards Tp. v. Stebbins*, 109 U. S. 341, 344, 27 L. Ed. 956; *New Providence v. Halsey*, 117 U. S. 336, 29 L. Ed. 904; *Cromwell v. Sac County*, 96 U. S. 51, 24 L. Ed. 681; *Pana v. Bowler*, 107 U. S. 529, 533, 542, 27 L. Ed. 424.

This shuts the door, as matter of law, to all inquiry touching the regularity of the proceedings of the officers charged with the duty of subscribing for stock and making payment in the way prescribed. *San Antonio v. Mehaffy*, 96 U. S. 312, 314, 24 L. Ed. 816.

The plaintiffs are the holders of the coupons in suit taken from county bonds, some of which they purchased without notice of any defense. The residue of those held by them are owned by other persons, who deposited them with the plaintiffs.

reception of the instrument, the burden of proof is thrown on the plaintiff to show that he is a holder for value.<sup>32</sup>

**The illegality which shifts the burden of proof** on the holder to prove that he paid value must be something which relates to the consideration.<sup>33</sup>

**More irregularity in the conduct of the election** is not such an illegality as is contemplated by the rule, and does not deprive the holder of the bonds and coupons of the presumption that he acquired them for value.<sup>34</sup>

b. *Rights of Bona Fide Holders*—(1) *In General*.—Bona fide holders for value before maturity of negotiable municipal bonds are entitled to the rights of a holder of negotiable paper taken in the ordinary course of business before maturity.<sup>35</sup> Holders of such instruments are as effectually shielded from the defense or prior equities between the original parties, if unknown to them at the time of the transfer, as the holders of any other class of negotiable instruments.<sup>36</sup> A bona fide purchaser of such bonds for value, before maturity, takes

for collection, taking a receipt. There was no evidence when or for what consideration those other persons purchased, and no evidence of actual notice to them or to the plaintiffs of any of the facts anterior to the issue of the bonds. The findings of the court exhibit no fraud in the inception of the contracts, nor anything that casts upon the holders of the bonds or coupons the burden of showing that they are bona fide holders for value. The legal presumption, therefore, is that they are. *Commissioners v. Bolles*, 94 U. S. 104, 109, 24 L. Ed. 46.

**32.** *Smith v. Sac County*, 11 Wall. 139, 20 L. Ed. 102; *Stewart v. Lansing*, 104 U. S. 505, 26 L. Ed. 866; *Pana v. Bowler*, 107 U. S. 529, 542, 27 L. Ed. 424.

Where the actual illegality of the bonds is established, the burden of proof is upon the holder to show that he occupies the position of bona fide holder. *Lytle v. Lansing*, 147 U. S. 59, 62, 37 L. Ed. 78.

In the case of *Stewart v. Lansing*, 104 U. S. 505, 26 L. Ed. 866, it was held that the actual illegality of the bonds being established, it was incumbent upon the plaintiff to show that he occupied the position of a bona fide holder before he could recover. In such a case, however, the plaintiff fulfills all the requirements of the law by showing that either he, or some person through whom he derives title, was a bona fide purchaser for value without notice. *Commissioners v. Bolles*, 94 U. S. 104, 24 L. Ed. 46; *Montclair v. Ramsdell*, 107 U. S. 147, 27 L. Ed. 431; *Scotland County v. Hill*, 132 U. S. 107, 33 L. Ed. 261; *Lytle v. Lansing*, 147 U. S. 59, 62, 37 L. Ed. 78.

**So held as to town bonds issued in aid of a railroad** which, though good upon their face, were undoubtedly void as between the railroad company and the town. *Stewart v. Lansing*, 104 U. S. 505, 26 L. Ed. 866.

**33.** *Pana v. Bowler*, 107 U. S. 529, 543, 27 L. Ed. 424.

"In *Smith v. Sac County*, 11 Wall. 139, 20 L. Ed. 102, the report shows that the bonds were issued to a contractor to pay for the building of a courthouse; that the

county judge who executed and delivered them was bribed to do so; and that the courthouse never was built." *Pana v. Bowler*, 107 U. S. 529, 542, 27 L. Ed. 424.

**34.** *Pana v. Bowler*, 107 U. S. 529, 544, 27 L. Ed. 424.

**35. Rights of bona fide holders.**—*Humboldt Tp. v. Long*, 92 U. S. 642, 23 L. Ed. 752; *Montclair v. Ramsdell*, 107 U. S. 147, 161, 27 L. Ed. 431; *Railroad Co. v. National Bank*, 102 U. S. 14, 26 L. Ed. 61; *Murray v. Lardner*, 2 Wall. 110, 17 L. Ed. 857; *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. Ed. 520; *Meyer v. Muscatine*, 1 Wall. 384, 17 L. Ed. 564; *Cromwell v. Sac County*, 96 U. S. 51, 24 L. Ed. 681; *Converse v. Fort Scott*, 92 U. S. 503, 509, 23 L. Ed. 621. See the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 296.

**36.** *Lexington v. Butler*, 14 Wall. 282, 296, 20 L. Ed. 809; *Moran v. Commissioners*, 2 Black 722, 17 L. Ed. 342; *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548; *Murray v. Lardner*, 2 Wall. 110, 17 L. Ed. 857; *Cromwell v. Sac County*, 96 U. S. 51, 24 L. Ed. 681; *Montclair v. Ramsdell*, 107 U. S. 147, 27 L. Ed. 431; *Railroad Co. v. National Bank*, 102 U. S. 14, 26 L. Ed. 61.

Where a municipal corporation has power, under any circumstances, to issue negotiable bonds, they are no more liable to be impeached for any infirmity in the hands of a bona fide holder than any other commercial paper. *Supervisors v. Schenck*, 5 Wall. 772, 784, 18 L. Ed. 556; *Gelpcke v. Dubuque*, 1 Wall. 175, 203, 17 L. Ed. 520; *County of Macon v. Shores*, 97 U. S. 272, 279, 24 L. Ed. 889; *Lexington v. Butler*, 14 Wall. 282, 296, 20 L. Ed. 809; *Board of Comm'rs v. Aspinwall*, 21 How. 539, 16 L. Ed. 208; *Bissell v. Jeffersonville*, 24 How. 287, 299, 16 L. Ed. 664; *San Antonio v. Mehaffy*, 96 U. S. 312, 314, 24 L. Ed. 816; *Hopper v. Covington*, 118 U. S. 148, 150, 30 L. Ed. 190.

**Municipal aid bonds.**—A bona fide holder of bonds issued in aid of a railroad or other work of internal improvement, secures a good title free from prior equities between antecedent parties to the same extent as in case of bills of exchange



it freed from all infirmities in its origin, unless it is absolutely void for want of power in the maker to issue it, or its circulation is by law prohibited by reason of the illegality of the consideration;<sup>37</sup> and can recover against the municipality the full amount of them, though he may have paid therefor less than their par value.<sup>38</sup>

(2) *Irregularities in Exercise of Power to Issue Bonds*.—(a) *In General*.—If the power to make bonds exists in the municipality, the bona fide holder, for value without notice, is protected against mere irregularities in the manner of its exercise. In a suit by such holder questions of irregularity cannot be considered.<sup>39</sup> A city will be estopped to deny its indebtedness, where the regularity of mode of procedure is the only defect alleged, and the evidences of indebtedness have come into the hands of a bona fide holder for value.<sup>40</sup>

**Municipal Aid Bonds.**—A purchaser of bonds in open market, for value, issued by a municipality in payment of a subscription for stock in a railroad company, is not charged with any defect or irregularity in their issue.<sup>41</sup>

(b) *Preliminary Requisites and Proceedings*.—**Omission of Formalities and Ceremonies.**—If there be lawful authority for the municipality to issue its bonds, the omission of formalities and ceremonies cannot be urged against a bona fide holder seeking to enforce them.<sup>42</sup> Bonds of this sort may be valid in the hands of a bona fide holder, notwithstanding the fact that the preliminary proceedings requisite to their issue may have been so defective as to sustain a direct proceeding against the county officers to annul them or prevent their issue.<sup>43</sup> If the legal authority under which the public agents acted in issuing mu-

and promissory notes. *Commissioners v. Clark*, 94 U. S. 278, 287, 24 L. Ed. 59.

The bona fide holders of such contracts as have been put on sale in the money market, by corporations or by counties acting corporately, will be protected against their efforts to be relieved from the responsibilities of official acts, in putting such papers into circulation, for capitalists to invest money in them, on assurances that the principal and interest would be paid accordingly. *Moran v. Commissioners*, 2 Black 722, 17 L. Ed. 342.

The legal effect of a valid negotiable coupon bond given in payment of a subscription to the stock of a railroad company, if found in the hands of a bona fide holder for value before maturity, would be to bind the taxpayers for the levy and collection of a tax for its payment. *Katzenberger v. Aberdeen*, 121 U. S. 172, 176, 30 L. Ed. 911.

37. *Cromwell v. Sac County*, 96 U. S. 51, 24 L. Ed. 681.

38. *Cromwell v. Sac County*, 96 U. S. 51, 24 L. Ed. 681; *Woods v. Lawrence County*, 1 Black 386, 17 L. Ed. 122; *Richards v. Lawrence County*, 154 U. S., appx., 536, 17 L. Ed. 558. See ante, "Consideration," IV, Q, 2, a, (2).

39. *Irregularities in exercise of power to issue bonds*.—*Anthony v. Jasper County*, 101 U. S. 693, 697, 25 L. Ed. 1005; *Lynde v. The County*, 16 Wall. 6, 13, 21 L. Ed. 272; *County of Daviess v. Huidekoper*, 98 U. S. 98, 25 L. Ed. 112; *County of Dallas v. Mackenzie*, 94 U. S. 660, 663, 24 L. Ed. 182; *East Lincoln v. Davenport*, 94 U. S. 801, 24 L. Ed. 322; *Mercer County v. Hackett*, 1 Wall. 83, 96, 17 L.

Ed. 548; *Northern Bank v. Porter Tp.*, 110 U. S. 608, 618, 28 L. Ed. 258; *Hoff v. Jasper County*, 110 U. S. 53, 55, 28 L. Ed. 68. See, also, *Lincoln v. Iron Co.*, 103 U. S. 412, 416, 26 L. Ed. 518.

40. *Meyer v. Muscatine*, 1 Wall. 384, 17 L. Ed. 564.

41. *Municipal aid bonds*.—*Rogers v. Keokuk*, 154 U. S., appx., 546, 18 L. Ed. 74; *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. Ed. 520; *Mercer County v. Hackett*, 1 Wall. 83, 96, 17 L. Ed. 548.

42. *Omission of formalities and ceremonies*.—*Kenicott v. Supervisors*, 16 Wall. 452, 464, 21 L. Ed. 319; *St. Josephs Tp. v. Rogers*, 16 Wall. 644, 21 L. Ed. 328; *Grand Chute v. Winegar*, 15 Wall. 355, 21 L. Ed. 170; *Board of Comm'rs v. Aspinwall*, 21 How. 539, 16 L. Ed. 208; *Gelpcke v. Dubuque*, 1 Wall. 175, 203, 17 L. Ed. 520; *Moran v. Commissioners*, 2 Black 722, 17 L. Ed. 342; *Brooklyn v. Insurance Co.*, 99 U. S. 362, 370, 25 L. Ed. 416; *Woods v. Lawrence County*, 1 Black 386, 17 L. Ed. 122; *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548; *Meyer v. Muscatine*, 1 Wall. 384, 17 L. Ed. 564.

In a suit by a bona fide holder against a municipal corporation to recover the amount of coupons annexed to bonds issued by it, under authority conferred by law, questions of form merely cannot be considered. *East Lincoln v. Davenport*, 94 U. S. 801, 24 L. Ed. 322.

43. *Lee County v. Rogers*, 7 Wall. 181, 19 L. Ed. 160; *County of Warren v. Marcy*, 97 U. S. 96, 105, 24 L. Ed. 977.

\* The bonds are not, in the hands of such a holder, rendered invalid by the fact that the preliminary proceeding was so defective that suit to prevent their issue



nicipal bonds were sufficiently comprehensive, a party taking them has a right to presume that those empowered to act and acting under it had complied with its requirements.<sup>44</sup> Thus irregularities touching the application for, and the notice of the election,<sup>45</sup> or defects in the ordinance on which the vote was taken,<sup>46</sup> do not affect the rights of such holders; nor does the fact that the grand jury failed to fix the manner and terms of payment.<sup>47</sup>

should be, and, on appeal to the supreme court of the state, ultimately was, sustained against the county officers. *County of Warren v. Marcy*, 97 U. S. 96, 24 L. Ed. 977.

**44.** *Meyer v. Muscatine*, 1 Wall. 384, 393, 17 L. Ed. 564.

**45. Irregularities touching application for or notice of election.**—*Roberts v. Bolles*, 101 U. S. 119, 25 L. Ed. 880.

The statute of the state of Illinois of March 6, 1867, provides that the supervisor of a town, if a majority of the legal voters thereof voting at an election to be held for the purpose so authorized, shall subscribe for stock of a railroad company in the name of the town, and issue its bonds in payment therefor, and the fifth section declares that "no mistake in the giving of notice, or in the canvass or return of votes, or in the issuing of the bonds, shall in any way invalidate the bonds so issued, provided that there is a majority of the votes at such election in favor of such subscription." An application in due form for an election was signed by only twelve legal voters and taxpayers instead of twenty, and ten days' notice of the election instead of twenty given. The election was held at the specified time, and a majority of the electors of the town voting thereat favored the subscription. It was accordingly made. An act of the legislature legalized the subscription, and the bonds were issued. Held, that, independently of that act the bonds are not, in the hands of a bona fide purchaser, rendered invalid by reason of the departure from the statutory provisions touching the application for, and the notice of, the election. *Roberts v. Bolles*, 101 U. S. 119, 25 L. Ed. 880.

Where the statute of a state provided that the board of commissioners of a county should have power to subscribe for railroad stock, and issue bonds therefor, in case a majority of the voters of the county should so determine after a certain notice should be given of the time and place of election, and the board subscribed for the stock and issued the bonds purporting to act in compliance with the statute, it is too late to call in question the existence or regularity of the notices in a suit against them by the holders of the coupons attached to the bonds who were innocent holders, in this collateral way. *Board of Comm'rs v. Aspinwall*, 21 How. 539, 16 L. Ed. 208; *Board of Comm'rs v. Wallace*, 21 How. 546, 16 L. Ed. 211.

**Irregular order for election.**—Municipal

bonds, which were indorsed and delivered before maturity, are not void in the hands of a holder for value, and without notice of any defect in the proceedings, because the order for the election in which the majority of the qualified voters of the county voted to subscribe for the stock of the railroad company and purchase the shares, was made by the county court, and not by the supervisors of the county. *Supervisors v. Schenck*, 5 Wall. 772, 778, 18 L. Ed. 556.

**46. Defects in ordinance on which vote taken.**—*Meyer v. Muscatine*, 1 Wall. 384, 393, 17 L. Ed. 564.

It was insisted that "the ordinance on which the vote for a loan was taken was void, because it submitted three distinct propositions in one, and in such a manner as to cut off an effective opposition from all voters who were against the whole of the propositions." The record showed that all the votes cast, except five, were in favor of the loan. The city and citizens adopted and acted upon the ordinance as valid and sufficient. The citizens voted, and the city authorities issued the bonds. No one interposed to prevent their issue. It was not questioned that all the parties acted in good faith. It was held that under such circumstances the city cannot be heard to object to the regularity of its own proceedings. *Meyer v. Muscatine*, 1 Wall. 384, 389, 393, 17 L. Ed. 564.

**47. Failure to fix manner and terms of payment.**—*Woods v. Lawrence County*, 1 Black 386, 17 L. Ed. 122; *Grand Chute v. Winegar*, 15 Wall. 355, 372, 21 L. Ed. 170.

In *Woods v. Lawrence County*, 1 Black 386, 17 L. Ed. 122, it was held that where the statute requires the grand jury to fix the amount of a subscription to railroad stock, and to approve of it, and upon their report being filed empowers commissioners to carry the same into effect by making its subscription in the name of the county, and if these things be done agreeably to the law, the county cannot afterwards deny its obligation to pay the amount subscribed; in a suit brought to recover the arrears of interest on such bonds, it is not necessary for the holder to show that the grand jury fixed the manner and terms of paying for the stock; nor is it a defense for the county to show that the grand jury omitted to do so. It is enough that the manner and terms of payment were agreed upon between the company and the commissioners. *Grand Chute v. Winegar*, 15 Wall. 355, 372, 21 L. Ed. 170.

**Consent Roll and Assessor's Affidavit.**—That the consent roll did not in fact contain the requisite number of taxpayers and that the affidavit of the assessors was not true are unavailing against bona fide holders of the bonds.<sup>48</sup>

(3) *Defects and Irregularities in Execution or Form*—(a) *In General.*—Where the law requires municipal bonds to be executed in a particular manner, such execution is essential to their validity and in the absence of such execution the municipality is not estopped even against a bona fide holder, to deny this validity.<sup>49</sup>

(b) *Place of Execution.*—The fact that negotiable bonds of a municipal corporation which upon their face are apparently valid, were issued at a place not authorized by the charter of the corporation, does not affect the right of a bona fide holder thereof to recover thereon.<sup>50</sup>

(c) *Sealing.*—An irregularity consisting in affixing the seals to the bonds out of the state cannot affect the rights of a holder for value without notice.<sup>51</sup>

**Omission of Seals.**—See post, "Reformation—Omission of Seal," VI, B, 1, b, (4).

(4) *Wrongful Delivery.*—That the municipal officer delivered the bonds of the municipality in violation of special conditions cannot affect the rights of a holder for value without notice.<sup>52</sup>

**Bond Left in Escrow Delivered Contrary to Agreement.**—See the title ESCROW, vol. 5, p. 901.

(5) *Bonds Issued by De Facto Officers.*—The fact that municipal bonds were issued by de facto officers does not affect their validity in the hands of bona fide holders.<sup>53</sup>

(6) *Bonds Issued by De Facto Municipal Corporation.*—See post, "Determination Whether Municipality Duly Organized," IV, S, 3.

**Existence of Municipality.**—If both the governor and legislature of a state give notice to the world that a county within the territorial limits of the state has been duly organized and exists with full power of contracting, a purchaser in open market may safely purchase the securities of that county.<sup>54</sup>

(7) *Fraud and Misconduct of Officers or Agents of Municipality.*—Whatever fraud the officers authorized to issue municipal bonds may have committed in executing and disposing of them, will not affect the title of a subsequent bona fide purchaser for value before maturity or the liability of the municipality.<sup>55</sup>

48. **Assessor's affidavit.**—Bernards Tp. v. Morrison, 133 U. S. 523, 526, 33 L. Ed. 726.

So here where the commissioners to issue township bonds were duly appointed; the issue of bonds was not in excess of the amount authorized by the statute; a paper purporting to contain the consent of the requisite number of taxpayers, duly verified by the affidavit of the township assessor, was filed in the office of the clerk of the county; and the plaintiffs were bona fide holders. Bernards Tp. v. Morrison, 133 U. S. 523, 526, 33 L. Ed. 726.

49. *Bissell v. Spring Valley Tp.*, 110 U. S. 162, 169, 28 L. Ed. 105.

50. *Place of execution.*—Supervisors v. Schenk, 5 Wall. 772, 784, 18 L. Ed. 556.

51. *Sealing.*—Lynde v. The County, 16 Wall. 6, 13, 21 L. Ed. 272.

52. *Wrongful delivery.*—Brooklyn v. Insurance Co., 99 U. S. 362, 25 L. Ed. 416.

Where the authorities of a town in Illinois, being thereunto empowered, subscribed in its behalf for stock in a railroad company, and issued its coupon bonds in payment therefor, the town, when sued by a bona fide purchaser for value of the coupons before maturity, can-

not set up as a defense that the town officers delivered the bonds in violation of special conditions of which he had no knowledge or notice from the statute or otherwise. The remedy of the city is against the railroad company, and its own unfaithful officers. Brooklyn v. Insurance Co., 99 U. S. 362, 25 L. Ed. 416.

53. *De facto officer.*—County of Ralls v. Douglass, 105 U. S. 728, 729, 26 L. Ed. 957.

If county bonds are issued in Missouri by a de facto county court, and are sealed with the seal of the court and signed by the de facto president, they cannot be impeached in the hands of an innocent holder by showing that the acting president was not de jure one of the justices of the court. County of Ralls v. Douglass, 105 U. S. 728, 729, 26 L. Ed. 957.

54. *Existence of municipality.*—Comanche County v. Lewis, 133 U. S. 198, 204, 33 L. Ed. 604.

55. *Fraud.*—Cromwell v. Sac County, 96 U. S. 51, 57, 24 L. Ed. 681; Cairo v. Zane, 149 U. S. 122, 37 L. Ed. 673; Lytle v. Lansing, 147 U. S. 59, 37 L. Ed. 78; Kenicott v. Supervisors, 16 Wall. 452, 464, 21 L. Ed. 319; Brooklyn v. Insurance Co., 99 U. S.



Such a holder is not affected by any misconduct,<sup>56</sup> nor unfounded assumption of authority on the part of the agents of the town or county.<sup>57</sup>

(8) *Illegality*.—Even if there is illegality in the inception of the bonds (apart from such illegality as would have made them absolutely void by whomsoever held), a defense upon that ground is not good against a bona fide holder.<sup>58</sup>

(9) *Fraud by Payee Corporation of Municipal Aid Bonds*.—Evidence of the fraud practiced by the railroad company to whom municipal bonds were delivered, and by whom they were paid to bona fide holders for value, cannot be received to defeat the recovery of such holders.<sup>59</sup>

(10) *Amount of Issue in Excess of Amount Voted*.—The fact that the amount of bonds issued by the corporate authorities of a municipality exceeded the amount of railroad stock voted and in payment of which they were issued, can have no effect upon the right of a bona fide holder for value to recover such bonds.<sup>60</sup>

(11) *Bonds Issued for Unauthorized Purpose*.—A negotiable security of a municipal corporation, which upon its face appears to have been duly issued by such corporation, and in conformity with the provisions of its charter, is valid in the hands of a bona fide holder thereof, without notice, although such security was in point of fact issued for a purpose not authorized by the charter of the corporation.<sup>61</sup>

(12) *Failure of Consideration*.—However entire may have been the failure of the consideration promised by parties receiving them, this circumstance will not affect the title of subsequent bona fide purchasers for value before maturity or the liability of the municipalities.<sup>62</sup>

(13) *Irregularities in Sale or Disposal*—(a) *Disposal without Lawful Consideration*.—That the commissioners did not borrow any money on the bonds but disposed of them without lawful consideration, is unavailing against bona fide holders of the bonds.<sup>63</sup>

(b) *Municipal Aid Bonds*—aa. *Exchange for Stock*.—The exchange of municipal aid bonds directly for railroad stock would seem, in the absence of any de-

pose.—*Supervisors v. Schenck*, 5 Wall. 772, 784, 18 L. Ed. 556.

**62. Failure of consideration**.—*Cromwell v. Sac County*, 96 U. S. 51, 57, 24 L. Ed. 681. See, also, *Mercer County v. Hackett*, 1 Wall. 83, 96, 17 L. Ed. 548.

Failure of consideration is not a defense to an action by a bona fide holder of negotiable municipal securities to recover thereon. *Brooklyn v. Insurance Co.*, 99 U. S. 362, 25 L. Ed. 416.

**Municipal aid bonds—Failure to construct road**.—Where the authorities of a town in Illinois being thereunto empowered, subscribed in its behalf for stock in a railroad company and issued coupon bonds in payment therefor, the town, when sued by a bona fide purchaser for value of the coupons before maturity, cannot set up as a defense that the company disregarded its promise to construct the road. The remedy of the town is against the railroad company. *Brooklyn v. Insurance Co.*, 99 U. S. 362, 25 L. Ed. 416.

Municipalities cannot plead hard luck as a defense to their bonds—"hard cases cannot be permitted to make bad law." *Morgan County v. Allen*, 103 U. S. 498, 515, 26 L. Ed. 498.

**63. Disposal without lawful consideration**.—*Bernards Tp. v. Morrison*, 133 U. S. 523, 526, 33 L. Ed. 726.

362, 370, 25 L. Ed. 416; *St. Joseph Tp. v. Rogers*, 16 Wall. 644, 21 L. Ed. 328; *Grand Chute v. Winegar*, 15 Wall. 355, 21 L. Ed. 170; *Board of Comm'rs v. Aspinwall*, 21 How. 539, 16 L. Ed. 208; *Gelpcke v. Dubuque*, 1 Wall. 175, 203, 17 L. Ed. 520; *Moran v. Commissioners*, 2 Black 722, 17 L. Ed. 342; *Woods v. Lawrence County*, 1 Black 386, 17 L. Ed. 122; *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548; *Meyer v. Muscatine*, 1 Wall. 384, 17 L. Ed. 564; *County of Dallas v. MacKenzie*, 94 U. S. 660, 663, 24 L. Ed. 182; *Montclair v. Ramsdell*, 107 U. S. 147, 161, 27 L. Ed. 431.

**56.** *East Lincoln v. Davenport*, 94 U. S. 801, 24 L. Ed. 322.

**57.** *County of Dallas v. MacKenzie*, 94 U. S. 660, 663, 24 L. Ed. 182.

**58. Illegality**.—*Montclair v. Ramsdell*, 107 U. S. 147, 161, 27 L. Ed. 431. See ante, "Fraud and Misconduct of Officers or Agents of Municipality," IV, Q, 2, b, (7).

**59. Fraud of payee corporation of municipal aid bonds**.—*Mercer County v. Hackett*, 1 Wall. 83, 94, 17 L. Ed. 548. See *Brooklyn v. Insurance Co.*, 99 U. S. 362, 25 L. Ed. 416.

**60. Amount of issue in excess of amount voted**.—*Walnut v. Wade*, 103 U. S. 683, 697, 26 L. Ed. 526.

**61. Bonds issued for unauthorized pur-**



cision in the courts of the state upon the point, to be a substantial compliance with the statute authorizing them, or, at the most, a matter which would not defeat the rights of a bona fide purchaser.<sup>64</sup>

bb. *Sale at Less than Par by Payee*.—Where the law authorizing the issue of bonds in aid of a railroad company required that they should not be sold at less than par, the right of a bona fide holder for value of such bonds to recover their par value is not affected by the fact that the company to whom they were given sold them at less than par value. Evidence of such sale cannot be received to defeat the recovery of such holders.<sup>65</sup>

(14) *Disposal of Proceeds*.—**Disposal of Stock Received for Municipal Aid Bonds**.—A wrong, on the part of the council, or board having the matter in

**64. Exchange for stock**.—Bernards *Tp. v. Stebbins*, 109 U. S. 341, 352, 27 L. Ed. 956; *Queensbury v. Culver*, 19 Wall. 83, 22 L. Ed. 100; *Meyer v. Muscatine*, 1 Wall. 384, 17 L. Ed. 564. See, also, *Thompson v. Perrine*, 103 U. S. 806, 810, 26 L. Ed. 612; *Comanche County v. Lewis*, 133 U. S. 198, 207, 33 L. Ed. 604; *Scipio v. Wright*, 101 U. S. 665, 25 L. Ed. 1037; *Montclair v. Ramsdell*, 107 U. S. 147, 160, 27 L. Ed. 431.

An act empowered commissioners to dispose of certain town bonds (whose issue for the benefit of a railroad company named, the act authorized), "to such persons or corporation and upon such terms as the commissioners should deem most advantageous for the town, but not for less than par;" and to "donate the money which should be so raised to the railroad company." The act, however, required that they should not "pay over any money or bonds" except upon certain conditions specified. The commissioners did not sell the bonds, but handed them over to the railroad company in discharge of the authorized donation. On suit against the town by a bona fide holder of the bonds, held, that there was no violation of the act by the commissioners in what they had done. *Queensbury v. Culver*, 19 Wall. 83, 84, 22 L. Ed. 100.

**Lien retained on stock till bonds paid**.—A city was authorized to issue the bonds in order to borrow money to pay for the stock. If the company chose to receive the bonds in payment for the stock, retaining a lien on the stock until the bonds were paid, there was no legal obstacle in the way of their doing so. The object of issuing the bonds was thus accomplished, and no injury was done to those who were to pay them. It is neither averred in the answer, nor claimed in the argument, that the railroad company took them at less than their face. It does not appear that any one objected then, and no one can object now. After the bonds passed into the hands of the railroad company, the company was at liberty to sell them on such terms as it might deem proper. The act of January 25, 1855, ch. 128, by a clear implication, authorizes cities to give their bonds in payment of their subscriptions of railroad stock, and expressly authorizes the bonds to "be sold by the company at such discount as may be deemed expedient."

*Meyer v. Muscatine*, 1 Wall. 384, 392, 17 L. Ed. 564.

**New York**.—It was held "in *Scipio v. Wright*, 101 U. S. 665, 25 L. Ed. 1037, \* \* \* following the decisions of the state court, some of which were made long prior to the passage of the particular enactment now under examination—that a purchaser of town bonds, having notice that they were exchanged for stock in a railroad company, in violation of a statute \* \* \* was not a bona fide holder, and could not enforce the payment of them. We perceive no reason to qualify that ruling, and therefore proceed to the consideration of other questions not embraced by it." *Thompson v. Perrine*, 103 U. S. 806, 810, 26 L. Ed. 612.

"The case of *Scipio v. Wright*, 101 U. S. 665, 25 L. Ed. 1037, rested entirely on the fact of the uniform and continuous ruling on the part of the highest court in the state of New York, in which the bonds were issued, and was a case arising between a municipality and a purchaser who took with notice of the manner in which the bonds had been disposed of." *Comanche County v. Lewis*, 133 U. S. 198, 207, 33 L. Ed. 604.

**65. Sale at less than par by payee**.—*Richardson v. Lawrence County*, 154 U. S., appx., 536, 17 L. Ed. 558; *Woods v. Lawrence County*, 1 Black 386, 407, 17 L. Ed. 122; *Mercer County v. Hackett*, 1 Wall. 83, 96, 17 L. Ed. 548; *Grand Chute v. Winegar*, 15 Wall. 355, 372, 21 L. Ed. 170; *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. Ed. 520; *Meyer v. Muscatine*, 1 Wall. 384, 17 L. Ed. 564.

In the case of *Woods v. Lawrence County*, 1 Black 386, 17 L. Ed. 122, it was decided that in a suit brought on the coupons of these bonds by a bona fide holder, his right to recover is not affected by the fact that the railroad company sold the bonds at a discount (of 25 per cent), contrary to the provisions of their charter, which forbids the sale of them at less than their par value. *Mercer County v. Hackett*, 1 Wall. 83, 96, 17 L. Ed. 548; *Grand Chute v. Winegar*, 15 Wall. 355, 372, 21 L. Ed. 170.

A limitation upon a railroad company that it should not sell the bonds of the counties at less than par, after it had taken them in payment of the subscription, had

charge, in not carrying out the subscription as directed by the vote of the people, but in wrongfully disposing of the stock received, does not affect the question of the validity of the bonds given for such stock nor can it be presented as a defense against one who has purchased in good faith the bonds thus issued.<sup>66</sup>

(15) *Payee Corporation Defectively Organized*.—That the payee corporation of municipal aid bonds was defectively organized or was a corporation de facto and not de jure, is no defense to an action by a bona fide holder of such bonds.<sup>67</sup>

(16) *Time of Incorporation of Payee Corporation*.—Bonds issued to aid a railroad company are not void because the railroad was not incorporated until

no other meaning than this, that they should not so sell them at the expense of the counties—causing any loss to them less than their par value, as they were payable to the company at par in twenty years, with an annual interest of six per cent. *Woods v. Lawrence County*, 1 Black 386, 412, 17 L. Ed. 122.

The law of Pennsylvania authorizing the issue of bonds by a county in payment for a subscription to a railroad company, required that the company should not sell them at less than par value. It was held that the right of the holder of these bonds and coupons to recover their par value is not affected by the fact that the railroad company to whom they were given paid them out to contractors for sixty-four cents on the dollar. *Richardson v. Lawrence County*, 154 U. S., appx., 536, 17 L. Ed. 558.

66. *Disposal of stock received for municipal aid bonds*.—*Cairo v. Zane*, 149 U. S. 122, 137, 37 L. Ed. 673; *Anderson County Comm'rs v. Beal*, 113 U. S. 227, 240, 28 L. Ed. 966.

Bonds were issued by a city and received by a railroad company in payment of a subscription, and stock for an equal amount was issued by the company to the city. It was held that the fact the stock thus received was immediately thereafter sold to the company for a portion of the city bonds, did not invalidate the bonds, although this sale was in pursuance of an agreement made by the city long prior to the execution of the bonds. *Cairo v. Zane*, 149 U. S. 122, 37 L. Ed. 673.

"In the case of *Anderson County Comm'rs v. Beal*, 113 U. S. 227, 28 L. Ed. 966, it appeared that after bonds had been voted by the county, at an election held on September 13, 1869, the county board, on November 5, passed an order directing a subscription in accordance with the terms of the vote, and also 'that the stock above subscribed for by this board in behalf of Anderson County is hereby sold and transferred, for and in consideration of the sum of one dollar, the receipt whereof is hereby acknowledged, to James F. Joy, president of said railroad company, and the chairman of this board is authorized to sign a transfer of said stock to said James F. Joy, and to assign the certificate for said stock issued to Anderson County by said railroad company, and to authorize in such assignment the necessary transfer of said stock on the books of said com-

pany.' And it was averred that this transfer thus ordered was for the benefit of the railroad company. In reference to this, Mr. Justice Blatchford, speaking for the court, observed (p. 240): 'When the bonds were delivered to the company the transaction was complete, and the bonds, as they afterwards passed to bona fide holders, passed free from any impairment by reason of any dealing by the board with the stock subscribed for, to which the county became entitled by the issuing and delivery of the bonds. The board may have committed an improper act in parting with the stock, but that is no concern of a bona fide holder of the bonds or coupons.' *Cairo v. Zane*, 149 U. S. 122, 137, 37 L. Ed. 673.

67. *Payee corporation defectively organized*.—County of Daviess v. Huidekoper, 98 U. S. 98, 25 L. Ed. 112; County of Macon v. Shores, 97 U. S. 272, 24 L. Ed. 889; County of Ralls v. Douglass, 105 U. S. 728, 26 L. Ed. 957.

Where, pursuant to the assent given by two-thirds of the qualified voters of a county in Missouri, at an election therein, stock in a railway company, which afterwards constructed its road through the county, was subscribed for by the county court, and the county exercised its rights as a stockholder, and issued its bonds to pay for the stock, held, that the bonds are not, in the hands of a bona fide holder for value, rendered void by the fact that, at the time of such election, the company was not created according to law. *County of Daviess v. Huidekoper*, 98 U. S. 98, 25 L. Ed. 112.

It cannot be shown as a defense to bonds issued by counties in Missouri in payment of subscriptions to the capital stock of a company, and in the hands of innocent holders, that the company to whose stock the subscription was made was not organized within the time limited by its charter. *County of Ralls v. Douglass*, 105 U. S. 728, 729, 26 L. Ed. 957.

*That charter ceased before company organized*.—In a suit upon coupons for interest attached to bonds issued by a county in payment for its subscription to the capital stock of a railroad company, where the point was made that "the charter of the company had ceased before the company was organized," it was held that this was a question between the state and the company alone. *Dallas County v. Huidekoper*, 154 U. S., appx., 654, 25 L. Ed. 974.



the day of the election authorizing the subscription,<sup>68</sup> but a purchaser of county bonds issued in payment of a subscription to the capital stock of a railroad company cannot assume, in order to validate the bonds, that the company existed prior to the time stated in the bonds or was incorporated by a different statute than that mentioned in the bonds.<sup>69</sup>

(17) *Consolidation of Payee Company with Another.*—That the railroad company in whose favor a municipality voted a stock subscription was subsequently lawfully consolidated with another company and the bonds in payment of the subscription issued to the consolidated company, is no defense to an action by a bona fide holder of the bonds.<sup>70</sup>

(18) *Ultra Vires Act Not Affecting Validity of Bonds.*—An attempt of a municipality to exercise powers which it does not possess, and which do not affect the validity of the bonds it has issued, cannot affect the rights of a bona fide holder.<sup>71</sup>

(19) *Bonds Secured by Mortgage.*—Where negotiable bonds of a municipal corporation have been transferred to a bona fide holder for value before maturity and a bill is filed to foreclose the mortgage, no other or further defenses are allowed as against the mortgage than would be allowed were the action brought in a court of law upon the bonds.<sup>72</sup>

(20) *Statutory Lien to Secure State Issuing State Aid Bonds.*—A statutory lien acquired by a state under its statutes upon the issue of its bonds to aid a railroad company does not bind the property of the company to which the issue was made for the payment of the bonds so issued, and the interest thereon, to the several holders thereof, but only to the state.<sup>73</sup>

**68. Time of incorporation of payee corporation.**—County of Cass *v.* Johnston, 95 U. S. 360, 369, 24 L. Ed. 416; Cass County *v.* Jordan, 95 U. S. 373, 24 L. Ed. 419.

**69.** Stanly County *v.* Coler, 190 U. S. 437, 444, 47 L. Ed. 1126.

**70. Consolidation of payee company with another.**—Harter *v.* Kernochan, 103 U. S. 562, 563, 26 L. Ed. 411; Bonham *v.* Needles, 103 U. S. 648, 26 L. Ed. 451; Louisville *v.* Savings Bank, 104 U. S. 469, 26 L. Ed. 775. See post, "In General," IV, U. 2, a.

Whether or not it is a defense to this action by a bona fide holder for value of the interest coupons sued on without actual notice that after the order of the board of county commissioners for an election, and after a favorable vote by a three-fifths majority of the qualified electors of Salamanca Township, according to law, to subscribe stock in the State Line, Oswego, and Southern Kansas Railroad Company, payable in negotiable bonds, to aid in the construction of its railroad, the subscription of stock and the issue of bonds without any further election were made to the Memphis, Carthage, and Northwestern Railroad Company with which said prior company, in whose favor the vote was had, had become merged and consolidated under a law existing at the time of said election, to form a continuous line. The second question is likewise answered in the negative upon the authority of County of Scotland *v.* Thomas, 94 U. S. 682, 24 L. Ed. 219, also decided here since the trial below. The power of the State Line, Oswego, and Southern Kansas Railroad Company to consolidate

with other companies existed when the vote for subscription was taken in the township. When the consolidation took place there was a perfected power in the township to subscribe to the stock of that company, and there was also an existing privilege in the company to receive the subscription. That privilege, as was held in the Scotland county case, passed by the consolidation to the consolidated company. Wilson *v.* Salamanca, 99 U. S. 499, 503, 25 L. Ed. 330.

**71.** County Comm'rs *v.* Chandler, 96 U. S. 205, 24 L. Ed. 625.

That fact that the bridge, in aid of the construction of which the bonds were issued under the act of Nebraska passed February 15, 1869, authorizing cities, counties, and precincts in that state to issue bonds in aid of works of internal improvement was built as a toll bridge, and is used as such, does not affect their validity in the hands of a bona fide holder for value before maturity. County Comm'rs *v.* Chandler, 96 U. S. 205, 24 L. Ed. 625.

**72. Bonds secured by mortgage.**—Kenicott *v.* Supervisors, 16 Wall. 452, 21 L. Ed. 319, affirming Carpenter *v.* Longan, 16 Wall. 271, 21 L. Ed. 313. See the title BILLS, NOTES AND CHECKS, vol. 3, p. 314.

**73. Statutory lien to secure state issuing state aid bonds.**—Tennessee Bond Cases, 114 U. S. 663, 685, 29 L. Ed. 281.

So held as to the lien with which the state of Tennessee was vested upon the issue of its bonds under the internal improvement act of February 11, 1852, and the several acts amendatory thereof.



(21) *Lands Conveyed to State as Security against Loss on Loan of Bonds.*—Where land is conveyed to the state by a corporation as indemnity against losses on her bonds loaned to it, the bondholders have no equity for the application of the land to the payment of the bonds which can be enforced against the state, and her grantees take the property discharged of any claim of the bondholders.<sup>74</sup>

(22) *Benefit of Compromise Offered by State.*—The bona fide holder of an invalid bond is not entitled to the benefit of the scheme of compromise which the state had offered to the holders of its securities that were valid in the hands of the first taker.<sup>75</sup>

(23) *Effect of Prior and Subsequent Judicial Decisions.*—See the title COURTS, vol. 4, p. 1098, et seq.

(24) *Bonds Issued without Authority*—(a) *In General.*—Where there is no authority to issue municipal bonds, a bona fide holder for value before maturity cannot have a right to recover upon them or their coupons. Such bonds issued without authority or law are void even in the hands of a bona fide holder,<sup>76</sup> and

Tennessee Bond Cases, 114 U. S. 663, 685, 29 L. Ed. 281.

**74. Land conveyed to state as security against loss on loan of bonds.**—Chamberlain v. St. Paul, etc., R. Co., 92 U. S. 299, 23 L. Ed. 715.

In this case, the deed and mortgage to the state were not intended to create a trust in favor of the holders of her own bonds. The state was primarily liable to the bondholders; and it was only as between her and the company that the relation of principal and surety existed. Whatever right the bondholder has to compel the application of the lands received by the state to the payment of the bonds held by him, it is one resting in equity only. It is not a legal right arising out of any positive law or any agreement of the parties; and does not create any lien which attaches to and follows the property. It is a right to be enforced, if at all, only by a court of chancery against the surety. But, the state being the surety, it cannot be enforced at all, and, not being a specific lien upon the property, cannot be enforced against the state's grantees. Chamberlain v. St. Paul, etc., R. Co., 92 U. S. 299, 306, 23 L. Ed. 715.

**75. Benefit of compromise offered by state.**—Guaranty Co. v. Board of Liquidation, 105 U. S. 622, 624, 26 L. Ed. 1106.

**76. Bonds issued without authority.**—Marsh v. Fulton County, 10 Wall. 676, 19 L. Ed. 1040; East Oakland v. Skinner, 94 U. S. 255, 24 L. Ed. 125; Buchanan v. Litchfield, 102 U. S. 278, 26 L. Ed. 138; Hayes v. Holly Springs, 114 U. S. 120, 29 L. Ed. 81; Daviess County v. Dickinson, 117 U. S. 657, 29 L. Ed. 1026; Hopper v. Covington, 118 U. S. 148, 151, 30 L. Ed. 190; Merrill v. Monticello, 138 U. S. 673, 681, 682, 34 L. Ed. 1069; Brenham v. German American Bank, 144 U. S. 173, 188, 36 L. Ed. 390; Northern Bank v. Porter Tp., 110 U. S. 608, 28 L. Ed. 258; Dallas County v. MacKenzie, 94 U. S. 660, 24 L. Ed. 182; South Ottawa v. Perkins, 94 U. S. 260, 269, 24 L. Ed. 154; Wells v. Supervisors, 102 U. S. 625, 26 L. Ed. 122; Hoff v. Jasper County, 110 U. S. 53, 55, 28 L. Ed. 68; Anthony v. Jasper

County, 101 U. S. 693, 697, 25 L. Ed. 1005; Merchants' Bank v. Bergen County, 115 U. S. 384, 391, 29 L. Ed. 430; Post v. Supervisors, 105 U. S. 667, 671, 26 L. Ed. 1204; St. Joseph Tp. v. Rogers, 16 Wall. 644, 21 L. Ed. 328; Jarrolt v. Moberly, 103 U. S. 580, 585, 26 L. Ed. 492; Dixon County v. Field, 111 U. S. 83, 28 L. Ed. 360; Litchfield v. Ballou, 114 U. S. 190, 191, 29 L. Ed. 132; Lewis v. Shreveport, 108 U. S. 282, 286, 27 L. Ed. 728; Ogden v. County of Daviess, 102 U. S. 634, 26 L. Ed. 263; Ottawa v. Carey, 108 U. S. 110, 27 L. Ed. 669; Pendleton County v. Amy, 13 Wall. 297, 305, 20 L. Ed. 579.

Want of legislative authority in fact in the municipality to issue the bonds is a fatal objection to their validity, no matter under what circumstances the holder may have obtained them. South Ottawa v. Perkins, 94 U. S. 260, 269, 24 L. Ed. 154.

"In Hopper v. Covington, 118 U. S. 148, 151, 30 L. Ed. 190, this court \* \* \* said, Mr. Justice Gray delivering the opinion: 'When the law confers no authority to issue the bonds in question, the mere fact of their issue cannot bind the town to pay them, even to a purchaser before maturity and for value. Marsh v. Fulton County, 10 Wall. 676, 19 L. Ed. 1040; East Oakland v. Skinner, 94 U. S. 255, 24 L. Ed. 125; Buchanan v. Litchfield, 102 U. S. 278, 26 L. Ed. 138; Dixon County v. Field, 111 U. S. 83, 28 L. Ed. 360; Hayes v. Holly Springs, 114 U. S. 120, 29 L. Ed. 81; Daviess County v. Dickinson, 117 U. S. 657, 29 L. Ed. 1026.' Merrill v. Monticello, 138 U. S. 673, 681, 34 L. Ed. 1069.

To support a valid issue there must be a valid law so authorizing and bonds issued without a valid law so authorizing are invalid even in the hands of a bona fide purchaser. Post v. Supervisors, 105 U. S. 667, 670, 26 L. Ed. 1204; South Ottawa v. Perkins, 94 U. S. 260, 264, 24 L. Ed. 154.

There can be no bona fide holding where the statute did not in law authorize the issue of the bonds. The objection in such case goes to the point of power. There is an entire want of jurisdiction over the subject. It is not the case of an informality,

cannot be enforced without reference to any defense on the part of the corporation, whether existing at the time or arising subsequently.<sup>77</sup> If there is a want of power, no liability can be created.<sup>78</sup> Good faith is unavailing where there is an entire want of authority in those who profess to act.<sup>79</sup>

**Bonds issued in violation of a provision of the constitution** of a state are void in the hands of bona fide holders for value before maturity.<sup>80</sup> This is the rule where an authority to issue bonds is withdrawn, before it was exercised, by the adoption of a new constitution.<sup>81</sup>

an irregularity, fraud, or excess of authority in an authorized agent. Where there is a total want of authority to issue the bonds, there can be no such thing as a bona fide holding. *East Oakland v. Skinner*, 94 U. S. 255, 258, 24 L. Ed. 125.

**So held as to municipal aid bonds** issued without legislative authority to extend such aid. *St. Joseph Tp. v. Rogers*, 16 Wall. 644, 21 L. Ed. 328; *Aspinwall v. Board of Comm'rs*, 22 How. 364, 16 L. Ed. 296; *Wadsworth v. Supervisors*, 102 U. S. 534, 26 L. Ed. 221; *Norton v. Shelby County*, 118 U. S. 425, 452, 30 L. Ed. 178; *Pendleton County v. Amy*, 13 Wall. 297, 304, 20 L. Ed. 579.

Where county bonds to a railroad company are issued without any authority, they are invalid in the hands of an innocent purchaser. The authority to contract must exist before any protection as innocent purchaser can be claimed by the holder. *Marsh v. Fulton County*, 10 Wall. 676, 19 L. Ed. 1040; *Aspinwall v. Board of Comm'rs*, 22 How. 364, 379, 16 L. Ed. 296; *Meyer v. Muscatine*, 1 Wall. 384, 17 L. Ed. 564; *Wilkes County v. Coler*, 180 U. S. 506, 525, 45 L. Ed. 642.

In the case of *Ottawa v. Carey*, 108 U. S. 110, 27 L. Ed. 669, the court had occasion "to repeat and apply a rule which has always been recognized and adhered to in this court, to the effect, that unless power has been given by the legislature to a municipal corporation to grant pecuniary aid to railroad corporations, all bonds of the municipality, issued for such a purpose, and bearing evidence of the purpose on their face, are void even in the hands of bona fide holders, and this whether the people voted the aid or not." *Lewis v. Shreveport*, 108 U. S. 282, 286, 27 L. Ed. 728.

Unless the specific power to make subscription to capital stock or donations to corporations engaged in the construction of public improvements is granted, corporate bonds issued for the payment of such subscriptions and donations are absolutely void, even as against bona fide holders of the bonds. *Thomson v. Lee County*, 3 Wall. 327, 18 L. Ed. 177; *Marsh v. Fulton County*, 10 Wall. 676, 19 L. Ed. 1040; *St. Joseph Tp. v. Rogers*, 16 Wall. 644, 21 L. Ed. 328; *McClure v. Oxford Tp.*, 94 U. S. 429, 24 L. Ed. 129; *Wells v. Supervisors*, 102 U. S. 625, 26 L. Ed. 122; *Allen v. Louisiana*, 103 U. S. 80, 26 L. Ed. 318; *Ottawa v. Carey*, 108 U. S. 110, 123, 27 L. Ed. 669, reaffirmed in *Lewis v.*

*Shreveport*, 108 U. S. 282, 27 L. Ed. 728.

When a county pleads in defense to its donation bonds to a railroad that it had already made a subscription of stock in payment of which it had issued its bonds, and that it had authority to issue bonds only to the amount of one set of the bonds, it must show that the obligation to issue its bonds in payment of the stock subscription antedated its obligation to issue its bonds in satisfaction of its donation. *Moultrie County v. Fairfield*, 105 U. S. 370, 26 L. Ed. 945.

**77.** *Hill v. Memphis*, 134 U. S. 198, 203, 33 L. Ed. 887.

**78.** *Anthony v. Jasper County*, 101 U. S. 693, 697, 25 L. Ed. 1005; *Northern Bank v. Porter Tp.*, 110 U. S. 608, 618, 23 L. Ed. 258; *Hoff v. Jasper County*, 110 U. S. 53, 55, 28 L. Ed. 68.

**79.** *Dallas County v. MacKenzie*, 94 U. S. 660, 663, 24 L. Ed. 182; *Converse v. Fort Scott*, 92 U. S. 503, 509, 23 L. Ed. 621.

**80.** *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138; *Litchfield v. Ballou*, 114 U. S. 190, 191, 29 L. Ed. 132; *Commercial Bank v. Iola*, 154 U. S., appx., 617, 22 L. Ed. 463; *Otis v. Cullum*, 92 U. S. 447, 448, 23 L. Ed. 496; *Loan Ass'n v. Topeka*, 20 Wall. 655, 22 L. Ed. 455.

Where bonds were issued to a private corporation to aid in constructing and operating foundry and machine shops, although they were subsequently ratified by an act of the legislature, they are held void, since the legislature cannot authorize an issue of bonds for such a purpose. *Commercial Bank v. Iola*, 154 U. S., appx., 617, 22 L. Ed. 463.

"In *Loan Ass'n v. Topeka*, 20 Wall. 655, 22 L. Ed. 455, bonds of a city, issued, as appeared on their face, pursuant to an act of the legislature of Kansas, to a manufacturing corporation, to aid it in establishing shops in the city for the manufacture of iron bridges, were held by this court to be void, even in the hands of a purchaser in good faith and for value. (The legislature had no power to pass such act.) A like decision was made in *Parkersburg v. Brown*, 106 U. S. 487, 27 L. Ed. 238." *Cole v. LaGrange*, 113 U. S. 1, 6, 28 L. Ed. 896. See *Otis v. Cullum*, 92 U. S. 447, 448, 23 L. Ed. 496, citing and commenting upon *Loan Ass'n v. Topeka*, 20 Wall. 655, 22 L. Ed. 455.

**81.** *Aspinwall v. Board of Comm'rs*, 22 How. 364, 16 L. Ed. 296; *Wadsworth v. Supervisors*, 102 U. S. 534, 26 L. Ed. 221; *Norton v. Shelby County*, 118 U. S. 425,



**Statute Not Enacted in Conformity to Constitution.**—Bonds issued under a statute which the journal of the general assembly of the state did not show to have been enacted in conformity with the requirements of the constitution, and which never became a law and conferred no power, although referred to in later statutes as an existing law, are of no force or effect even in the hands of those who took them for value and in the belief that they have been lawfully issued.<sup>82</sup>

**Power to Raise Money to Pay the Bonds.**—So, too, if the municipality has no power, either by express grant or by implication, to raise money by taxation

452, 30 L. Ed. 178; *Concord v. Robinson*, 121 U. S. 165, 170, 30 L. Ed. 885; *Crow v. Oxford*, 119 U. S. 215, 30 L. Ed. 388.

"The case of *Aspinwall v. Board of Comm'rs*, 22 How. 364, 16 L. Ed. 296, is directly in point on this subject. There the charter of the Ohio and Mississippi Railroad Company, created by the legislature of Indiana in 1848, as amended in 1849, authorized the commissioners of a county, through which the road passed, to subscribe for stock and issue bonds, provided a majority of the qualified voters of the county voted on the first of March, 1849, that this should be done. The election was held on that day, and a majority of the voters voted that a subscription should be made. In September, 1852, the board of commissioners, pursuant to the acts and election, subscribed for 600 shares of the stock of the railroad company, amounting to \$30,000, and in payment of it issued thirty bonds of \$1,000 each, signed and sealed by the president of the board and attested by the auditor of the county, and delivered the same to the company. These bonds drew interest at the rate of six per cent per annum, for which coupons were attached. The plaintiffs became the holders of sixty of these coupons, and upon them the suit was brought against the commissioners of the county. After the subscription was voted, but before it was made or the bonds issued, the new constitution of Indiana went into effect, which contained the following provision: 'No county shall subscribe for stock in any incorporated company unless the same be paid for at the time of such subscription, nor shall any county loan its credit to any incorporated company, nor borrow money for the purpose of taking stock in any such company.' Art. 10, § 6. This provision was set up against the validity of the bonds and coupons; and the question arose whether, under the charter of the company and its amendment, the right to the county subscription became so vested in the company as to exclude the operation of the new constitution. The court held that the provisions of the charter authorizing the commissioners to subscribe conferred a power upon a public corporation, which could be modified, changed, enlarged, or restrained by the legislature; that by voting for the subscription no contract was created which prevented the application of the new constitution; that the mere vote

to subscribe did not of itself form a contract with the company within the protection of the Federal Constitution; that until the subscription was actually made no contract was executed; and that the bonds, being issued in violation of the new constitution of the state, were void. That constitution withdrew from the county commissioners all authority to make a subscription for the stock of an incorporated company, except in the manner and under the circumstances prescribed by that instrument, even though a vote for such subscription had been previously had, and a majority of the voters had voted for it. The doctrine of this case was reaffirmed in *Wadsworth v. Supervisors*, 102 U. S. 534, 26 L. Ed. 221." *Norton v. Shelby County*, 118 U. S. 425, 452, 30 L. Ed. 178.

**82. Statute not enacted in conformity to constitution.**—*Post v. Supervisors*, 105 U. S. 667, 671, 26 L. Ed. 1204. See *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. Ed. 154.

"The act of the general assembly of Illinois of Feb. 18, 1857, under which the bonds in suit were issued, having been adjudged by the supreme court of that state in 1870 in the cases of *Ryan v. Lynch* (68 Ill. 160) and *Miller v. Goodwin* (70 Ill. 659), upon proof that the journals did not show it to have been enacted in conformity with the requirements of the constitution, to have never become a law, and to have conferred no power, although referred to in later statutes as an existing law, those decisions must govern the action of the courts of the United States. \* \* \* For these reasons, the act of Feb. 18, 1857, under which all the bonds in suit purport to have been issued, must be held to be of no force or effect, and the plaintiffs can maintain no action on the bonds. Upon the attempt made at the argument to support their validity in the first case under the statute of Nov. 6, 1849, and in the second case under the statute of March 6, 1867, it is enough to say that there is nothing in the record to show that either of those statutes was ever complied with by the defendant in issuing the bonds, or relied on by the plaintiff in purchasing them." *Post v. Supervisors*, 105 U. S. 667, 671, 26 L. Ed. 1204.

"That which is not a law can give no validity to bonds purporting to be issued under it, even in the hands of those who



to pay the bond, the holder cannot require the municipal authorities to levy a tax for that purpose.<sup>83</sup>

(b) *Genuineness of Official Signature*—aa. *In General*.—Purchasers of municipal securities must always take the risk of the genuineness of the official signature of those who execute the paper they buy. This includes not only the genuineness of the signature itself, but the official character of him who makes it.<sup>84</sup>

bb. *Antedating*.—Public officer issuing municipal bonds cannot bind the municipality under powers that have been taken away, by simply antedating the bonds. Under such circumstances, a false date is equivalent to a false signature; and the public, in the absence of any ratification of its own, is no more estopped by the one than it would be by the other.<sup>85</sup>

take them for value and in the belief that they have been lawfully issued." *Post v. Supervisors*, 105 U. S. 667, 669, 26 L. Ed. 1204. See *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. Ed. 154.

83. *United States v. Macon County*, 99 U. S. 582, 590, 25 L. Ed. 331.

Where the statute authorizing a county to subscribe for stock in a railroad company, and issue its bonds therefor, limits its power to provide for the payment of them to an annual special tax of one twentieth of one per cent, and other laws then and still in force empowered it to levy a tax for general purposes not exceeding one-half of one per cent, upon the assessed value of the taxable property of the county, held, that, in the absence of further legislation, a mandamus will not lie to compel the levy of taxes beyond the amount so authorized. A holder of such bonds who has recovered judgment for the amount thereof does not thereby obtain an increased right to a levy of taxes. *United States v. Macon County*, 99 U. S. 582, 25 L. Ed. 331.

84. *Genuineness of official signature*.—*Coler v. Claeburne*, 131 U. S. 162, 174, 33 L. Ed. 146; *Anthony v. Jasper County*, 101 U. S. 693, 699, 25 L. Ed. 1005; *Merchants' Bank v. Bergen County*, 115 U. S. 384, 390, 29 L. Ed. 430.

"Bona fide purchasers of municipal bonds must take the risk of the official character of those who execute them." *Coler v. Claeburne*, 131 U. S. 162, 173, 23 L. Ed. 146; *Anthony v. Jasper County*, 101 U. S. 693, 699, 25 L. Ed. 1005. See, also, *Bissell v. Spring Valley Tp.*, 110 U. S. 162, 28 L. Ed. 105; *Northern Bank v. Porter Tp.*, 110 U. S. 608, 618, 28 L. Ed. 258; *Merchants' Bank v. Bergen County*, 115 U. S. 384, 390, 29 L. Ed. 430.

An examination of the records of the city in regard to the issuing of the bonds would have disclosed the fact that the bonds had not been signed and issued under the ordinance of September 13, 1883, until July 3, 1884, that W. N. Hodge was not mayor on that day; and that the person who then signed the bonds as mayor was a private citizen. *Coler v. Claeburne*, 131 U. S. 162, 173, 33 L. Ed. 146.

85. *Antedating*.—*Anthony v. Jasper County*, 101 U. S. 693, 698, 25 L. Ed. 1005.

A township in Missouri voted to sub-

scribe for stock in a railroad company. The proper county court, March 28, 1872, made the subscription, and June 4 ordered that the bonds in payment therefor be issued. They were issued in October following, but bore date the day of the subscription. They were sealed with the seal of the court, and signed by the clerk and by A., as presiding justice, although the latter did not become such until October. Neither the county court nor the other justice thereof consented to A.'s act. The bonds were not registered, nor was the certificate of registration required by said act of March 30, indorsed thereon. In a suit by B., a holder for value, upon the bonds: Held, 1. That he was charged with notice that A. was not presiding justice at the time they bear date. 2. That the bonds being signed by A. was equivalent to notice that they were not in fact issued before the passage of said act, and that they are consequently void. *Anthony v. Jasper County*, 101 U. S. 693, 25 L. Ed. 1005. See, also, *Louisiana v. Wood*, 102 U. S. 294, 298, 26 L. Ed. 153.

This plaintiff is charged with notice of the fact that A. was not the presiding justice of the county court until October, 1872, and that he could not have signed the bonds in his official capacity until that time. Had he signed them in March, he could not have bound the township for their payment. This is equivalent to notice that they were not in fact issued before March 30, and that consequently they were not valid because not certified by the auditor of state. *Anthony v. Jasper County*, 101 U. S. 693, 699, 25 L. Ed. 1005.

"This case is entirely different from *Weyauwega v. Ayling*, 99 U. S. 112, 25 L. Ed. 470, where we held the town was estopped from proving that the bonds were actually signed by a former clerk after he went out of office; because the clerk in office adopted that signature as his own when he united with the chairman in delivering the bonds to the railroad company, pursuant to the vote of the town. There the bonds were not only complete in form at the time they bore date, but when they were actually issued as genuine by the proper agents, one of whom was the clerk who should have signed them. Here they were not actually complete in

(25) *Change of Terminus as Affecting Vested Rights of Holder.*—The previously vested rights of a bona fide holder of municipal aid bonds cannot be affected by the fact that the township became, under the law, a township "along the route of the road," instead of being a terminal township.<sup>86</sup>

(26) *Presumptions and Burden of Proof*—(a) *Authority to Issue*—aa. *In General.*—Even a bona fide holder of a municipal bond is bound to show legislative authority in the issuing body to create the bond.<sup>87</sup> Where the board issuing the bonds was acting under delegated authority, a person dealing with them must show that the authority has been properly conferred.<sup>88</sup>

bb. *Performance of Conditions Precedent and Requisites to Validity*—(aa) *In General.*—The holder of municipal bonds is bound to show, in the absence of recitals that prevent its denial, that the corporation issued them, in the exercise of a power conferred by law; and where that can arise only in consequence of the performance of a condition precedent, such as the result of an election by a public vote, he has the burden of proof to show the fact.<sup>89</sup> But if the municipality had, under the law, authority to issue bonds, and did issue them, and they went into circulation and came to the hands of a bona fide holder, he is not, in a suit upon them, required to prove the performance of any of the requisites nec-

form when they were issued, and it was only by a false date inserted by one of the two agents required by law to unite in their execution, and without the knowledge or consent of the other, who never acted at all, that they were apparently so. They were never in a condition to be issued, and were never in fact issued by the proper authorities. They were in legal effect forged. *Anthony v. Jasper County*, 101 U. S. 693, 699, 25 L. Ed. 1005. See, also, *Coler v. Claeburne*, 131 U. S. 162, 174, 33 L. Ed. 146. See ante, "Date," IV, G, 3, b.

**86. Change of terminus as affecting vested rights of holder.**—*Pompton v. Cooper Union*, 101 U. S. 196, 25 L. Ed. 803.

**87. Authority to issue.**—*Hayes v. Holly Springs*, 114 U. S. 120, 126, 29 L. Ed. 81. See *Hannibal v. Fauntleroy*, 105 U. S. 408, 412, 26 L. Ed. 1103.

In a suit upon county bonds it is part of the plaintiff's case to show not merely the execution of the bonds by the county authorities, but that they were issued in pursuance of a law making them the valid obligations of the county. *Harshman v. Knox County*, 122 U. S. 306, 317, 30 L. Ed. 1152.

Where the municipal bonds in suit contain no statement of the purpose for which they were issued, and no recital which can bind the municipality by way of estoppel, any one suing upon the bonds is bound to prove the authority of the municipality to issue them. *Hopper v. Covington*, 118 U. S. 148, 150, 30 L. Ed. 190. See post, "Bonds Containing No Recitals," IV, U, 2, k.

**88. Board of Comm'rs v. Aspinwall**, 21 How. 539, 544, 16 L. Ed. 208.

**89. Performance of conditions precedent and requisites to validity.**—*Hannibal v. Fauntleroy*, 105 U. S. 408, 412, 26 L. Ed. 1103.

The plaintiff is not bound to show that the persons voting to ratify the stock

subscription were all taxpayers, and that they had all the other requisite qualifications of persons entitled by law to vote. The law imposes no such unreasonable burden upon the owner of such bonds. *Hannibal v. Fauntleroy*, 105 U. S. 408, 412, 26 L. Ed. 1103.

"That fact, as in the present case, is fully proven by an exhibition of the record, which shows on its face the result claimed. He is not bound to sustain the truth of the record, as if it were the case of a contested election, and prove that the majority, on the existence of which his rights rest, consisted of persons, all of whom possessed the qualification of voters. Whether each voter was lawfully such, was a question in the first place, in the present case, for the judges of the election, who were appointed under the law, for the express purpose of receiving and deciding upon their votes; and, in the second place, for the city council, to whom the official return of the election and of its result was made, as required, and who were authorized to act upon that result as certified to and verified by themselves, in the very matter of consummating the subscription, which was the subject of the vote. It would be impracticable for any purchaser of the bond, put on inquiry, as to the authority of the city council to make the issue of the bonds in question, to make inquisition into the facts of the election, beyond these returns and records; and it is but reasonable to permit him safely to rest his rights upon them, as they appear. They show the fact, that the subscription to the railroad stock was ratified by a majority of the voters, presumed to be qualified to vote, because permitted by the authorities controlling the election to do so, at an election held for the purpose, among other things, of deciding that question; and that fact constitutes the condition on which the authority to issue the bonds, by law, depends, and is the guarantee of their va-



essary to give them validity. The want of such performance is a matter of defense, and the burden of proof is upon the county to establish it.<sup>90</sup>

(bb) *Performance of Condition Imposed by Vote of Electors.*—The presumption of performance of the conditions which the municipality had a right to impose upon the issuance of municipal aid bonds and did impose, by vote of its election; from the fact of subscription and issuance, is conclusive where the bonds contain recitals, which fairly import a compliance with the conditions upon the happening of which their issue was authorized. In such case the bonds go into the hands of innocent holders with a conclusive presumption that the condition had been performed. Without such recital the presumption is not conclusive and it is open to the municipality that such conditions had not been complied with. In other words, in the absence of a recital, the performance of the condition is not conclusively presumed.<sup>91</sup>

lidity." *Hannibal v. Fauntleroy*, 105 U. S. 408, 412, 26 L. Ed. 1103.

90. *County of Clay v. Society for Savings*, 104 U. S. 579, 586, 26 L. Ed. 856; *Lincoln v. Iron Co.*, 103 U. S. 412, 26 L. Ed. 518.

Where a municipal corporation has lawful power to issue negotiable bonds and does so, the bona fide holder has a right to presume the power was properly exercised, and is not bound to look beyond the question of its existence. *Pompton v. Cooper Union*, 101 U. S. 196, 204, 25 L. Ed. 803; *Orleans v. Platt*, 99 U. S. 676, 25 L. Ed. 404; *Moran v. Commissioners*, 2 Black 722, 17 L. Ed. 342; *Board of Comm'rs v. Aspinwall*, 21 How. 539, 16 L. Ed. 208; *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548; *San Antonio v. Mehaffy*, 96 U. S. 312, 24 L. Ed. 816; *County of Moultrie v. Rockingham, etc., Sav. Bank*, 92 U. S. 631, 23 L. Ed. 631.

A bona fide purchaser for value of bonds and coupons issued by a county in payment of a subscription for stock in a railroad company, made payable to the railroad company, or bearer, has only to inquire whether the county was, by law, authorized to issue them and whether their issue had been approved by a popular vote. *Nugent v. Supervisors*, 19 Wall. 241, 253, 22 L. Ed. 83.

In *County of Clay v. Society for Savings*, 104 U. S. 579, 586, 26 L. Ed. 856, the court said: "The county offered no evidence in any degree tending to show that the conditions precedent upon the performance of which the issue was authorized had not been complied with. It cannot, therefore, assume that the conditions were not performed, and insist on nonperformance as a defense."

In *Meyer v. Muscatine*, 1 Wall. 384, 17 L. Ed. 564, "the court say that if the legal authority was sufficiently comprehensive, a bona fide holder for value has a right to presume that all precedent requirements have been complied with." *Grand Chute v. Winegar*, 15 Wall. 355, 372, 21 L. Ed. 170.

Where a municipal corporation has lawful power to issue negotiable bonds and does so, the bona fide holder has a right to presume the power was properly ex-

ercised, and is not bound to look beyond the question of its existence. *Orleans v. Platt*, 99 U. S. 676, 682, 25 L. Ed. 404.

Section 12 of the act of Feb. 24, 1869, amendatory of the act to incorporate the Illinois Southeastern Railway Company, which was indorsed on the bonds, expressly provided that when payment to the capital stock of the company should be made in the bonds of counties or townships, under any act authorizing such subscription, all such bonds issued by the proper authorities and appearing regular on their face should, in the hands of a bona fide holder, be deemed and taken in all courts, and elsewhere, as prima facie evidence of the regularity of everything required by the several acts in relation to the issuing of said bonds, or by any other act to be done preliminary to their issue and negotiation. It was held that as no proof has been submitted of any irregularity in the issuing of the bonds, this section of the law is conclusive against the existence of any. *County of Clay v. Society for Savings*, 104 U. S. 579, 587, 26 L. Ed. 856.

91. *Performance of condition imposed by vote of election.*—*Quinlan v. Green County*, 205 U. S. 410, 419, 51 L. Ed. 860. See post, "Operation and Effect of Recitals as Estoppel," IV, U, 2, j.

"In the first case, dealing with this question (*Board of Comm'rs v. Aspinwall*, 21 How. 539, 16 L. Ed. 208), it was said that a purchaser of such bonds had the right to assume that the condition of their issue had been complied with, merely from the facts of the subscription and issue. But in this case there was a recital, and subsequent cases have limited the adjudication to the precise point necessarily decided. *Citizens' Sav., etc., Ass'n v. Perry County*, 156 U. S. 692, 39 L. Ed. 535." *Quinlan v. Green County*, 205 U. S. 410, 419, 51 L. Ed. 860.

"In *Supervisors v. Schenck*, 5 Wall. 772, 18 L. Ed. 556, it was said obiter by Mr. Justice Clifford, speaking of bonds of the kind under consideration, 'the bona fide holder has a right to presume they were issued under the circumstances which gives the requisite authority.' The same dictum was in substance repeated by the



(b) *Presumption That Officers Discharged Duty.*—It is a reasonable presump-

same justice in *Lexington v. Butler*, 14 Wall. 282, 296, 20 L. Ed. 809." *Quinlan v. Green County*, 205 U. S. 410, 419, 51 L. Ed. 860. And see *San Antonio v. Mehaffy*, 96 U. S. 312, 314, 24 L. Ed. 816; *Hopper v. Covington*, 118 U. S. 148, 150, 30 L. Ed. 190; *County of Macon v. Shores*, 97 U. S. 272, 279, 24 L. Ed. 889; *Supervisors v. Schenck*, 5 Wall. 772, 784, 18 L. Ed. 556. See, also, *Gelpcke v. Dubuque*, 1 Wall. 175, 203, 17 L. Ed. 520; *Board of Comm'rs v. Aspinwall*, 21 How. 539, 16 L. Ed. 208; *Bissell v. Jeffersonville*, 24 How. 287, 299, 16 L. Ed. 664.

In *Hopper v. Covington*, 118 U. S. 148, 150, 30 L. Ed. 190, the court after quoting the dictum of Mr. Justice Clifford in *Supervisors v. Schenck*, 5 Wall. 772, 784, 18 L. Ed. 556, set out in the preceding paragraph and citing *Lexington v. Butler*, 14 Wall. 282, 296, 20 L. Ed. 809, as approving the same said: "But the circumstances thus spoken of were the preliminary facts requisite to the exercise of the power, not the limits, fixed by law, of the objects and purposes for which the power could be exercised at all. In each of the cases cited, the defects suggested were in the requisite preliminary proceedings, and the bonds sued on appeared by recitals on their face to have been issued according to law."

"In *Pendleton County v. Amy*, 13 Wall. 297, 20 L. Ed. 579, it appeared that the county of Pendleton had issued bonds in aid of a railroad company. An act of the legislature gave the county the authority to issue the bonds, provided a majority of the real estate owners of the county should so vote. One of the pleas of the defendant in an action on the bonds was that they had never been authorized by the vote prescribed in the act which gave the power to issue them. This plea was demurred to, and the court passed upon the question thus raised. Mr. Justice Strong, in delivering the opinion of the court said: 'If the right to subscribe be made dependent upon the result of a popular vote, the officers of the county must first determine whether the vote had been taken as directed by law, and what the vote was. When, therefore, they make a subscription, and issue county bonds in payment, it may fairly be presumed, in favor of an innocent purchaser of the bonds, that the condition which the law attaches to the exercise of the power, has been fulfilled. To issue the bonds without the fulfillment of the precedent conditions would be a misdemeanor, and it is to be presumed that public officers act rightly. We do not say this is a conclusive presumption in all cases, but it has more than once been decided that a county may be estopped against asserting that the conditions attached to a grant of power were not fulfilled.' In this case there was no recital in the bond. It appeared by

the pleadings that the bonds had been exchanged for the stock of the railroad company which was retained, and the decision was based upon the ground that the retention of the stock created an estoppel." *Quinlan v. Green County*, 205 U. S. 410, 420, 51 L. Ed. 860.

"In the case of *Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579, the opinion of the court lends some countenance to the broad principle stated in *Board of Comm'rs v. Aspinwall* (21 Wall. 539, 16 L. Ed. 208), but Mr. Justice Bradley, in a concurring opinion, said: 'I dissent from the opinion of the court in this case, so far as it may be construed to reaffirm the first point asserted in the case of *Knox County v. Aspinwall*, to wit, that the mere execution of a bond by officers charged with the duty of ascertaining whether a condition precedent has been performed is conclusive proof of its performance. If, when the law requires a vote of taxpayers before bonds can be issued, the supervisor of a township, or the judge of probate of a county, or other officer or magistrate, is the officer designated to ascertain whether such vote has been given, and is also the proper officer to execute, and who does execute, the bonds, and if the bonds themselves contain a statement or recital that such vote has been given, then the bona fide purchaser of the bonds need go back no farther. He has a right to rely on the statement as a determination of the question. But a mere execution and issue of the bonds without such recital is not, in my judgment, conclusive. It may be prima facie sufficient, but the contrary may be shown. This seems to me to be the true distinction to be taken on this subject; and I do not think that the contrary has been decided by this court.'" *Quinlan v. Green County*, 205 U. S. 410, 421, 51 L. Ed. 860.

"These cases left it uncertain whether the court would give to the facts of subscription to stock and issue of bonds in payment therefor by officers charged with the duty of ascertaining whether conditions precedent had been complied with, the same conclusive effect as to the validity of the bonds which would exist when to those facts was added a recital in the bonds themselves. But the tendency, observable in the earlier cases, to deny to bonds in the hands of an innocent holder any other defense than a want of power of the maker was arrested by the cases of *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138, and *Citizens' Sav., etc., Ass'n v. Perry County*, 156 U. S. 692, 39 L. Ed. 585, which held that the mere fact of the subscription to stock and issue of bonds containing no recital left it open to the obligor to show that a condition precedent had not been fulfilled. But these cases in no way con-

tion that the officer of the law in issuing municipal bonds, discharged their duty.<sup>92</sup>

flict with the view expressed by Mr. Justice Strong in *Pendleton County v. Amy*, 13 Wall. 297, 20 L. Ed. 579, and by Mr. Justice Bradley in *Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579, that a presumption arises from the mere fact of subscription and issue, though not a conclusive one. Independent of authority such a presumption exists and is but an instance of the broader presumption that officers charged with the performance of a public duty perform it correctly." *Quinlan v. Green County*, 205 U. S. 410, 420, 51 L. Ed. 860.

In the case at bar the judge of the county court was charged with the duty of issuing the bonds upon the performance of the condition precedent. That condition was that the county should be "fully and completely exonerated from the payment of the capital stock voted by said county and authorized to be subscribed by said Green county court to the Elizabethtown and Tennessee Railroad." The performance of that condition did not necessarily require any formal release or the execution of any paper whatever. It was completely fulfilled, if from any circumstances it should appear that the county had been effectively relieved from any liability on account of the vote in aid of the Elizabeth and Tennessee Railroad. It would be impossible for any purchaser of the bonds to ascertain whether this condition had been complied with, except by an inquiry which would naturally be made of the judge himself. The judge determined that it had been complied with, and the fact that for thirty-eight years no one has made any claim against the county on account of its supposed liability to subscribe to the stock of the Elizabethtown and Tennessee Railroad shows conclusively that he was right. On the facts found there is a presumption that the county had been exonerated from its former subscription to another railroad. *Quinlan v. Green County*, 205 U. S. 410, 422, 51 L. Ed. 860.

"By the terms of the law it was the duty of the judge of the county court, in whom the powers of the court were vested, to issue the bonds. After a favorable vote has been had in an election called by the court, the law provides that 'it shall be the duty of said county court \* \* \* to make the subscription in the name of their \* \* \* counties \* \* \* and proceed to have issued the bonds to the amount of such subscription, as hereinbefore directed.' This clearly placed upon the judge the duty and responsibility of ascertaining and determining whether the condition of the issue of the bonds had been complied with. *Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579. If he had issued the bonds and they had contained in them recitals which fairly

imported a compliance with the condition upon the happening of which their issue was authorized, they would have gone into the hands of innocent holders with a conclusive presumption that the condition had been performed. This principle has been announced by repeated decisions of this court and needs no other citations to support it than those already made. Without such recital the presumption is, as has been shown, not conclusive." *Quinlan v. Green County*, 205 U. S. 410, 419, 51 L. Ed. 860.

"But there was no such recital in the body of these bonds, and the words of the heading, 'For the Cumberland and Ohio Railroad,' cannot be interpreted as such without going beyond the decided cases, which themselves have gone far. In the absence of a recital it is open to the defendant to show that the condition which it had a right to impose and did impose by the vote of its electors had not been complied with. *Citizens' Sav., etc., Ass'n v. Perry County*, 156 U. S. 692, 39 L. Ed. 585. In other words, in the absence of a recital, the performance of the condition is not conclusively presumed." *Quinlan v. Green County*, 205 U. S. 410, 419, 51 L. Ed. 860.

As the presumption always is, in the absence of anything to the contrary, that a public officer while acting in his official capacity is performing his duty, it must be assumed for all the purposes of this case that the bonds were delivered to the railroad company by the chairman with the assent of the clerk, and, therefore, that they were issued as negotiable instruments by the proper officers of the town. If the fact was otherwise, it was incumbent on the town to make the necessary proof. *Case v. Beauregard*, 99 U. S. 119, 25 L. Ed. 370.

Where there is nothing in the bonds or the recorded proceedings to indicate any irregularity, or even to create a suspicion that the bonds had not been issued pursuant to a lawful authority; the railroad company to which they are issued in payment of a stock subscription and their assigns, under the circumstances of this case, had a right to assume that they imported verity. *Bissell v. Jeffersonville*, 24 How. 287, 299, 16 L. Ed. 664.

**92. Presumption that officers discharged duty.**—*Coloma v. Eaves*, 92 U. S. 484, 490, 23 L. Ed. 579.

Where the issue of bonds to a railroad company in payment of a subscription to stock in the road, would be a misdemeanor, by the county officers, it is to be presumed though perhaps not conclusively, that the conditions were fulfilled. *Pendleton County v. Amy*, 13 Wall. 297, 298, 20 L. Ed. 579.

"If the right to subscribe be made dependent upon the result of a popular vote,



(c) *Presumption That Holder a Bona Fide Purchaser*.—See ante, "Presumption That Holders Are Bona Fide Purchasers," IV, Q, 2, a, (5).

(d) *Presumption That Holder Lawfully Entitled to Bonds*.—Where the bonds of a county, issued by the county court in payment of its subscription to the stock of a railroad company, show on their face that they were issued pursuant to a law which authorized their issue without the consent of the qualified voters of the county, given at an election, and there is nothing on them to show that they were not regularly issued, it is not incumbent upon a purchaser of them to inquire whether the company has pursued the regular steps necessary to entitle it to receive them. Where the agents of the company have them for sale, he has a right to presume that they were lawfully entitled to them.<sup>93</sup>

3. **RIGHTS OF HOLDERS WHO ARE NOT BONA FIDE PURCHASERS**.—A holder of municipal bonds who is not a bona fide purchaser for value before maturity stands exactly in the shoes of the original payee and his rights are no greater.<sup>94</sup> A defect or irregularity in the preliminary requisites to the issuance of municipal bonds can be set up by the maker of the bonds where the suit upon them is brought by one who has not paid value for them, or who had notice of the defect or irregularity.<sup>95</sup>

4. **RIGHTS OF ASSIGNEES**.—An assignee of bonds issued by a municipality to a railroad company takes all the rights of the company by reason of its contract with the municipality, although at the time of such assignment the supreme court of the state had held the statute under which they were issued to be unconstitutional.<sup>96</sup>

5. **RIGHTS OF PLEDGEE**.—The rights of a pledgee of municipal securities are governed by the ordinary rules of law in relation to the rights and liabilities of pledgor and pledgee.<sup>97</sup>

**R. Rights Arising from Illegal Issuance and Sale**—1. **RECOVERY ON IMPLIED CONTRACT**.—An issue of bonds made by a municipal corporation, which is unlawful and void because beyond the scope of its corporate powers, does not, by being carried into execution, become lawful and valid, but the proper remedy of the party aggrieved is by disaffirming the contract, and suing to recover, as on a quantum meruit, the value of what the municipality has actually received the benefit.<sup>98</sup>

the officers of the county must first determine whether the vote has been taken as directed by law and what the vote was. When, therefore, they make a subscription, and issue county bonds in payment, it may fairly be presumed, in favor of an innocent purchaser of the bonds, that the condition which the law attached to the exercise of the power has been fulfilled. To issue the bonds without the fulfillment of the precedent conditions would be a misdemeanor, and it is to be presumed that public officers act rightly. We do not say this is a conclusive presumption in all cases." *Pendleton County v. Amy*, 13 Wall. 297, 304, 20 L. Ed. 579.

93. **Presumption that holder lawfully entitled to bonds**.—*County of Henry v. Nicolay*, 95 U. S. 619, 24 L. Ed. 394; *Cass County v. Gillett*, 100 U. S. 585, 592, 25 L. Ed. 585.

The fact that subsequently to making the subscription, but before the issue of the bonds, the company transferred its franchises to another company, does not alter the case. *County of Henry v. Nicolay*, 95 U. S. 619, 24 L. Ed. 394.

94. **Rights of holders who are not bona fide purchasers**.—*Young v. Clarendon Tp.*,

132 U. S. 340, 355, 33 L. Ed. 356; *Smith v. Bourbon County*, 127 U. S. 105, 32 L. Ed. 73. See, also, ante, "Who Are Bona Fide Holders," IV, Q, 2, a.

So held as to municipal aid bonds. *Young v. Clarendon Tp.*, 132 U. S. 340, 355, 33 L. Ed. 356; *Smith v. Bourbon County*, 127 U. S. 105, 32 L. Ed. 73.

95. *Chambers County v. Clews*, 21 Wall. 317, 321, 22 L. Ed. 517.

96. **Rights of assignees**.—*New Buffalo v. Iron Co.*, 105 U. S. 73, 26 L. Ed. 1024.

97. **Rights of pledgee**.—*Lacombe v. Forstalls Sons*, 123 U. S. 562, 31 L. Ed. 255. See the title PLEDGE AND COLLATERAL SECURITY.

98. **Recovery on implied contract**.—*Pittsburgh, etc., R. Co. v. Keokuk, etc., Bridge Co.*, 131 U. S. 371, 389, 33 L. Ed. 157; *Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153; *Parkersburg v. Brown*, 106 U. S. 487, 503, 27 L. Ed. 238; *Chapman v. County of Douglas*, 107 U. S. 348, 360, 27 L. Ed. 378; *Salt Lake City v. Hollister*, 181 U. S. 256, 263, 30 L. Ed. 176; *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 30 L. Ed. 83; *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 629, 44 L. Ed. 611; *Thomas v. Richmond*, 12 Wall.



Where a municipal corporation is in the market as a borrower, and receives money in that character for bonds issued by it without authority, the law implies a contract that the corporation will, on demand, return the money paid to it by mistake, notwithstanding the transaction assumed the form of a sale of its securities, upon which a suit could not be maintained. The corporation is not held liable on any contract of purchase nor any express contract whatever, but on a contract implied from its receipt of the money.<sup>99</sup>

349, 20 L. Ed. 453; *Draper v. Springport*, 104 U. S. 501, 504, 26 L. Ed. 812.

99. *Louisiana v. Wood*, 102 U. S. 294, 299, 26 L. Ed. 153. See, to the same effect, *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 75, 35 L. Ed. 107; *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534, 546, 31 L. Ed. 537; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 58, 35 L. Ed. 55; *Draper v. Springport*, 104 U. S. 501, 504, 26 L. Ed. 812; *Thomas v. Richmond*, 12 Wall. 349, 20 L. Ed. 453; *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 629, 44 L. Ed. 611.

"Where the transaction has nothing in it of malum in se, and the parties are not participes criminis in a violation of law, money had and received by one from the other in good faith, may be recovered even though the security given therefor be void for some technical defect or illegality. This matter was sufficiently discussed in the case of *Thomas v. Richmond*, 12 Wall. 349, 20 L. Ed. 453." *Draper v. Springport*, 104 U. S. 501, 504, 26 L. Ed. 812.

In *Louisiana v. Wood*, 102 U. S. 294, 299, 26 L. Ed. 153, the court said: "There was no actual sale of bonds, because there were no valid bonds to sell. There was no express contract of borrowing and lending, and consequently no express contract to pay any rate of interest at all. The only contract actually entered into is the one the law implies from what was done, to wit, that the city would on demand, return the money paid to it by mistake, and, as the money was got under a form of obligation which was apparently good, that interest should be paid at the legal rate from the time the obligation was denied." *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 58, 35 L. Ed. 55; *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534, 546, 31 L. Ed. 537; *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 75, 35 L. Ed. 107.

The court said, in *Marsh v. Fulton County*, 10 Wall. 676, 19 L. Ed. 1040: "The obligation to do justice \* \* \* rests upon all persons, natural or artificial, and if a county obtains the money or property of others without authority the law, independent of any statute, will compel restitution or compensation." *Louisiana v. Wood*, 102 U. S. 294, 299, 26 L. Ed. 153; *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 75, 35 L. Ed. 107.

"This," it was further said, "is a very different thing from enforcing an obligation attempted to be created in one way,

when the statute declares that it shall only be created in another and different way."

*Marsh v. Fulton County*, 10 Wall. 676, 19 L. Ed. 1040. Upon this obligation to do justice rests the decision in *Louisiana v. Wood*, 102 U. S. 294, 298, 26 L. Ed. 153, where the federal supreme court held a municipal corporation liable to an action for money received on bonds issued by it, and which, being issued without authority of law, were invalid. The money it got was paid to it in the belief that the bonds were valid obligations of the corporation, and, therefore, was paid by mistake. *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 75, 35 L. Ed. 107.

In *Read v. Plattsmouth*, 107 U. S. 568, 27 L. Ed. 414, as in *Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153, the city got the full pecuniary consideration for the bonds, and applied the money to the very purpose for which they were issued; and upon well-settled principles, if the securities given for the money so obtained proved invalid or defective for any reason, there was a clear legal, as well as moral, obligation to refund the money which had been so advanced to and received by the city. *Hedges v. Dixon County*, 150 U. S. 182, 186, 37 L. Ed. 1044.

A public corporation may be compelled to pay back money which it has received for bonds illegally issued, when the purpose of the loan was lawful and the creation of the debt not prohibited by law. *Read v. Plattsmouth*, 107 U. S. 568, 579, 27 L. Ed. 414.

#### Unregistered bonds bearing false date.

—In *Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153, the city of Louisiana, having a right by its charter to borrow money, had issued bonds and placed them on the market for that purpose. These bonds were negotiated by the agents of the city, and purchased by the holder in good faith, and the money paid therefor went directly into the city's treasury. The bonds bore a false date which apparently made them obligatory and binding. They recite that they are issued under the authority of the city charter, and an ordinance pursuant thereto passed January 8, 1867. Although not actually executed until July 16, 1872, they were antedated as of January 1, 1872, for the purpose of evading a law of the state passed March 28, 1872, requiring municipal bonds to be registered by the state auditor. It was afterwards held that they were invalid for want of being registered. Afterwards the parties who had bought these bonds brought

suit against the city for the sum they had paid, on the ground that the city had received their money without any consideration, and was bound *ex æquo et bono* to pay it back. The court held that the city was in the market as a borrower and received the money in that character, notwithstanding the transaction assumed the form of a sale of her securities, which being defectively executed a suit could not be maintained thereon, and that the holder was entitled to recover the money paid, with interest thereon from the time the obligation of the city to pay was denied. See, to the same effect, *Hedges v. Dixon County*, 150 U. S. 182, 185, 37 L. Ed. 1044; *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534, 546, 31 L. Ed. 537; *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 75, 35 L. Ed. 107.

The money was paid for bonds apparently well executed, when in fact they were not, because of the false date they bore. This was clearly money paid by mistake. The consideration on which the payment was made has failed, because the bonds were not, in fact, valid obligations of the city. And the money was got through imposition, because the city, with intent to deceive, pretended that the false date the bonds bore was the true one. While, therefore, the bonds cannot be enforced, because defectively executed, the money paid for them may be recovered back. *Louisiana v. Wood*, 102 U. S. 294, 299, 26 L. Ed. 153.

The city, by putting the bonds out with a false date, represented that they were valid without registry. The bonds were bought and the price was paid under the belief, brought about by the conduct of the city, that they had been put out and had become valid commercial securities before the registry law went into effect. It would certainly be wrong to permit the city to repudiate the bonds and keep the money borrowed on their credit. The city could lawfully borrow. The objection goes only to the way it was done. As the purchasers were kept in ignorance of the facts which made the bonds invalid, they did not knowingly make themselves parties to any illegal transaction. They bought the bonds in open market, where they had been put by the city in the possession of one clothed with apparent authority to sell. The only party that has done any wrong is the city. *Louisiana v. Wood*, 102 U. S. 294, 298, 26 L. Ed. 153.

The legal effect of the transactions by which the plaintiff and his assignors got possession of the bonds was a borrowing by the city of the money paid for what was supposed to be a purchase of the bonds. As the broker through whom the business was done was the agent of the city and acting as such, the case, so far as the city is concerned, is the same as though the money had been paid directly into the city treasury and the bonds given back in exchange. The fact that the pur-

chasers did not know for whom the broker was acting is, for all the purposes of the present inquiry, immaterial. They believed they were buying valid bonds which had been negotiated and were on the market, when in reality they were loaning money to the city, and got no bonds. *Louisiana v. Wood*, 102 U. S. 294, 298, 26 L. Ed. 153.

**Existence of obligation recognized by legislature.**—In *Read v. Plattsmouth*, 107 U. S. 568, 27 L. Ed. 414, the bonds were issued by a city for the purpose of raising money wherewith to construct a high school building within her limits. The bonds were sold and the proceeds applied to that purpose. The legislature subsequently legalized the proceedings of the city in the premises, but this act of the legislature was passed after the constitution of the state went into effect, declaring that the "legislature shall pass no special act conferring corporate powers," and that "no bill shall contain more than one subject, which shall be clearly expressed in its title." A purchaser of the bonds for value without notice of any infirmity in their issue brought suit to recover the amount of the coupons then due and unpaid. It was held that as, by force of the transaction, the city was bound to refund the moneys paid it in consideration of its void bonds, and as the act by confirming them merely recognizes the existence of that obligation and provides a medium for enforcing it according to the original intention of the parties, no new corporate powers were thereby conferred. *Hedges v. Dixon County*, 150 U. S. 182, 186, 37 L. Ed. 1044.

In the case of *Read v. Plattsmouth*, 107 U. S. 568, 27 L. Ed. 414, "this court, speaking by Mr. Justice Matthews, said: 'As the city of Plattsmouth was bound by force of the transaction to repay to the purchaser of its void bonds the consideration received and used by it, or a legal equivalent, the statute which recognized the existence of that obligation, and, by confirming the bonds themselves, provided a medium for enforcing it according to the original intention and promises, cannot be said to be a special act conferring upon the city any new corporate powers. No addition is made to its enumerated or implied corporate faculties, no new obligation is, in fact, created.'" *Sherman County v. Simons*, 109 U. S. 735, 738, 27 L. Ed. 1093. See, also, *Railroad Co. v. County of Otsego*, 16 Wall. 667, 21 L. Ed. 375.

In *Read v. Plattsmouth*, 107 U. S. 568, 575, 27 L. Ed. 414, where the question was as to the validity of bonds issued by a municipal corporation, the court said: "In the present case the statute in question does not impose upon the city of Plattsmouth, by an arbitrary act, a burden without consent and consideration. On the contrary, upon the supposition that the bonds issued, as to the excess over \$15,000,



In case of the mere putting of property into the hands of a municipal corporation in exchange for its void securities, the rule is the same.<sup>1</sup>

A purchaser of void municipal bonds issued in satisfaction of a donation to a railroad company has made no payment of any debts of the municipality, and hence cannot be subrogated to any right of the railroad company to enforce the donation.<sup>2</sup>

were void, because unauthorized, the city of Plattsmouth received the money of the plaintiff in error, and applied it to the purpose intended, of building a schoolhouse on property the title to which is confirmed to it by the very statute now claimed to be unconstitutional, and an obligation to restore the value thus received, kept and used immediately arose." *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 631, 44 L. Ed. 611.

1. *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 75, 35 L. Ed. 107; *Parkersburg v. Brown*, 106 U. S. 487, 503, 27 L. Ed. 238; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 58, 35 L. Ed. 55; *Chapman v. County of Douglas*, 107 U. S. 348, 360, 27 L. Ed. 378; *Crampton v. Zabriskie*, 101 U. S. 601, 25 L. Ed. 1070; *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 630, 44 L. Ed. 611.

In *Parkersburg v. Brown*, 106 U. S. 487, 503, 27 L. Ed. 238, individuals, in consideration of bonds issued to them by a city for a purpose beyond its powers, executed to the city a trust deed, in the nature of a mortgage, to secure the payment of the bonds and interest. It was held that the bonds could not be enforced against the city, but that the mortgagors had a right to reclaim the property and to demand an account of the city; and the court said: "But, notwithstanding the invalidity of the bonds and of the trust, the O'Briens had a right to reclaim the property and to call on the city to account for it. The enforcement of such right is not in affirmation of the illegal contract, but is in disaffirmance of it, and seeks to prevent the city from retaining the benefit which it has derived from the unlawful act." 2 Com. Cont. 109. There was no illegality in the mere putting of the property by the O'Briens in the hands of the city. To deny a remedy to reclaim it is to give effect to the illegal contract. The illegality of the contract does not arise from any moral turpitude. The property was transferred under a contract which was merely *malum prohibitum*, and where the city was the principal offender. In such a case the party receiving may be made to refund to the person from whom it has received the property for the unauthorized purpose, the value of that which it has actually received." *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 75, 35 L. Ed. 107; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 58, 35 L. Ed. 55; *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 630, 44 L. Ed. 611. See, also, *Hitchcock v. Galveston*, 96 U. S. 341, 351, 24 L.

Ed. 659; *Chapman v. County of Douglas*, 107 U. S. 348, 356, 357, 27 L. Ed. 378; *Salt Lake City v. Hollister*, 118 U. S. 256, 263, 30 L. Ed. 176.

But the city cannot in such case be charged with any loss, damage or depreciation of the property. *Parkersburg v. Brown*, 106 U. S. 487, 27 L. Ed. 238.

In *Parkersburg v. Brown*, 106 U. S. 487, 27 L. Ed. 238, it was held that the equity of the original grantor of the property sought to be reclaimed passed by an assignment of the void securities. Such assignee may rescind the contract and recover the property conveyed. The right of the county, represented by its taxpayers, to require a rescission of such a contract, on condition of a surrender of the void securities on the part of the vendor, and a reconveyance of the title in consideration of which they were issued, was recognized by this court in *Crampton v. Zabriskie*, 101 U. S. 601, 25 L. Ed. 1070. *Chapman v. County of Douglas*, 107 U. S. 348, 360, 27 L. Ed. 378.

2. *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534, 31 L. Ed. 537; *Hedges v. Dixon County*, 150 U. S. 182, 191, 37 L. Ed. 1044.

"In *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534, 31 L. Ed. 537, the town of Middleport made an appropriation to a railroad company, to be raised by tax on the property of the town, and bonds of the town for a sum large enough to include interest and discount for which they could be sold and delivered were issued to the railroad company, by whom they were put in circulation. These bonds were declared void, and the insurance company, as a purchaser and holder, for value and without notice, of a portion thereof, sought by a proceeding in equity to be subrogated to the right of the railroad company to enforce payment of the amount of the appropriation voted by the town; but it was held that the purchase of these bonds by the holder was no payment of the appropriation voted by the town, and that the holder was not entitled to claim the benefit of such appropriation; nor that the advantages conferred by the railroad company upon the town inured to the benefit of the holder, or constituted the basis of a consideration on which it could claim to be paid the sum appropriated for the railroad company. The proposition contended for in that case by the complainant was that by its purchase of the bonds, which were supposed to represent the benefit conferred upon the town by the appropriation to the railroad company,



**Recovery in Equity—Bonds Issued in Excess of Debt Limit—In General.**—A purchaser of bonds issued in excess of a constitutional limitation of the amount of the indebtedness a municipal corporation can incur, in the absence of an estoppel to dispute their validity, cannot maintain a suit in equity against the corporation to recover back the money paid for the bonds.<sup>3</sup> A provision in a state constitution that a municipal corporation shall not become indebted in any manner, or for any purpose, to an amount exceeding five per cent of its taxable property therein, forbids implied as well as express liability for the amount or amounts received on bonds issued contrary to such provisions, and a court of equity cannot afford relief in such a case either on an express or implied obligation. The transaction being invalid at law, was equally invalid in equity.<sup>4</sup>

it became entitled in equity to claim the payment of the amount represented by the bonds on the basis of the original consideration. This contention was not sustained, and the complainant was denied the equitable relief sought. *Hedges v. Dixon County*, 150 U. S. 182, 191, 37 L. Ed. 1044.

"There was no borrowing of money. There was nothing which pretended to take that form. No money of the complainants ever went into the treasury of the town of Middleport; that municipality never received any money in that transaction. It did not sell the bonds, either to complainant or anybody else. It simply delivered bonds, which it had no authority to issue, to the railroad company, and that corporation accepted them in satisfaction of the donation by way of taxation which had been voted in aid of the construction of its road. The whole transaction of the execution and delivery of these bonds was utterly void, because there was no authority in the town to borrow money or to execute bonds for the payment of the sum voted to the railroad company. They conferred no right upon anybody, and of course the transaction by which they were passed by that company to complainant could create no obligation, legal or implied, on the part of the town to pay that sum to any holder of these bonds. *Litchfield v. Ballou*, 114 U. S. 190, 29 L. Ed. 132, sustains this view of the subject. That town had issued bonds for the purpose of aiding in the construction of a system of waterworks. In that case, as in *Louisiana v. Wood*, the bonds were so far in excess of the authority of the town to create a debt that they were held by this court to be void in the case of *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138." *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534, 547, 31 L. Ed. 537.

**3. Bonds issued in excess of debt limit.**—*Litchfield v. Ballou*, 114 U. S. 190, 192, 29 L. Ed. 132; *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534, 547, 31 L. Ed. 537; *Doon Tp. v. Cummins*, 142 U. S. 366, 373, 35 L. Ed. 1044; *Hedges v. Dixon County*, 150 U. S. 182, 190, 37 L. Ed. 1044. See *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138.

**4.** *Litchfield v. Ballou*, 114 U. S. 190, 8 U S Enc—46

29 L. Ed. 132; *Hedges v. Dixon County*, 150 U. S. 182, 190, 37 L. Ed. 1044.

The court, speaking by Mr. Justice Miller, after quoting the constitutional provision, and emphasizing the words "indebted in any manner or for any purpose," said: "It shall not become indebted. Shall not incur any pecuniary liability. It shall not do this in any manner. Neither by bonds, nor notes, nor by express or implied promises. Nor shall it be done for any purpose. No matter how urgent, how useful, how unanimous the wish. There stands the existing indebtedness to a given amount in relation to the sources of payment as an impassable obstacle to the creation of any further debt, in any manner, or for any purpose whatever. If this prohibition is worth anything, it is as effectual against the implied as the express promise, and is as binding in a court of chancery as a court of law." *Litchfield v. Ballou*, 114 U. S. 190, 192, 193, 29 L. Ed. 132; *Doon Tp. v. Cummins*, 142 U. S. 366, 373, 35 L. Ed. 1044.

In *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138, bonds were issued by the city of Litchfield under authority of a statute of Illinois and an ordinance of the city, for the construction of a system of waterworks for the use of the municipality. Neither the statute nor the ordinance contained any reference to the provisions of the constitution prohibiting any county, city, township, or school district from becoming indebted in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per cent of the taxable property therein. The ordinance of the city made no reference to or mention of the indebtedness of the city, although at that time it exceeded the constitutional limit. A bona fide holder of the bonds brought suit upon the unpaid coupons thereto attached, and it was held that they were void and could not be recovered. In this case the city was directly benefited by the issue of the bonds, which were negotiated for the sole purpose of erecting a system of public works. The holders of the bonds thereafter sought relief by a bill in equity against the city of Litchfield to enforce the payment of the money loaned, or which the city had received

**As Lien on Public Works in Erection of Which Expended.**—The money received on the bonds having been expended, with other funds raised by taxation, in erecting the waterworks of the city, to impose the amount thereof as an equitable lien upon these public works would be equally a violation of the constitutional prohibition, as to raise against the city an implied assumpsit for money had and received.<sup>5</sup> The holders of the bonds and agents of the city are participants criminis in the act of violating that prohibition, and equity will no more raise a resulting trust in favor of the bondholders than the law will raise an implied assumpsit against a public policy so strongly declared.<sup>6</sup>

**Scaling Overissue.**—Parties holding the greater part of a series of bonds issued by a county in excess of the limit fixed by the constitution of the state, and which for that reason are not enforceable at law, cannot invoke the aid of a court of equity to afford them relief, by first ascertaining the extent of such excess, or settling the amount of bonds which the county could lawfully have issued, and then proceeding to scale down the issue to the limit thus ascertained, and to declare such excess only to be void; and thereupon decree the residue of such bonds good and valid, and enforce payment of such residue, with interest, against the county; or, in other words, the holders of bonds issued by a county in excess of its authority, cannot, by an offer to surrender and cancel so much of such bonds as may upon inquiry be found to exceed the limit authorized by law, invest a court of equity with jurisdiction, not only to ascertain the amount of such excess, but to declare the residue of such bonds valid and enforce the payment thereof against the county.<sup>7</sup>

upon the issue of the bonds, and used in the construction of its public works. The question of their right to recover on the equitable consideration came before this court in *Litchfield v. Ballou*, 114 U. S. 190, 29 L. Ed. 132, and it was held that there could be no recovery.

In *Litchfield v. Ballou*, 114 U. S. 190, 29 L. Ed. 132, the holder of the bonds, brought a suit in equity upon the ground that, though the bonds were void, the town was liable to him for the money which he had paid in their purchase. This court held that there was no equity in the bill on the ground that, if the plaintiff had any right of action against the city for money had and received, it was an action at law, and equity had no jurisdiction. *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534, 547, 31 L. Ed. 537.

5. **As lien on public works in erection of which expended.**—*Litchfield v. Ballou*, 114 U. S. 190, 194, 29 L. Ed. 132; *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534, 547, 31 L. Ed. 537.

6. *Litchfield v. Ballou*, 114 U. S. 190, 194, 29 L. Ed. 132.

7. **Scaling overissue.**—*Hedges v. Dixon County*, 150 U. S. 182, 183, 186, 37 L. Ed. 1044, distinguishing *Read v. Plattsmouth*, 107 U. S. 568, 27 L. Ed. 414, and *Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153, as to which it is said: "The circumstances and conditions which gave the holders of the bonds an equitable right in those cases to recover from the municipality the money which the bonds represented, do not exist in the case under consideration, where the county received no part of the proceeds of the bonds, and no direct money benefit, but merely derived an incidental advantage

arising from the construction of the railroad, upon which advantage it would be impossible for the court to place a pecuniary estimate, or to say that it would be equal to such portion of the bonds in question as the county could lawfully have issued."

Where bonds are issued in excess of what the county was authorized to donate under provisions of the state constitution, and which for that reason are invalid at law, a promise to pay so much thereof as could have been lawfully issued will not be implied and enforced against the county, on the principle applied in *Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153, and in *Read v. Plattsmouth*, 107 U. S. 568, 27 L. Ed. 414. Those cases are clearly distinguishable. *Hedges v. Dixon County*, 150 U. S. 182, 185, 37 L. Ed. 1044.

The bonds in question were issued as a donation to the railroad company, and, being intended as a donation, it cannot properly be said that the purchasers of these bonds from the railroad company paid any consideration therefor to the county so as to raise any equity as against it, for the amount represented by the bonds, or any part thereof. Any equitable demand which might under the circumstances have existed against the county, on the theory of consideration received, was in favor of the railroad company which constructed the railroad, and thereby conferred all the incidental benefits which the county derived from the transaction. If any equitable claim arises in favor of the holders of the bonds it must be against the railroad company, from whom the bonds were purchased, and by whom their payment was guaranteed, as that com-



**Identification of Money Fund or Property.**—Where bondholders file a bill to recover money paid to a city for the purchase of void bonds, they must clearly identify the money or the fund or other property which represents that money, in such a manner that it can be reclaimed and delivered without taking other property with it or injuring other persons or interfering with other's rights.<sup>8</sup> When money received from the sale of void municipal bonds has been expended together with other funds upon public works of the city, the purchasers of such bonds have no lien upon such public works.<sup>9</sup>

**Against Railroad Company Disposing of Void Aid Bonds—Sequestration of Income of Railroad Receiving Void State Bonds.**—The fact that a railroad company received bonds from a state, issued in violation of its constitution, and used the same, gives no valid lien upon its road which the state or its bondholders are entitled to enforce by a sequestration of the income and revenue arising therefrom in the hands of a subsequent purchaser of the road under foreclosure proceedings.<sup>10</sup>

**Rights of Purchaser of Void Railroad Aid Bonds to Stock Transferred to Him by Municipality and Right to Compel Transfer of Stock.**—See the titles MUNICIPAL, COUNTY, STATE AND FEDERAL AID, ante, p. 618; SUBROGATION.

pany was the recipient of the legal consideration realized upon the negotiation of the bonds. *Hedges v. Dixon County*, 150 U. S. 182, 187, 37 L. Ed. 1044.

"The principle running through these decisions controls the case under consideration, and clearly establishes that the complainants are not entitled to the relief they seek. The fact that the complainants have no remedy at law, arising from the invalidity of the bonds, confers no jurisdiction upon a court of equity to afford them relief." *Hedges v. Dixon County*, 150 U. S. 182, 192, 37 L. Ed. 1044.

**Valid and invalid part of issue separable.**—In *Daviess County v. Dickinson*, 117 U. S. 657, 29 L. Ed. 1026, under authority conferred by statute, the county voted a subscription of \$250,000 to a railroad company, which was made, and, by order of the county court, bonds of the county to that amount were ordered to be sold and disposed of by a committee, for the purpose of paying such subscription. The officers of the county, without authority, executed and issued bonds in the amount of \$300,000. The bonds, as they were delivered, were separately numbered and entered upon the county register. The court held that the power to issue bonds was limited to \$250,000, and that the bonds issued in excess of that amount were unlawful and void. It was further held that bonds to the amount authorized, which were first issued and delivered, were valid and entitled to payment. In that case there was a clear and well-defined line between the legal and illegal issues, which enabled the court to declare invalid such of the bonds as exceeded the amount authorized, and to hold that the illegal excess did not vitiate the bonds which were authorized and legally issued. There was no scaling of the entire issue in that case so as to bring it within the limits of the

county's authority. The \$250,000, which the court pronounced valid, had been expressly authorized by the county, and the bonds for that amount were readily separated from the \$50,000 excess which had not been authorized. It did not, therefore, involve any investigation on the part of the court to ascertain what the county could lawfully issue, but was merely the identification of the bonds which it intended to issue. Again, the amount of the bonds issued was not based upon the assessed valuation of the property of the county, but was limited to the amount which the people of the county, by an election duly held, had determined should be issued. There is a radical difference in these respects between that case and the one under consideration. *Hedges v. Dixon County*, 150 U. S. 182, 188, 37 L. Ed. 1044. See ante, "Limitation of Indebtedness," IV, Q, 2, a, (3), (c), aa, (bb).

8. *Litchfield v. Ballou*, 114 U. S. 190, 195, 29 L. Ed. 132.

A decree in a suit in chancery by bondholders to enforce payment of money loaned to a city upon void bonds, which declares that there is due to complainants a sum of money equal in amount to the bonds and interest on them from the day of their issue is unwarranted, such decree not being to return the identical money or property received but to pay as on an implied contract the sum received. *Litchfield v. Ballou*, 114 U. S. 190, 193, 29 L. Ed. 132.

9. *Litchfield v. Ballou*, 114 U. S. 190, 29 L. Ed. 132.

10. **Sequestration of income of railroad receiving void state bonds.**—*Tompkins v. Little Rock, etc., Railway*, 125 U. S. 109, 31 L. Ed. 615; *McKittrick v. Arkansas Cent. R. Co.*, 152 U. S. 473, 492, 38 L. Ed. 518.



2. **LIABILITY OF INDORSERS OR TRANSFERRERS OF VOID MUNICIPAL OR STATE BONDS**—a. *In General*.—The seller of negotiable municipal bonds is liable *ex delicto* for bad faith, and *ex contractu* there is an implied warranty on his part that they belong to him, and are not forgeries. Where there is no express stipulation, there is no liability beyond this. If the buyer desires special protection, he must take a guaranty. He can dictate its terms, and refuse to buy unless it be given. If not taken, he cannot occupy the vantage ground upon which it would have placed him.<sup>11</sup>

A seller of state bonds appearing on their face to be valid impliedly warrants that they are valid, both parties to the sale contemplating the delivery of valid obligations of the state though they are really null and void under the constitution of the state.<sup>12</sup>

In Louisiana a state statute governs the rights of the parties.<sup>12a</sup>

b. *Payee Giving Lien as Security*.—Where the payee of state bonds gave a lien as security for the issue of the bonds and negotiated the same upon the faith of a certificate to that effect, the case is within the reason of the rule which makes every indorser of commercial paper the guarantor of the genuineness and validity of the instrument he indorses; and under these circumstances the payee is estopped so far as his own liabilities are concerned, from denying the validity of the bonds.<sup>13</sup>

11. **Liability of indorsers or transferrers of municipal or state bonds**.—*Otis v. Cullum*, 92 U. S. 447, 449, 23 L. Ed. 496; *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534, 545, 31 L. Ed. 537; *Orleans v. Platt*, 99 U. S. 676, 679, 25 L. Ed. 404.

In *Otis v. Cullum*, 92 U. S. 447, 23 L. Ed. 496, a city bond issued in Kansas was sold to the plaintiffs in New York. The federal supreme court, on the ground that the legislature had no power to pass the act under which the bond was issued, adjudged it void. The plaintiffs subsequently sued to recover back what they had paid for it. The federal court held that in such cases there is only an implied warranty of title and genuineness, and that if there were no guaranty, and no fraud or misrepresentation on the part of the vendor in selling, the plaintiffs could not recover. It was said that such instruments pass from hand to hand like bank notes, and that, if invalid, the law would not inflict the hardship of compelling every one who had passed them to pay back what he had received from his transferee. *Orleans v. Platt*, 99 U. S. 676, 679, 25 L. Ed. 404.

In *Otis v. Cullum*, 92 U. S. 447, 23 L. Ed. 496, *Otis & Company* were the purchasers of bonds of the city of Topeka from the First National Bank of that place. These bonds were afterwards held by the federal supreme court to be void for want of authority. A suit was brought against the bank, which had failed and was in the hands of a receiver, to recover back the money paid to it for the bonds. It was held that there being no warranty of validity there could be no recovery and the court said: "The plaintiffs in error got exactly what they intended to buy, and did buy. They took no guaranty. They are seeking to recover, as it were, upon one, while none exists. They are not

clothed with the rights which such a stipulation would have given them. Not having taken it, they cannot have the benefit of it. The bank cannot be charged with a liability which it did not assume." *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534, 545, 31 L. Ed. 537.

12. *Meyer v. Richards*, 163 U. S. 385, 41 L. Ed. 199.

12a. **Louisiana**.—The Code of Louisiana, C. C. 2646, providing that "he who sells a credit or an incorporated right, warrants its existence at the time of the transfer, though no warranty be mentioned in the deed," is applicable to the sale of state bonds and the seller of such bonds warrants the existence of the bonds as valid obligations of the state. *Meyer v. Richards*, 163 U. S. 385, 389, 41 L. Ed. 199.

13. **Payee giving lien as security**.—*Railroad Cos. v. Schutte*, 103 U. S. 118, 26 L. Ed. 327; *Trask v. Jacksonville, etc., R. Co.*, 124 U. S. 515, 516, 31 L. Ed. 521.

In *Railroad Cos. v. Schutte*, 103 U. S. 118, 26 L. Ed. 327, it was decided that, although the bonds in suit were void as against the state, the railroad company that sold them was estopped from setting up their invalidity as a defense to an action brought by a bona fide holder to enforce the lien the company had given on its property to secure their payment. Accordingly a decree was rendered establishing the lien of the holders of the bonds on the railroad of the company, and ordering a sale to pay the amount due thereon. *Trask v. Jacksonville, etc., R. Co.*, 124 U. S. 515, 516, 31 L. Ed. 521.

"Having negotiated them on the faith of such a certificate, the company must be held to have agreed, as part of its own contract, whatever that was, that the bonds were obligatory." *Railroad Cos. v. Schutte*, 103 U. S. 118, 139, 26 L. Ed. 327.

**S. Conclusiveness of Official Determination and Certificate**—1. **IN GENERAL.**—Where an officer is charged by law with the duty to decide certain facts upon which the power to issue municipal bonds depends, his decision thereon is conclusive and takes the form of a judgment, only to be reviewed by a higher court.<sup>14</sup>

2. **COMPLIANCE WITH PRECEDENT CONDITIONS**—a. *In General.*—The action of the persons or the tribunal authorized by law to determine whether the conditions precedent to the lawful issue of municipal bonds have been complied with, is conclusive, and a bona fide purchaser of the bonds is under no obligation to look beyond it.<sup>15</sup> A bona fide purchaser of municipal bonds for a valuable consideration, who had no actual notice of any defense which could be set up against them, is not bound to look further than to see that there was legislative authority for their issue, and that the officers who were thereunto authorized have decided that the precedent conditions upon which it was allowed to be exercised have been fulfilled. If such authority was conferred and such a decision made, the bonds are valid obligations which he may enforce.<sup>16</sup> It cannot be collaterally attached in every suit upon the bond, or attached coupons;

"In *Railroad Cos. v. Schutte*, 103 U. S. 118, 26 L. Ed. 327, the object was to enforce the statutory mortgage. The company actually gave the state as security for the issue of the bonds, not to recover the money received for them." *Tompkins v. Little Rock, etc., Railway*, 125 U. S. 109, 118, 31 L. Ed. 615.

14. **Conclusiveness of official determination and certificate.**—*Andes v. Ely*, 158 U. S. 312, 39 L. Ed. 996; *Tulare Irrig. Dist. v. Shepard*, 185 U. S. 1, 24, 46 L. Ed. 773; *County of Macon v. Shores*, 97 U. S. 272, 279, 24 L. Ed. 889.

"The due execution of bonds" is an executive act, and "every executive officer, when called on to act in his official capacity, must inquire and determine whether, on the facts, the law requires him to do one thing or another." *Hoff v. Jasper County*, 110 U. S. 53, 56, 28 L. Ed. 68.

The function of making the subscription and issuing the bonds was confided to the county court. They had jurisdiction over the entire subject. They were clothed with the power and duty to hear and determine. The power was exercised and the duty performed. The result is conclusive, and the county is estopped to deny that such is its effect. *County of Macon v. Shores*, 97 U. S. 272, 279, 24 L. Ed. 889.

15. **Compliance conditions precedent.**—*Commissioners v. Bolles*, 94 U. S. 104, 24 L. Ed. 46; *Pompton v. Cooper Union*, 101 U. S. 196, 25 L. Ed. 803.

Where the persons appointed by law to certify that the preliminary requisites in regard to the issuance of municipal bonds have been complied with, do so certify, their certificate is conclusive in favor of the holder who, on the strength of such certificate, pays his money for the bonds without notice of the defect or illegality. *Chambers County v. Clews*, 21 Wall. 317, 321, 22 L. Ed. 517; *Grand Chute v. Winegar*, 15 Wall. 355, 21 L. Ed. 170; *Lynde v.*

*The County*, 16 Wall. 6, 21 L. Ed. 272; *Railroad Co. v. County of Otoe*, 16 Wall. 667, 21 L. Ed. 375.

16. *Block v. Commissioners*, 99 U. S. 686, 25 L. Ed. 491.

When the power to issue bonds, "depends upon the existence of conditions, the local officers are charged with the duty and the responsibility of ascertaining them, and the presumption that the duty was exercised should and does accompany and guarantee the bonds in every financial market." *Stanly County v. Coler*, 190 U. S. 437, 447, 47 L. Ed. 1126.

It is a settled rule of law that, where a particular functionary is clothed with the duty of deciding such a question, his decision, in the absence of fraud or collusion, is final. It is not open for examination, and neither party can go behind it. *Lynde v. The County*, 16 Wall. 6, 13, 21 L. Ed. 272.

**Exoneration from former subscription.**—The qualified voters of a county by vote approved on issue of bonds in payment of a subscription to the stock of a railroad company upon condition that the county be "fully and completely exonerated from the payment of" a former subscription by the said county to another railroad. The judge of the county court of said county, in whom the powers of the court to issue the bonds were vested, thereafter, entered an order to that effect, issued the bonds and received the stock subscribed for. No formal release or exoneration from payment of the former subscription was ever made and nothing ever done in regard to it. The bonds and attached coupons came into the hands of a bona fide purchaser for values before maturity. It was held that a bona fide purchaser, before maturity of these bonds and coupons for value, was entitled to assume in his purchase that the said county had before their issuance been "fully and completely exonerated from the payment of the former subscription." *Quinlan v.*



but such decision would not be conclusive in a direct proceeding to inquire into the facts previously to the execution of the power.<sup>17</sup>

**Certificate as to Fact, Determination of Which Unauthorized.**—An officer's certificate of a fact which he has no authority to determine is of no legal effect.<sup>18</sup>

**Instances.**—This rule has been applied where the common council,<sup>19</sup> board of commissioners, of a county<sup>20</sup> or township,<sup>21</sup> county court<sup>22</sup> or county judge,<sup>23</sup> the supervisor,<sup>24</sup> a trustee,<sup>25</sup> the town or township clerk,<sup>26</sup> or the town-

Green County, 205 U. S. 410, 51 L. Ed. 860.

17. Board of Comm'rs *v.* Aspinwall, 21 How. 539, 544, 16 L. Ed. 208; Supervisors *v.* Schenck, 5 Wall. 772, 783, 18 L. Ed. 556; Bissell *v.* Jeffersonville, 24 How. 287, 299, 16 L. Ed. 664; Moran *v.* Commissioners, 2 Black 722, 725, 17 L. Ed. 342.

18. Certificate as to fact determination of which unauthorized.—Davies County *v.* Dickinson, 117 U. S. 657, 664, 29 L. Ed. 1026; Dixon County *v.* Field, 111 U. S. 83, 28 L. Ed. 360.

"The certificate of the judge of the county court upon the back of each bond, that it was issued as authorized by the statute and by an order of the county court in pursuance thereof, cannot estop the county to deny that the particular bond is void because the county court, at the time of issuing it, had exhausted the power conferred by the act of the legislature and the vote of the people. The certificate is not a recital in the bond. It is not the act of the county court, is not under its seal, nor signed by its clerk; but is simply the certificate of the person holding the office of judge of that court. Neither the statute, nor the vote of the people, nor the order of the county court, empowered him to make such a certificate, or to determine the question whether the county court had exceeded the power conferred upon it." Davies County *v.* Dickinson, 117 U. S. 657, 664, 29 L. Ed. 1026.

19. Bissell *v.* Jeffersonville, 24 How. 287, 299, 16 L. Ed. 664; Tulare Irrig. Dist. *v.* Shepard, 185 U. S. 1, 20, 46 L. Ed. 773.

20. Board of county commissioners.—Marcy *v.* Oswego Tp., 92 U. S. 637, 23 L. Ed. 748; Humboldt Tp. *v.* Long, 92 U. S. 642, 23 L. Ed. 752; Commissioners *v.* Bolles, 94 U. S. 104, 24 L. Ed. 46; Commissioners *v.* Clark, 94 U. S. 278, 283, 24 L. Ed. 59; Board of Comm'rs *v.* Aspinwall, 21 How. 539, 16 L. Ed. 208; Board of Comm'rs *v.* Wallace, 21 How. 546, 16 L. Ed. 211; Supervisors *v.* Schenck, 5 Wall. 772, 783, 18 L. Ed. 556.

**Under the act of the legislature of Kansas,** to authorize counties and cities to issue bonds to railroad companies, approved April 10, 1865, and that of Feb. 25, 1868, the board of commissioners of a county is authorized to determine whether the condition precedent to the lawful issue of such bonds has been complied with. Commissioners *v.* Bolles, 94 U. S. 104, 24 L. Ed. 46.

In the case of Marcy *v.* Oswego Tp., 92

U. S. 637, 23 L. Ed. 748, it was held that, by the provisions of the act authorizing the bond issue the board of county commissioners, who caused the bonds to be issued, were constituted the authority to determine whether the conditions of fact, made by the statute precedent to the exercise of the authority granted to execute and issue the bonds, had been performed, and that their recital in the bonds issued by them was conclusive in a suit against the township brought by a bona fide holder. Humboldt Tp. *v.* Long, 92 U. S. 642, 645, 23 L. Ed. 752.

21. Commissioners of township.—Pompton *v.* Cooper Union, 101 U. S. 196, 25 L. Ed. 803.

22. County court.—County of Macon *v.* Shores, 97 U. S. 272, 24 L. Ed. 889; Citizens' Sav., etc., Ass'n *v.* Perry County, 156 U. S. 692, 39 L. Ed. 585; Livingston County *v.* First Nat. Bank, 128 U. S. 102, 127, 32 L. Ed. 359; County of Davies *v.* Huidekoper, 98 U. S. 98, 102, 25 L. Ed. 112.

23. County judge.—Lynde *v.* The County, 16 Wall. 6, 13, 21 L. Ed. 272; Citizens' Sav., etc., Ass'n *v.* Perry County, 156 U. S. 692, 711, 39 L. Ed. 585; Quinlan *v.* Green County, 205 U. S. 410, 51 L. Ed. 860.

The judgment of a county judge who the officer charged by law with the duty to decide whether the bonds could be legally issued, is conclusive until reversed by a higher court. Orleans *v.* Platt, 99 U. S. 676, 683, 25 L. Ed. 404; Lynde *v.* The County, 16 Wall. 6, 21 L. Ed. 272; Rock Creek Tp. *v.* Strong, 96 U. S. 271, 24 L. Ed. 815; Lyons *v.* Munson, 99 U. S. 684, 25 L. Ed. 451.

24. The supervisor.—St. Joseph Tp. *v.* Rogers, 16 Wall. 644, 665, 21 L. Ed. 328; Oregon *v.* Jennings, 119 U. S. 74, 92, 30 L. Ed. 323.

25. Trustee.—In Provident Life, etc., Co. *v.* Mercer County, 170 U. S. 593, 42 L. Ed. 1156, where the fact whether a condition precedent had been performed before the issuing of the bonds was confined for decision to a trustee, it was held that his decision that the condition precedent had been complied with was conclusive in favor of a bona fide holder, even though the condition had in fact not been performed. Tulare Irrig. Dist. *v.* Shepard, 185 U. S. 1, 24, 46 L. Ed. 773. See, also, Waite *v.* Santa Cruz, 184 U. S. 302, 46 L. Ed. 552.

26. Oregon *v.* Jennings, 119 U. S. 74.



ship trustees<sup>27</sup> was charged with the duty of deciding whether the conditions authorizing a municipal bond issue existed.

b. *Form of Certificate*.—Where municipal bonds become, under the agreement of the parties, valid instruments completely executed in form when a certificate that the conditions upon which they were voted, have been performed, the certificate must show a substantial compliance with the condition on their face.<sup>28</sup>

c. *Result of Election*.—For all legal purposes the result of an election to ascertain whether municipal bond shall be issued is what it is declared to be by the authorized board of canvassers empowered to make the canvass at the time when the returns should be made, until their decision has been reversed by a superior power, and a reversal has no effect upon acts lawfully done prior to it.<sup>29</sup>

92, 30 L. Ed. 323; *Wilson v. Salamanca*, 99 U. S. 499, 504, 25 L. Ed. 330.

27. **The township trustee and the township clerk** who made the subscription and issued the bonds in this case were the officially constituted authorities of the township, and when they subscribed to the stock and issued the bonds they acted in their official capacity as the legal representatives of the township, and not as mere agents. In this particular they occupied the position of the county court in the Scotland county case. They were to all intents and purposes the township in its corporate capacity. In *Harshman v. Bates County*, 92 U. S. 569, 23 L. Ed. 747, the case was different. There the county court was the mere agent of a corporation, with which it had no official connection. The difference between the two cases is precisely that between a principal and an agent, and it is so expressly said in the Scotland county case. In the one case the corporation is bound if the action of the officers is within their corporate powers, while in the other the action must be within the corporate powers delegated to the agent. *Wilson v. Salamanca*, 99 U. S. 499, 504, 25 L. Ed. 330.

28. A town in Wisconsin, being thereunto authorized by law, subscribed for stock in a railroad company, and issued its bonds in payment therefor, each reciting that it "shall be valid only when it is thereon duly certified that the conditions upon which it was voted, issued, and deposited by said town have been performed." Suit was brought on the bonds by a party who in good faith purchased them before they matured. Held, that the certificate on the bonds is in proper form estopping the town from denying their validity, and placing them in a condition to be put on the market as commercial paper. *Menasha v. Hazard*, 102 U. S. 81, 26 L. Ed. 85.

When the bonds were "duly certified" and delivered to the railroad company by the bank, they became, under the agreement of the parties, valid instruments, completely executed in form, and in a condition to be put on the market as commercial paper. Having on them the necessary certificate, the purchaser need not inquire whether the facts were as certified.

*Anthony v. Jasper County*, 101 U. S. 693, 25 L. Ed. 1005. With the certificate indorsed, the bonds were in legal effect the same as if they had been issued by the proper officers under full authority without the condition which appeared on their face. Under these circumstances, the condition did not destroy their negotiability. *Menasha v. Hazard*, 102 U. S. 81, 95, 26 L. Ed. 85.

The words "duly certified" discussed.—See *Menasha v. Hazard*, 102 U. S. 81, 93, 26 L. Ed. 85.

29. **Result of election**.—See, also, *St. Joseph Tp. v. Rogers*, 16 Wall. 644, 665, 21 L. Ed. 328; *Rock Creek Tp. v. Strong*, 96 U. S. 271, 24 L. Ed. 815; *Supervisors v. Schenck*, 5 Wall. 772, 783, 18 L. Ed. 556; *County of Daviess v. Huidekoper*, 98 U. S. 98, 102, 25 L. Ed. 112; *Citizens' Sav., etc., Ass'n v. Perry County*, 156 U. S. 692, 39 L. Ed. 585.

The action of the persons or the tribunal authorized by law to determine the result of an election held for the purpose of ascertaining whether a municipality shall issue its bonds in aid of an object authorized by law is conclusive, and a bona fide purchaser of the bonds is under no obligation to look beyond it. *Rock Creek Tp. v. Strong*, 96 U. S. 271, 24 L. Ed. 815; *St. Joseph Tp. v. Rogers*, 16 Wall. 644, 665, 21 L. Ed. 328.

Where the statute of a state provided that the board of commissioners of a county should have power to subscribe for railroad stock, and issue bonds therefor, in case a majority of the voters of the county should so determine after a certain notice should be given of the time and place of election, and the board subscribed for the stock and issued the bonds purporting to act in compliance with the statute, it is too late to call in question the existence or regularity of the notices in a suit against the county by the holders of the coupons attached to the bonds, who were innocent holders. *Board of Comm'rs v. Aspinwall*, 21 How. 539, 16 L. Ed. 208; *Board of Comm'rs v. Wallace*, 21 How. 546, 16 L. Ed. 211; *Supervisors v. Schenck*, 5 Wall. 772, 783, 18 L. Ed. 556; *St. Joseph Tp. v. Rogers*, 16 Wall. 644, 665, 21 L. Ed. 328.

In such a suit, according to the true in-

d. *Petition and Written Assent of Taxpayers.*—The action of the persons or tribunal authorized to determine whether the petition or written assent of the

terpretation of the statute, the board were the proper judges whether or not a majority of the votes in the county had been cast in favor of the subscription to the stock. *Board of Comm'rs v. Aspinwall*, 21 How. 539, 16 L. Ed. 208; *St. Joseph Tp. v. Rogers*, 16 Wall. 644, 665, 21 L. Ed. 328; *Supervisors v. Schenck*, 5 Wall. 772, 783, 18 L. Ed. 556.

Whether or not the election has been properly held, and a majority of the votes of the county cast in favor of the subscription, is not to be determined by the court, in a collateral way, in every suit upon the bond, or coupons attached, but by the board of commissioners, as a duty imposed upon it before making the subscription. The question belongs to the board. *Board of Comm'rs v. Aspinwall*, 21 How. 539, 544, 16 L. Ed. 208.

The decision of the board may not be conclusive in a direct proceeding to inquire into the facts, previously to the execution of the power, and before the rights and interests of third parties had attached; but, after the authority has been executed, the stock subscribed, and the bonds issued, and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question. Much less can it be called in question to the prejudice of a bona fide holder of the bonds in this collateral way. *Board of Comm'rs v. Aspinwall*, 21 How. 539, 544, 16 L. Ed. 208; *Supervisors v. Schenck*, 5 Wall. 772, 777, 783, 18 L. Ed. 556; *Mercer County v. Hackett*, 1 Wall. 83, 93, 17 L. Ed. 548; *St. Joseph Tp. v. Rogers*, 16 Wall. 644, 665, 21 L. Ed. 328.

The law authorizing a municipality to subscribe for stock in a railroad company made it the duty of the supervisor who executed the bonds to determine the question whether an election was held, and whether a majority of the votes cast were in favor of the subscription. He passed upon that question and subscribed for the stock and subsequently executed and delivered the bonds. It was held that it is too late to question their validity where it appears, that they are in the hands of an innocent holder. *St. Joseph Tp. v. Rogers*, 16 Wall. 644, 665, 21 L. Ed. 328.

*Illinois.*—Bonds issued to pay a county subscription for stock of a railroad company under the Illinois act of April 16, 1869, under which act there could be no valid subscription except upon a vote of "a majority of the legal voters living in said county" in favor of such subscription, are valid in the hands of bona fide purchasers where the county court certifies upon its record that the subscription had been voted for by such majority. The question whether such majority voted in favor of such subscription is a matter not determinable by any public record and was to be ascertained by the county court or

county judge upon examination. *Citizens' Sav., etc., Ass'n v. Perry County*, 156 U. S. 692, 711, 39 L. Ed. 585.

*Iowa.*—The county judge being, by the Code of Iowa, the officer designated to decide whether the voters have given the required sanction to the borrowing of money and issuing of bonds, his execution and issue of bonds setting forth on their face that "all of said bonds are issued in accordance with a vote of the people of said county," and that "the people have voted the levying of sufficient taxes," etc., is conclusive evidence against the county of the popular sanction so far as respects holders bona fide and for value. *Lynde v. The County*, 16 Wall. 6, 21 L. Ed. 272.

*Kansas.*—Where, pursuant to a statute entitled "An act authorizing counties and cities to issue bonds to railroad companies," approved Feb. 10, 1865, as amended Feb. 26, 1866, an election was held in a county in Kansas upon the question of a county subscription to the capital stock of "any railroad company" then, or thereafter to be, organized which should construct a railroad from a point in Missouri to a point in the county, and the result having, May 8, 1867, been declared by the proper authorities to be in favor of the subscription, and so entered on their minutes, the bonds were, in 1870, issued in payment of the subscription to a Missouri company, which caused the road to be built; held, that the subscription was binding, and that the county, in an action on the bonds of such a purchaser, is estopped from asserting that in fact a majority of the qualified electors had not voted in favor of the issue of the bonds. *Block v. Commissioners*, 99 U. S. 686, 687, 25 L. Ed. 491.

*New York.*—Where, pursuant to the authority vested in him by chapter 907 of the laws of New York, passed May 18, 1869, and the several laws amendatory thereof, the county judge renders judgment declaring that the conditions have been performed whereon a town in the county can lawfully subscribe for shares of the capital stock of a railroad company in that state, and issue its bonds to pay therefor, held, that the judgment, until reversed by a higher court, is conclusive. *Orleans v. Platt*, 99 U. S. 676, 25 L. Ed. 404; *Lyons v. Munson*, 99 U. S. 684, 25 L. Ed. 451.

His judgment in favor of the subscription cannot be collaterally attacked in a suit on the bonds, brought by a bona fide holder for value of them against the town, and where it is recited in them, the town is estopped from denying their validity. *Lyons v. Munson*, 99 U. S. 684, 25 L. Ed. 451.

The county judge unquestionably had jurisdiction to decide upon the application



taxpayers is sufficient is conclusive in favor of a bona fide holder of the bonds.<sup>30</sup>

3. DETERMINATION WHETHER MUNICIPALITY DULY ORGANIZED.—Where the statute invested the board of supervisors with power to decide whether a municipal corporation (an irrigation district) had been duly organized, the exercise

made by the taxpayers. His judgment until reversed was final. If there were errors, the proceedings should have been brought before a higher court for review by a writ of certiorari, and if need be, the issuing and circulation of the bonds should have been enjoined, subject to the final result of the litigation. The judgment rendered can no more be collaterally attacked in this case than could any other judgment of a court of competent jurisdiction rendered with the parties, as in this case, properly before it. *Lyons v. Munson*, 99 U. S. 684, 685, 25 L. Ed. 451; *Orleans v. Platt*, 99 U. S. 676, 25 L. Ed. 404; *Lynde v. The County*, 16 Wall. 6, 21 L. Ed. 272; *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548; *Board of Comm'r's v. Aspinwall*, 21 How. 539, 16 L. Ed. 208; *Rock Creek Tp. v. Strong*, 96 U. S. 271, 24 L. Ed. 815.

30. **Petition and written assent of taxpayer.**—*Bissell v. Jeffersonville*, 24 How. 287, 16 L. Ed. 664; *Tulare Irrig. Dist. v. Shepard*, 185 U. S. 1, 20, 46 L. Ed. 773; *Venice v. Murdock*, 92 U. S. 494, 23 L. Ed. 583. See, also, *Genoa v. Woodruff*, 92 U. S. 502, 23 L. Ed. 586.

**Petition of taxpayers.**—The common council of the city of Jeffersonville, in Indiana, had authority to subscribe for stock in a railroad company, and to issue bonds for such subscription, upon the petition of three-fourths of the legal voters of the city. The common council determined that three-fourths had so petitioned; and under a subsequent act, authorizing them to revise the subject, they again came to the same conclusion, and issued the bonds. Jurisdiction of the subject matter on the part of the common council was made to depend upon the fact whether the petitioners whose names were appended constituted three-fourths of the legal voters of the city, and the common council were made by the laws the tribunal to decide that question. When sued upon the bonds by innocent holders for value, it was too late to introduce parol testimony to show that the petitioners did not constitute three-fourths of the legal voters of the city. Duly certified copies of the proceedings of the common council were exhibited to the plaintiffs at the time they received the bonds, and upon the bonds themselves it was recited that three-fourths of the legal voters had petitioned for the subscription. The railroad company and their assigns had a right, therefore, to conclude that they imported absolute verity. *Bissell v. Jeffersonville*, 24 How. 287, 16 L. Ed. 664. See, also, *Tulare Irrig. Dist. v. Shepard*, 185 U. S. 1, 21, 46 L. Ed. 773.

In *Bissell v. Jeffersonville*, 24 How. 287,

16 L. Ed. 664, the court adopting the language of the federal supreme court in the case of the *Board of Comm'r's v. Aspinwall*, 21 How. 539, 544, 16 L. Ed. 208, said: "We are of the opinion that 'this board was one, from its organization and general duties, fit and competent to be the depository of the trust confided to it.' Perfect acquiescence in the decision and action of the board seems to have been manifested by the defendants until the demand was made for the payment of interest on the loan. So far as appears, they never attempted to enjoin the proceedings but suffered the authority to be executed, the bonds to be issued, and to be delivered to the railroad company, without interference or complaint." *Tulare Irrig. Dist. v. Shepard*, 185 U. S. 1, 21, 46 L. Ed. 773.

When the contract has been ratified and affirmed, and the bond issued and delivered to the railroad company in exchange for stock, it was then too late to call in question the fact determined by the common council—and, a fortiori, it is too late to raise that question in a case like the present, where it is shown that the plaintiffs are holders for value. Certified copies of the proceedings were exhibited to the plaintiffs at the time they received the bonds, etc., and whether we look to the bonds or recorded proceedings, there is nothing to indicate any irregularity, or to raise a suspicion that the bonds had not been issued pursuant to lawful authority. We hold that the company and its assigns, under the circumstances of the case, had a right to assume that they imported verity. *Bissell v. Jeffersonville*, 24 How. 287, 16 L. Ed. 664. The same ruling was made by the court in the case of the *Board of Comm'r's v. Wallace*, 2 How. 546, 16 L. Ed. 211. It was substantially repeated in *Board of Comm'r's v. Aspinwall*, 21 How. 539, 16 L. Ed. 208; *Moran v. Commissioners*, 2 Black 722, 725, 17 L. Ed. 342, and *Tulare Irrig. Dist. v. Shepard*, 185 U. S. 1, 21, 46 L. Ed. 773, each quoting from *Bissell v. Jeffersonville*, supra.

**Written assent of taxpayer.**—An act of the legislature of New York authorized the supervisor of any town in the county of Cayuga, and the assessors of such town, who were thereby appointed to act with the supervisor as commissioners, to borrow money to the amount of twenty-five thousand dollars to aid in the construction of a railroad passing through the town, and execute the bonds of the town therefor. The act, however, provided that the supervisor and commissioners should have no power to issue the bonds until the written assent of two-thirds of the resident



of that power by the board and its determination that the municipality had been legally and duly organized (such determination being evidenced by the order duly recorded as provided for in the statute), is a finding of fact upon which a purchaser of bonds, issued by such corporation, has a right to rely. It is the record provided by the statute, made by a body directed by it to determine the very fact in question. In such cases the finding is conclusive in favor of a bona fide holder of the bonds.<sup>31</sup>

4. DETERMINATION OF AMOUNT OF ISSUE.—Purchasers of municipal bonds purporting to be issued under authority of an act of the legislature, by commissioners or other persons whose duty it was to determine the amount that could be lawfully put out under such statute, have the right to rely upon the decision of such commissioners as conclusive as to the amount that could be issued and to enforce payment of bonds issued beyond the limit.<sup>32</sup> But exactions of the

taxpayers, as appearing on the assessment roll of such town next previous to the time when such money may be borrowed, should have been obtained by such supervisor and commissioners, or some one or more of them, and filed in the clerk's office of said county, together with the affidavit of such supervisor or commissioners, or any two of them, attached to such statement, to the effect that the persons whose written assents are thereto attached and filed comprise two-thirds of all the resident taxpayers of said town on the assessment roll of such town next previous thereto. Subsequently a written assent to the effect required was filed in that office, the persons who signed it representing themselves to be such resident taxpayers. Upon this instrument was indorsed the affidavit of the supervisor and one of the commissioners, that the persons whose names were subscribed to the assent composed two-thirds of all the resident taxpayers of said town. The bonds were issued, signed by the supervisor and commissioners, reciting that, in pursuance of said act of the legislature, "and the written assent of two-thirds of the resident taxpayers of said town obtained and filed in the office of the clerk of the county of Cayuga," said town promised to pay the sum of money therein named to bearer. Held: 1. That it was the appointed province of the supervisor and commissioners to decide the question, whether the condition precedent to the exercise of their authority had been fulfilled; that they did decide it by issuing the bonds; and that the recital in the bonds was a declaration of their decision. 2. That the supervisor and commissioners, who procured what purported to be the written assent of the taxpayers, had means of knowledge touching the genuineness of the signatures to the paper, which, from the nature of the case, the purchaser could not have; and that, in a suit by a bona fide holder of the bonds, the town was estopped from disputing their validity, and that he was not bound to prove the genuineness of the signatures to the written assent. *Venice v. Murdock*, 92 U. S. 494, 23 L. Ed. 583. See also, *Genoa v. Woodruff*, 92 U. S. 502, 23 L. Ed. 586.

**31. Determination whether municipality duly organized.**—*Tulare Irrig. Dist. v. Shepard*, 185 U. S. 1, 19, 46 L. Ed. 773, citing *Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579; *Venice v. Murdock*, 92 U. S. 494, 23 L. Ed. 583.

**32. Determination of amount of issue.**—*New Providence v. Halsey*, 117 U. S. 336, 29 L. Ed. 904; *Dixon County v. Field*, 111 U. S. 83, 95, 28 L. Ed. 360; *Marcy v. Oswego Tp.*, 92 U. S. 637, 23 L. Ed. 748; *Humboldt Tp. v. Long*, 92 U. S. 642, 645, 23 L. Ed. 752; *Sherman County v. Simons*, 109 U. S. 735, 27 L. Ed. 1093.

An issue of county bonds by commissioners appointed for that purpose estops the county from setting up as a defense against a bona fide holder that the original issue was in excess of the amount authorized. *Sherman County v. Simons*, 109 U. S. 735, 738, 27 L. Ed. 1093; *New Providence v. Halsey*, 117 U. S. 336, 338, 29 L. Ed. 904.

Where the commissioners issued township bonds under the act of the legislature of New Jersey of April 9, 1868, "to authorize certain towns \* \* \* to issue bonds and take stock in the \* \* \* railroad company," their decision on the subject was final and conclusive as to the amount that could be issued under the statute and estops the township from setting up as against a bona fide holder that the issue was in excess of the amount authorized. *New Providence v. Halsey*, 117 U. S. 336, 29 L. Ed. 904.

In *Marcy v. Oswego Tp.*, 92 U. S. 637, 23 L. Ed. 748, "although it was provided that the amount of the bonds voted by any township should not be above such a sum as would require a levy of more than one per cent per annum on the taxable property of such township to pay the yearly interest, it was held that the existence of sufficient taxable property to warrant the amount of the subscription and issue, it not being designated as fixed by the assessment, was one of those prerequisite facts to the execution and issue of the bonds, which was of a nature that required examination and decision, and had been referred by the statute to the inquiry and determination of the board. In *Sherman County v. Simons*, 109 U. S. 735.

constitution itself cannot be dispensed with, by the legislature either directly or indirectly, by the creation of a ministerial commission, whose finding shall be taken in lieu of the facts.<sup>33</sup>

5. CONCLUSIVENESS OF CERTIFICATE UNDER REGISTRATION ACTS.—Where a state statute requires a municipal bond to be certified in a particular way by the state auditor (for instance) and the requisite certificate is indorsed on the bond, the execution of the bond is complete, and, under the law, it may then be negotiated, that is to say, put on the market as valid commercial paper. When the certificate is found on the bond, the purchaser need not inquire whether what has been certified to is true. As against a bona fide holder the public is bound by what its authorized agents have done and stated in the prescribed form.<sup>34</sup> The doctrine has not been carried further than that the officer, whose duty it is to make the certificate, is authorized to ascertain whether the facts exist which the statute requires should exist, to make a valid issue of bonds.

27 L. Ed. 1093, the county commissioners were constituted by the statute the tribunal for the purpose of determining the amount of the indebtedness, in excess of which the bonds were not to be issued, and their decision was accordingly held to be conclusive." *Dixon County v. Field*, 111 U. S. 83, 95, 28 L. Ed. 360. And see *Humboldt Tp. v. Long*, 92 U. S. 642, 645, 23 L. Ed. 752.

In *Sherman County v. Simons*, 109 U. S. 735, 737, 27 L. Ed. 1093, the court said: "A purchaser of the bonds was required to inspect the records of the county to ascertain the amount of its indebtedness, and whether there had been an overissue of bonds; it appears from the findings of fact that the records of the commissioners contained an estimate of the indebtedness of the county made by them for the express purpose of fixing the amount of bonds to be issued, and in pursuance of which they were issued, which showed that there was no overissue. This was a decision by the very officers whose duty it was under the law to fix the amount of bonds which could be lawfully issued. A purchaser of bonds was not required to make further inquiry, and if the finding of the commissioners was untrue, he could not be affected by its falsity." See, also, *Lynde v. The County*, 16 Wall. 6, 21 L. Ed. 272; *Commissioners v. January*, 94 U. S. 202, 24 L. Ed. 110; *County of Warren v. Marcy*, 97 U. S. 96, 24 L. Ed. 977; *Commissioners v. Bolles*, 94 U. S. 104, 24 L. Ed. 46; *Pana v. Bowler*, 107 U. S. 529, 27 L. Ed. 424.

33. *Lake County v. Graham*, 130 U. S. 674, 680, 32 L. Ed. 1065; *Doon Tp. v. Cummins*, 142 U. S. 366, 35 L. Ed. 1044; *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 269, 43 L. Ed. 689.

"In the case of *Sherman County v. Simons*, 109 U. S. 735, 27 L. Ed. 1093, and others like it, the question was one of estoppel as against an exaction imposed by the legislature; and the holding was that the legislature, being the source of exaction, had created a board authorized to determine whether its exaction had been complied with, and that its finding

was conclusive to a bona fide purchaser." *Lake County v. Graham*, 130 U. S. 674, 683, 684, 32 L. Ed. 1065; *Doon Tp. v. Cummins*, 142 U. S. 366, 376, 35 L. Ed. 1044; *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 269, 43 L. Ed. 689.

"So, also, in *Oregon v. Jennings*, 119 U. S. 74, 30 L. Ed. 323, the condition violated was not one imposed by the constitution, but one fixed by the subscription contract of the people." *Lake County v. Graham*, 130 U. S. 674, 684, 32 L. Ed. 1065; *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 269, 43 L. Ed. 689.

34. **Conclusiveness of certificate under registration acts.**—*Anthony v. Jasper County*, 101 U. S. 693, 696, 25 L. Ed. 1005.

"When the law of the state provides for registry of municipal bonds and a certificate thereof, such certificate should be held as sufficient evidence to a purchaser of the existence of those facts upon which alone bonds can be registered." *Cairo v. Zane*, 149 U. S. 122, 141, 37 L. Ed. 673.

Where a state auditor has full authority to ascertain and determine whether bonds presented for registration have been issued in accordance with the statute, his certificate to that effect is conclusive upon the county. *Lewis v. Commissioners*, 105 U. S. 739, 750, 26 L. Ed. 993, distinguished in *Bissell v. Spring Valley Tp.*, 110 U. S. 162, 171, 28 L. Ed. 105.

**Under the Kansas act of March 2, 1872**, the action and certificate of the auditor of state must be deemed conclusive evidence, as between the county and a bona fide purchaser, that the bonds were regularly and legally issued, and, therefore, negotiable, in the fullest sense of that word. *Lewis v. Commissioners*, 105 U. S. 739, 750, 26 L. Ed. 993.

In the case of *Lewis v. Commissioners*, 105 U. S. 739, 26 L. Ed. 993, "§ 14 of the Kansas act of March 2d, 1872, was under consideration in regard to the bonds of a county in Kansas, issued, in fact, under that act, each of which had endorsed on it a certificate by the state auditor, that it had been 'regularly and legally issued,' and that it had been registered in his office according to law. A defense was set up



It does not extend to or cover matter of law.<sup>35</sup> A certificate of registry is not conclusive that the bonds are issued in full compliance with the terms and

against a bona fide holder of the bonds, that they had been issued in violation of a condition contained in the popular vote, and were fraudulently parted with by the person in whose hands they were put, to be deposited with the state treasurer in escrow, to await a compliance with the condition. This court held, as to the effect of the registration, that the determination by the auditor involved an investigation as to every fact essential to the validity of the bonds; that the bona fide purchaser was not bound, under the circumstances disclosed in that case, to find out whether the auditor had ascertained all the facts; and that the auditor was authorized by the statute to inquire whether the bonds were, as a matter of fact, of the class which, under the act, should have passed through the hands of the state treasurer (it being required by the act that some should do so, and others not), and, also, whether the conditions on which they were deliverable had been performed." *Crow v. Oxford*, 119 U. S. 215, 225, 30 L. Ed. 388.

Bonds having been issued while a de facto, but fraudulent, organization of the county was in existence, and reciting that they were issued "in pursuance of and in accordance with a vote of a majority of over three-fifths of the qualified electors" of the county "as required by law;" and the auditor of the state having certified that they were "regularly and legally issued, that the signatures thereto are genuine, and that such bond has been duly registered," in accordance with the law of the state, are the valid obligations of the county in the hands of bona fide purchasers for value, before maturity. *Comanche County v. Lewis*, 133 U. S. 198, 33 L. Ed. 604; *Lewis v. Commissioners*, 105 U. S. 739, 749, 26 L. Ed. 993. There is no material distinction in principle, between this case and the cases just cited. *Comanche County v. Lewis*, 133 U. S. 198, 33 L. Ed. 604, involved the validity of bonds similar to these in suit, which had been issued by Comanche County, and *Lewis v. Commissioners*, 105 U. S. 739, 26 L. Ed. 993, involved the validity of similar bonds issued by Barbour County, Kansas. The bonds in suit in both of those cases were held valid and binding upon the respective counties. *Harper County Comm'rs v. Rose*, 140 U. S. 71, 76, 35 L. Ed. 344.

In *Comanche County v. Lewis*, 133 U. S. 198, 206, 33 L. Ed. 604, the bonds in suit were endorsed with the official certificate of the auditor of the state that the bonds had been regularly and legally issued; that the signatures were genuine; and that the bonds had been duly registered in his office in accordance with the act of the legislature of March 2, 1872. It was held that this is sufficient to validate them in the

hands of a bona fide holder. The court said: "Inasmuch as these bonds were issued after the act of 1872 went into effect, they fall within the decision in the case of *Lewis v. Commissioners*, 105 U. S. 739, 26 L. Ed. 993, rather than within that in the case of *Bissell v. Spring Valley Tp.*, 110 U. S. 162, 28 L. Ed. 105, as to the conclusiveness of the certificate of the auditor."

**Certificate made prima facie evidence only.**—"The registration acts, in some of the states, while imposing like duties upon state auditors, and requiring them (when the facts justified them in so doing) to certify, upon municipal bonds, that they have been issued in compliance with law, expressly declare such certificates to prima facie evidence only of the facts stated, and shall not prevent proof to the contrary in any suit involving the validity of the bonds, or the power and authority of the municipality, in whose name they are executed, to issue them. *Anthony v. Jasper County*, 101 U. S. 693, 25 L. Ed. 1005." *Lewis v. Commissioners*, 105 U. S. 739, 749, 26 L. Ed. 993.

**The statute of Illinois of April 16, 1869**, does not require that the auditor shall determine or certify that bonds have been regularly or legally issued by the county. It was held that the municipality issuing the bonds was not estopped by the registry or certificate of the auditor. *German Sav. Bank v. Franklin County*, 128 U. S. 526, 541, 32 L. Ed. 519.

35. *Crow v. Oxford*, 119 U. S. 215, 225, 30 L. Ed. 388, explaining *Lewis v. Commissioners*, 105 U. S. 739, 26 L. Ed. 993, and stating: "That this is so is shown by the case of *Dixon County v. Field*, 111 U. S. 83, 28 L. Ed. 360."

"In *Dixon County v. Field*, 111 U. S. 83, 28 L. Ed. 360, and in *Crow v. Oxford*, 119 U. S. 215, 30 L. Ed. 388, the first case arising in Nebraska, and the second in Kansas, the certificate of the auditor in each case was that the bonds were 'regularly and legally' issued, but this court held, in both cases, that the municipality issuing the bonds was not estopped by the registry or the certificate." *German Sav. Bank v. Franklin County*, 128 U. S. 526, 541, 32 L. Ed. 519.

**Violation of constitutional limit.**—A municipality issuing its bonds is not estopped, by a certificate of the auditor that the bonds had been "regularly and legally issued," from objecting that they were issued in violation of a restriction in the constitution of the state as to the amount of bonds to be issued. *Dixon County v. Field*, 111 U. S. 83, 28 L. Ed. 360; *Crow v. Oxford*, 119 U. S. 215, 30 L. Ed. 388; *German Sav. Bank v. Franklin County*, 128 U. S. 526, 541, 32 L. Ed. 519.

In *Dixon County v. Field*, 111 U. S. 83, 28 L. Ed. 360, "there was an innocent



conditions of a subscription of stock,<sup>36</sup> where the statute does not require that the auditor shall determine or certify that the bonds have been regularly or legally issued.<sup>37</sup> But the certificate of registry in the office of the state auditor can be relied upon as showing that what the city did, in a particular case, amounted to a subscription of stock, which the statute gave it a right to make, rather than to a donation, which it could not legally make.<sup>38</sup>

**T. Ratification**—1. CORPORATION HAVING POWER TO ISSUE.—Where a municipal corporation has power to issue bonds, it may ratify an issue irregularly made under such power.<sup>39</sup>

**A minority** of the officers empowered to act for a municipality cannot ratify an irregular bond issue.<sup>40</sup>

holder of bonds, of a county in Nebraska, and on each bond was endorsed a certificate of the state auditor that the bond was 'regularly and legally issued.' As against an objection that the bonds were issued in violation of a restriction in the constitution of the state as to the amount of bonds to be issued, it was held by this court, \* \* \* that no conclusive effect was given by the statute to the registration or to the certificate; that the certificate was no more comprehensive or efficacious than the statement in the bonds; that such statement did not extend to or cover matters of law; and that 'a certificate reciting the actual facts, and that thereby the bonds were conformable to the law, when, judicially speaking, they are not, will not make them so, nor can it work an estoppel upon the county to claim the protection of the law.'" *Crow v. Oxford*, 119 U. S. 215, 225, 30 L. Ed. 388; *Dixon County v. Field*, 111 U. S. 83, 28 L. Ed. 360. See, to the same effect, *German Sav. Bank v. Franklin County*, 128 U. S. 526, 541, 32 L. Ed. 519; *Cairo v. Zane*, 149 U. S. 122, 141, 37 L. Ed. 673; *Citizens' Sav., etc., Ass'n v. Perry County*, 156 U. S. 692, 704, 39 L. Ed. 585.

**Whether bonds of kind authorized to be registered.**—The state auditor of Kansas was authorized by the act of March 2, 1872, only to register municipal bonds issued under that act where bonds are not of the kind authorized to be registered by him under that act, he has no right to decide as a matter of law that such bonds were bonds of the kind which he was authorized to register and certify by that act, when as a matter of law they were not. *Crow v. Oxford*, 119 U. S. 215, 226, 30 L. Ed. 388.

**36. Compliance with terms of subscription.**—*Cairo v. Zane*, 149 U. S. 122, 141, 37 L. Ed. 673; *German Sav. Bank v. Franklin County*, 128 U. S. 526, 540, 32 L. Ed. 519; *Citizens' Sav., etc., Ass'n v. Perry County*, 156 U. S. 692, 39 L. Ed. 585.

**37. German Sav. Bank v. Franklin County**, 128 U. S. 526, 540, 32 L. Ed. 519; *Citizens' Sav., etc., Ass'n v. Perry County*, 156 U. S. 692, 702, 39 L. Ed. 585.

**38. Cairo v. Zane**, 149 U. S. 122, 141, 37 L. Ed. 673; *Citizens' Sav., etc., Ass'n v. Perry County*, 156 U. S. 692, 39 L. Ed. 585.

"In *Cairo v. Zane*, 149 U. S. 122, 141, 142,

37 L. Ed. 673, this court \* \* \* adjudged that the certificate of registry in the office of the state auditor could be relied upon as showing that what the city of Cairo did, in that case, amounted to a subscription of stock, which the statute gave it a right to make, rather than to a donation, which it could not legally make. It is to be observed, also, that the bonds there in suit recited that they were issued pursuant as well to an ordinance of the city council of Cairo as to a vote of the citizens of that city, and in accordance with the laws of the state. The recital that they were issued in accordance with the laws of the state brought that case within the rule announced in *Insurance Co. v. Bruce*, 105 U. S. 328, 26 L. Ed. 1121, rather than within that announced in *German Sav. Bank v. Franklin County*, 128 U. S. 526, 32 L. Ed. 519." *Citizens' Sav., etc., Ass'n v. Perry County*, 156 U. S. 692, 704, 39 L. Ed. 585. See post, "Recitals as to Compliance with Conditions Precedent," IV, V, 5.

**39. Corporation having power to issue.**—*Katzenberger v. Aberdeen*, 121 U. S. 172, 179, 30 L. Ed. 911; *Marsh v. Fulton County*, 10 Wall. 676, 19 L. Ed. 1040; *Daviess County v. Dickinson*, 117 U. S. 657, 665, 29 L. Ed. 1026; *Norton v. Shelby County*, 118 U. S. 425, 451, 30 L. Ed. 178; *Parkersburg v. Brown*, 106 U. S. 487, 27 L. Ed. 238.

In *Campbell v. Kenosha*, 5 Wall. 194, 18 L. Ed. 610, it is said: So far as the corporate authorities could ratify them they have done it by a series of unmistakable acts; by voting to ratify taxes; redeeming a portion of the bonds first issued, and exchanging the residue for new ones; issuing script in settlement of unpaid interest, and selling the securities obtained from the company by way of indemnity for the bonds.

**40. Minority of officers empowered to act.**—*Norton v. Shelby County*, 118 U. S. 425, 30 L. Ed. 178.

No ratification of a previously invalid subscription of the county court of Shelby County, Tennessee, to stock in the Mississippi River R. Co., or of bonds issued for its payment, can be inferred from the action of a minority of the justices on April 11th and 16th, 1870, before the con-

**A settlement upon the assumption of their validity, under a refunding act,** by the corporate authorities, amounts to a ratification of irregularly issued municipal bonds.<sup>41</sup>

**The poll books of a city and the proceedings of its council** showing the holding of an election for the ratification of a bond issue are evidence of ratification.<sup>42</sup>

**2. BONDS ISSUED WITHOUT AUTHORITY.**—A ratification of a municipal bond issue can only be made when the authority ratifying possesses power to perform in the first instance, the act ratified. Such bonds which were void when issued for want of legislative authority to make the same, cannot be made valid by corporate ratification. The municipality cannot ratify what it could not have authorized; for a ratification can have no greater force or effect than a previous authority.<sup>43</sup>

stitution of 1870 took effect. After the new constitution went into effect there could be no ratification of the subscription or bonds without the previous assent of three-fourth of the voters of the county. *Norton v. Shelby County*, 118 U. S. 425, 30 L. Ed. 178.

**41.** *Jasper County v. Ballou*, 103 U. S. 745, 26 L. Ed. 422; *Graves v. Saline County*, 161 U. S. 359, 40 L. Ed. 732.

**Settlement under refunding act, upon assumption of validity.**—In the case of *Jasper County v. Ballou*, 103 U. S. 745, 26 L. Ed. 422, it was held in a case arising in the state of Illinois that when the people of a county, at an election held under a refunding act, voted to issue new bonds to exchange for old ones, such a vote recognized the original bonds as binding and subsisting obligations, and that the county was therefore estopped from setting up that they were invalid because voted for at an election called by the board of supervisors instead of by the county court, and that where, at an election held according to law, the people of a county authorized their proper representatives to treat certain outstanding county obligations as "properly authorized by law" for the purpose of settling with the holders, and the settlement has been made, the validity of the obligations can be no longer questioned. In that case there was lawful power in the county to issue the original bonds, but there was an irregularity in the election, it having been called for by the wrong officers. *Graves v. Saline County*, 161 U. S. 359, 371, 40 L. Ed. 732.

Where outstanding original bonds, issued for a subscription to railroad stock, and void for noncompliance with a condition of that subscription, are refunded in new bonds in accordance with a vote so taken and in accordance with the funding laws, such action may well be regarded as a declaration that there had been a substantial compliance with the original conditions, and therefore if the original subscription could have been made unconditionally such bonds are valid in the hands of a bona fide holder. *Graves v. Saline County*, 161 U. S. 359, 374, 40 L. Ed. 732.

In *Little Rock v. National Bank*, 98 U. S. 308, 25 L. Ed. 108, the federal supreme court held that even if the bonds mentioned therein were issued in violation of law, yet when the city accepted their surrender and redeemed them by giving other bonds in lieu of a portion and a credit on the books of the city for another portion of them so surrendered, such transaction was valid, and the holder of the bonds so given in lieu of the illegal ones, could recover on them, and also upon the credit given on the books of the city. *Houston, etc., R. Co. v. Texas*, 177 U. S. 66, 93, 44 L. Ed. 673.

**42.** *Hannibal v. Fauntleroy*, 105 U. S. 408, 411, 26 L. Ed. 1103.

Where the poll books of a city and the proceedings of its council show the holding of an election for the ratification of a bond issue, this coupled with proof that the city had admitted its liability upon these bonds by making arrangements for the payment of coupons as they fell due and receiving them in payment of taxes due, it is sufficient evidence to establish the validity of the bonds and show a ratification of the subscription to the stock of the railroad company by a vote of a majority of taxpayers at an election called and held for that purpose. *Hannibal v. Fauntleroy*, 105 U. S. 408, 411, 26 L. Ed. 1103.

**43. Bonds issued without authority.**—*Marsh v. Fulton County*, 10 Wall. 676, 19 L. Ed. 1040; *Davies County v. Dickinson*, 117 U. S. 657, 665, 29 L. Ed. 1026; *Katzenberger v. Aberdeen*, 121 U. S. 172, 179, 30 L. Ed. 911; *Kelley v. Milan*, 127 U. S. 139, 159, 32 L. Ed. 77; *Norton v. Shelby County*, 118 U. S. 425, 451, 30 L. Ed. 178; *Lewis v. Shreveport*, 108 U. S. 282, 287, 27 L. Ed. 728; *Parkersburg v. Brown*, 106 U. S. 487, 27 L. Ed. 238; *Bissell v. Spring Valley Tp.*, 110 U. S. 162, 28 L. Ed. 105; *Doon Tp. v. Cummins*, 142 U. S. 366, 376, 35 L. Ed. 1044; *Loan Ass'n v. Topeka*, 20 Wall. 655, 22 L. Ed. 455.

Neither the payment of interest on the bond by the municipality, nor the acts of its officers or agents in dealing with the property, operate, by way of estoppel, ratification or otherwise, to render it liable on bonds issued without legislative



**U. Estoppel**—1. **BONDS ISSUED WITHOUT AUTHORITY.**—Recitals on the face of the bond or acts in pais, operating by way of estoppel, may cure irregularities in the execution of a statutory power, but they cannot create it. If legislative authority was wanting, the bond has no validity.<sup>44</sup> Where there is a total want of power to issue bonds, a municipality cannot estop itself from raising such a defense<sup>45</sup> by admission<sup>46</sup> by issuing such securities negotiable in form,<sup>47</sup> by paying interest thereon,<sup>48</sup> nor by even receiving or enjoying the proceeds of such bonds.<sup>49</sup> That the qualified voters of the municipality gave their sanction to a subscription to the capital stock of the railroad company; that the bonds in suit are part of those issued in payment of such subscription; that stock was issued to the county to the full amount subscribed; that the road desired by the people of the county was constructed and is in operation; that for many years the county paid interest upon the bonds; and that the holders purchased the bonds in suit for value and in good faith, do not estop the county from raising the

authority. *Parkersburg v. Brown*, 106 U. S. 487, 27 L. Ed. 238.

"It is a matter of no importance that the city employed agents to sell the bonds, or that its law officer gave an opinion in favor of their validity, or that they have been recognized in official statements as binding obligations, or that taxes have been levied to pay either principal or interest." *Lewis v. Shreveport*, 108 U. S. 282, 287, 27 L. Ed. 728.

**Overissue.**—The payment of installments of interest on all the bonds of an issue in excess of the constitutional limit have the effect of ratifying bonds issued beyond the lawful limit. *Daviess County v. Dickinson*, 117 U. S. 657, 665, 29 L. Ed. 1026; *Doon Tp. v. Cummins*, 142 U. S. 366, 376, 35 L. Ed. 1044; *Marsh v. Fulton County*, 10 Wall. 676, 19 L. Ed. 1040; *Loan Ass'n v. Topeka*, 20 Wall. 655, 22 L. Ed. 455; *Norton v. Shelby County*, 118 U. S. 425, 451, 30 L. Ed. 178.

The fact that the municipality actually received a portion of the money arising from the sale of the so-called bonds (or, in legal contemplation, perhaps all of it, as it was paid to the agent of the town) does not estop the corporation from pleading a want of authority in the municipality to issue the instruments sued on. The original act of issuing the bonds for sale was not only unauthorized by law, but in disregard of its requirements, and no subsequent act of the town trustees could make it valid. *Merrill v. Monticello*, 138 U. S. 673, 693, 34 L. Ed. 1069.

**Agreement to have consent judgment entered.**—The mayor of a town agreed to have a consent judgment entered against the town to validate an unauthorized issue of municipal bonds, and such decree was entered, which contained a declaration of the validity of the bonds. It was held that the act of the mayor in signing the agreement could give no more validity to the bonds than they had before, and that there was no adjudication by the court of the validity of the bonds. "There is nothing inconsistent with this

view in Nashville, etc., *R. Co. v. United States* (113 U. S. 261, 28 L. Ed. 971).

\* \* \* In that case both parties had full power to make the compromise involved." *Kelley v. Milan*, 127 U. S. 139, 159, 32 L. Ed. 77. See the title **COMPROMISE AND SETTLEMENT**, vol. 3, p. 980.

**Failure to hold election.**—Where the supervisors possessed no authority to issue the bonds in the first instance without the previous sanction of the qualified voters of the county, they could not ratify a subscription without a vote of the county, because they could not make a subscription in the first instance without such authorization. *Marsh v. Fulton County*, 10 Wall. 676, 683, 19 L. Ed. 1040; *Norton v. Shelby County*, 118 U. S. 425, 451, 30 L. Ed. 178.

**44. Bonds issued without authority.**—*Hayes v. Holly Springs*, 114 U. S. 120, 126, 29 L. Ed. 81. See ante, "Power to Issue," I; post, "Operation and Effect of Recitals as Estoppel," IV, U, 2, j.

**45.** *Graves v. Saline County*, 161 U. S. 359, 373, 40 L. Ed. 732; *Hayes v. Holly Springs*, 114 U. S. 120, 126, 29 L. Ed. 81; *Rich v. Mentz Tp.*, 134 U. S. 632, 644, 33 L. Ed. 1074; *Parkersburg v. Brown*, 106 U. S. 487, 27 L. Ed. 238; *Bissell v. Spring Valley Tp.*, 110 U. S. 162, 28 L. Ed. 105; *South Ottawa v. Perkins*, 94 U. S. 260, 261, 24 L. Ed. 154; *O'Brien v. Wheelock*, 184 U. S. 450, 489, 46 L. Ed. 636; *Loan Ass'n v. Topeka*, 20 Wall. 655, 22 L. Ed. 455; *Wilkes County v. Coler*, 190 U. S. 107, 113, 47 L. Ed. 971.

**46.** *Graves v. Saline County*, 161 U. S. 359, 373, 40 L. Ed. 732.

**47.** *Graves v. Saline County*, 161 U. S. 359, 373, 40 L. Ed. 732.

**48.** *Loan Ass'n v. Topeka*, 20 Wall. 655, 22 L. Ed. 455; *South Ottawa v. Perkins*, 94 U. S. 260, 267, 24 L. Ed. 154; *O'Brien v. Wheelock*, 184 U. S. 450, 489, 46 L. Ed. 636; *Wilkes County v. Coler*, 190 U. S. 107, 113, 47 L. Ed. 971.

**49.** *Graves v. Saline County*, 161 U. S. 359, 373, 40 L. Ed. 732.



question of its power to have made the subscription and issued the bonds in question.<sup>50</sup>

**Existence of Law.**—The municipality cannot be estopped from denying the existence of a law under which it has issued bonds.<sup>51</sup>

**A de facto corporation** cannot contest the legality of its bonds on the ground that it was not legally incorporated.<sup>52</sup>

2. **MUNICIPALITY HAVING AUTHORITY TO ISSUE BONDS**—a. *In General.*—A municipality may be estopped from asserting that the conditions attached to a grant of power to issue bonds were not fulfilled.<sup>53</sup> Without legislative authority a municipal corporation cannot bind itself by issuing bonds and if it attempts to do so the purchaser of such bonds is affected by the want of authority to make them. But it does not follow from this that when the legislature has given its sanction to the issue of bonds, provided that before their issue certain things shall be done by the officers, or the people of the county, the bonds can always be avoided in the hands of an innocent purchaser by proof that the county officers, or the people, have not done, or have insufficiently done, the things which the legislature required to be done before the authority to subscribe, or to issue bonds, should be exercised. A purchaser is not always bound to look farther than to discover that the power has been conferred, even though it be coupled with conditions precedent.<sup>54</sup> Power to issue the bonds being shown, the municipal corporation, as against bona fide holders of them for value, is estopped to deny that the power was properly executed.<sup>55</sup> Thus a municipality may be es-

50. *Wilkes County v. Coler*, 190 U. S. 107, 113, 47 L. Ed. 971.

51. *South Ottawa v. Perkins*, 94 U. S. 260, 261, 24 L. Ed. 154; *O'Brien v. Wheelock*, 184 U. S. 450, 489, 46 L. Ed. 636.

In *South Ottawa v. Perkins*, 94 U. S. 260, 267, 24 L. Ed. 154, the invalidity of the law grew out of the fact that the journals of the senate and house did not show the passage of the bill as the constitution required it to be shown. Bonds had been issued, bought innocently, and the town had paid one installment of interest, but it was held that the bonds could not be sustained on the doctrine of estoppel, and that the municipality was not estopped from denying its passage, notwithstanding the holder of the bonds was not a bona fide purchaser, without actual notice. See, also, *O'Brien v. Wheelock*, 184 U. S. 450, 489, 46 L. Ed. 636.

52. *Tulare Irrig. Dist. v. Shepard*, 185 U. S. 1, 46 L. Ed. 773.

Where an irrigation district has done business as a de facto corporation and has issued its bonds receiving valuable consideration for the same, it cannot set up the invalidity of such bonds on the ground that it was not legally incorporated, as a defense to a suit for the interest on such bonds by a bona fide holder for value and without notice. *Tulare Irrig. Dist. v. Shepard*, 185 U. S. 1, 46 L. Ed. 773.

The moneys received from the sale of the bonds in suit were applied to building and constructing the irrigation works now in use by the defendant corporation. It has, therefore, received the full consideration for which the bonds were issued, has built its works with the proceeds, and

uses such works for the purposes intended. Notwithstanding these facts, it now refuses to pay the bonds or the interest thereon, and, while acting as a corporation, at all times, still sets up that it was never legally organized, and hence had no legal right to issue any bonds. "In the case of *Commissioners v. Bolles*, 94 U. S. 104, 110, 24 L. Ed. 46, a case involving facts somewhat similar, this court said: 'Common honesty demands that a debt thus incurred should be paid.' That sentiment has lost no force by the lapse of time, and we think it applies in its full strength to this case." *Tulare Irrig. Dist. v. Shepard*, 185 U. S. 1, 8, 46 L. Ed. 773.

53. **Municipality having authority to issue bonds.**—*Pendleton County v. Amy*, 13 Wall. 297, 304, 20 L. Ed. 579; *Board of Comm'rs v. Aspinwall*, 21 How. 539, 16 L. Ed. 208; *Bissell v. Jeffersonville*, 24 How. 287, 16 L. Ed. 664; *Moran v. Commissioners*, 2 Black 722, 17 L. Ed. 342; *Meyer v. Muscatine*, 1 Wall. 384, 17 L. Ed. 564; *Van Hostrup v. Madison City*, 1 Wall. 291, 17 L. Ed. 538; *Supervisors v. Schenck*, 5 Wall. 772, 18 L. Ed. 556.

54. *Pendleton County v. Amy*, 13 Wall. 297, 304, 20 L. Ed. 579.

So held where a county subscribed for stock in a railroad company and issued bonds in payment of its subscription. *Pendleton County v. Amy*, 13 Wall. 297, 304, 20 L. Ed. 579.

55. *Rogers v. Burlington*, 3 Wall. 654, 18 L. Ed. 79; *Board of Comm'rs v. Aspinwall*, 21 How. 539, 544, 16 L. Ed. 208; *Meyer v. Muscatine*, 1 Wall. 384, 392, 17 L. Ed. 564; *Van Hostrup v. Madison City*, 1 Wall. 291, 17 L. Ed. 538.

"If the bonds could have been properly issued under any circumstances, an inno-

topped from asserting that there was an irregularity in the organization of a railroad company to which it issued bonds in payment of a subscription for stock in its road,<sup>56</sup> as, for instance, that the bonds were issued to a new company formed by consolidation of the original company with another,<sup>57</sup> or that a railroad has not been completed according to contract.<sup>58</sup>

b. *Receiving and Retaining Proceeds or Benefits*.—A municipality which received and retains the proceeds of the bonds it issued and sold, is estopped from asserting against a bona fide purchaser for value, that, though the legislature empowered it to make them only upon certain conditions, they were issued in disregard of the conditions.<sup>59</sup>

cent purchaser has a right to presume they were so issued, and as against him the city is estopped to deny their validity." *The Mayor v. Lord*, 9 Wall. 409, 414, 19 L. Ed. 704.

"Where there existed in the board a general power to issue negotiable securities of the county, parties would be justified in taking them when properly executed in form by its officers." *Merchants' Bank v. Bergen County*, 115 U. S. 384, 390, 29 L. Ed. 430.

56. *County of Leavenworth v. Barnes*, 94 U. S. 70, 72, 24 L. Ed. 63.

57. *Bonds issued to consolidated company*.—*Harter v. Kernochan*, 103 U. S. 562, 563, 26 L. Ed. 411, reaffirmed in *Bonham v. Needles*, 103 U. S. 648, 26 L. Ed. 451; *Louisville v. Savings Bank*, 104 U. S. 469, 470, 26 L. Ed. 775. See, also, *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138.

*Bonds issued to new company upon consolidation*.—Where a donation was voted to a railway company before it was consolidated with another, thereby forming a new company, and the records of the municipality show that the bonds were directed to be issued and delivered to the new company, it is estopped to say, as against a bona fide purchaser for value, that the bonds are invalid. *Harter v. Kernochan*, 103 U. S. 562, 26 L. Ed. 411.

When the parties interested in the two companies are content, when the newly-named company has been in operation for ten years, when the county has received and held its stock until 1869, when the same was sold by the county by authority of the legislature, it is not competent for such a contracting party to say that there was an irregularity in the organization of the donee company. *County of Leavenworth v. Barnes*, 94 U. S. 70, 72, 24 L. Ed. 63, citing *Moran v. Commissioners*, 2 Black 722, 17 L. Ed. 342; *Zabriskie v. Cleveland, etc., R. Co.*, 23 How. 381, 400, 16 L. Ed. 488; *Pendleton County v. Amy*, 13 Wall. 297, 20 L. Ed. 579.

58. Railroad aid bonds issued by a county under a statute providing that "such bonds shall not be valid until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same," and further "no such subscription shall be binding unless such railroad

shall pass to or through the corporate limits of the town of Harrodsburg," are valid in the hands of a bona fide holder, where the line was not run through the county but within two miles of one border and then the work was stopped because the question being fully discussed at a meeting of the county court of claims, the opinion of that body was that the contract had been fully complied with and that the bonds ought to be delivered; the company then taking such bonds, while the county accepted the stock issued by the railroad, voted upon it at stockholders' meetings and for three years and a half paid interest on the bonds without questioning the validity. *Provident Life, etc., Co. v. Mercer County*, 170 U. S. 593, 42 L. Ed. 1156. See post, "Levying Taxes and Paying Interest," IV, U, 2, d.

The county, by an order in writing made on the sixth day of October, 1871, expressly agreed, for reasons satisfactory to itself, to extend the time of completing the road from the twenty-seventh day of December, 1871, to the first day of February, 1872. Before that time—to wit, on the nineteenth day of January, 1872—it declared the road to be completed to its satisfaction, delivered its bonds to the company, and received its stock in return, which it still holds and owns. It was held that this constitutes a waiver and an estoppel, which under ordinary circumstances would prevent the obligor from raising the objection that the contract had not been performed in time. *Randolph County v. Post*, 93 U. S. 502, 514, 23 L. Ed. 957; *Grand Chute v. Winegar*, 15 Wall. 373, 21 L. Ed. 174; *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548; *Gelpcke v. Dubuque*, 1 Wall. 175, 184, 17 L. Ed. 520; *County of Moultrie v. Rockingham, etc., Sav. Bank*, 92 U. S. 631, 23 L. Ed. 631; *Converse v. Fort Scott*, 92 U. S. 503, 23 L. Ed. 621.

59. *Receiving and retaining proceeds or benefits*.—*Pendleton County v. Amy*, 13 Wall. 297, 305, 20 L. Ed. 579. See, also, *Nugent v. Supervisors*, 19 Wall. 241, 253, 22 L. Ed. 83.

A county issued bonds to a railroad company in payment of a subscription for stock in the road, which subscription it was authorized to make and pay for by the issue of bonds only after certain



c. *Long Acquiescence as Validating*.—A municipality may be estopped by long acquiescence in the validity of its bonds from thereafter asserting that they are invalid because of irregularities in the exercise of the power to issue them.<sup>60</sup>

d. *Levying Taxes and Paying Interest*.—Where there was in the first instance authority to issue the bonds, a municipal corporation, by levying taxes and paying the interest thereon for a series of years, is thereby estopped from denying their validity by reason of any irregularities in their issue,<sup>61</sup> such as a defect in the election or notices thereof,<sup>62</sup> an irregular or defective consent of the

things directed had been performed. The county had received the proper amount of stock for which the bonds were issued; held it for seventeen years before suit was brought on the bonds and was actually enjoying it at the time when pleading want of authority to subscribe. It was held that having exchanged the bonds for the stock it cannot retain the proceeds of the exchange, and assert against a purchaser of the bonds for value that though the legislature empowered it to make them, and put them upon the market, upon certain conditions, they were issued in disregard of the conditions. *Pendleton County v. Amy*, 13 Wall. 297, 298, 20 L. Ed. 579.

The Missouri statute shows that it devolved upon the county court, subject to the question of power before stated, to determine whether a subscription had been made, and to raise money for its payment. This included a determination of the questions whether an assent had been given by the voters, and whether a subscription had in fact been made by the county court. It did determine both of these questions in the affirmative, and so certified in the bonds issued by the same authority, and which are not in suit. Under these circumstances, the authorities in this court and in the state of Missouri hold that the decision of the voters and the action of the county court in issuing the bonds in question, and their subsequent action in receiving and retaining their benefits, gave validity to the bonds, and that they are now to be taken as valid instruments. *County of Daviess v. Huidekoper*, 98 U. S. 98, 102, 25 L. Ed. 112. Among these authorities are the following: *Coloma v. Eaves*, 92 U. S. 484, 491, 23 L. Ed. 579; *Randolph County v. Post*, 93 U. S. 502, 23 L. Ed. 957; *County of Leavenworth v. Barnes*, 94 U. S. 70, 24 L. Ed. 63; *Commissioners v. Bolles*, 94 U. S. 104, 24 L. Ed. 46; *Commissioners v. Thayer*, 94 U. S. 631, 24 L. Ed. 133; *County of Cass v. Johnston*, 95 U. S. 360, 24 L. Ed. 416.

60. *Atchison Board of Education v. De Kay*, 148 U. S. 591, 37 L. Ed. 573. See, also, *Livingston County v. First Nat. Bank*, 128 U. S. 102, 127, 32 L. Ed. 359.

Preliminary proceedings looking to a subscription for stock in a railroad company by a municipal corporation may often be enjoined for defects or irregularities before the contract is perfected, in cases where the corporation will be held

to be forever concluded, if they remain silent and suffer the shares to be purchased, the bonds to be issued, and the securities to be exchanged. *Supervisors v. Schenck*, 5 Wall. 772, 781, 18 L. Ed. 556.

61. *Levying taxes and paying interest*.—*Board of Comm'rs v. Aspinwall*, 21 How. 539, 544, 16 L. Ed. 208; *Atchison Board of Education v. De Kay*, 148 U. S. 591, 37 L. Ed. 573; *Supervisors v. Schenck*, 5 Wall. 772, 783, 18 L. Ed. 556; *Provident Life, etc., Co. v. Mercer County*, 170 U. S. 593, 42 L. Ed. 1156; *Moran v. Commissioners*, 2 Black 722, 725, 17 L. Ed. 342; *Campbell v. Kenosha*, 5 Wall. 194, 18 L. Ed. 610; *Bissell v. Jeffersonville*, 24 How. 287, 299, 16 L. Ed. 664; *Pendleton County v. Amy*, 13 Wall. 297, 304, 20 L. Ed. 579.

A municipality having authority to issue bonds may, by paying the interest thereon, estop itself to deny their validity because of irregularities or defects in the proceedings preliminary to their issuance or in their issuance. *Atchison Board of Education v. De Kay*, 148 U. S. 591, 37 L. Ed. 573.

In *County of Clay v. Society for Savings*, 104 U. S. 579, 591, 26 L. Ed. 856, the taxes had been levied to pay interest, and interest had been paid on the subscription bonds for eleven years, and on the donation bonds for nine years. It was held that this fact would of itself cure mere irregularities in the issuing of the bonds when they were sued on by a bona fide holder for value. *Supervisors v. Schenck*, 5 Wall. 772, 18 L. Ed. 556. Under these circumstances, when a suit is brought on them by such a holder, some substantial defense must be set up by the county before it can escape its liability.

A county issued bonds in payment of a subscription to the capital stock of a railroad made payable to the company, or bearer; and all the conditions precedent to the delivery of the bonds were complied with to the satisfaction of the county agents, certificates for the stock were received, and the bonds were delivered and sold. The county voted as a stockholder and levied a tax to pay the interest on the bonds as it accrued. The plaintiff, a bona fide holder of some of the coupons for value paid, brought suit to recover thereon. It was held that the county is estopped to contest the validity of the bonds. *Nugent v. Supervisors*, 19 Wall. 241, 253, 22 L. Ed. 83.

62. *Election and notices*.—*Board of*



council,<sup>63</sup> a defective execution of the bonds with respect to the date and signature<sup>64</sup> or in the description of the payee,<sup>65</sup> an irregularity in the delivery or

*Comm'r's v. Aspinwall*, 21 How. 539, 544, 16 L. Ed. 208; *Supervisors v. Schenck*, 5 Wall. 772, 783, 18 L. Ed. 556.

The acceptance and holding by the county of the certificate of stock of the company, the issue and delivery of the bonds to the company, and the payment of interest on them for a time, cured the defects, if any existed, as to the order for an election, and authorized a bona fide taker of the bonds to presume that everything necessary to their validity had been properly done. *Commissioners v. January*, 94 U. S. 202, 206, 24 L. Ed. 110, citing *Supervisors v. Schenck*, 5 Wall. 772, 18 L. Ed. 556; *Olcott v. Supervisors*, 16 Wall. 678, 698, 21 L. Ed. 382; *Lexington v. Butler*, 14 Wall. 282, 283, 20 L. Ed. 809; *Pendleton County v. Amy*, 13 Wall. 297, 298, 20 L. Ed. 579; *Meyer v. Muscatine*, 1 Wall. 384, 385, 17 L. Ed. 564; *Board of Comm'r's v. Aspinwall*, 21 How. 539, 544, 16 L. Ed. 208; *Lynde v. The County*, 16 Wall. 6, 21 L. Ed. 272; *St. Joseph Tp. v. Rogers*, 16 Wall. 644, 21 L. Ed. 328; *Pine Grove Tp. v. Talcott*, 19 Wall. 666, 22 L. Ed. 227.

The levy of a tax and payment of interest by the proper county authorities, validates, in the hands of bona fide holders for value, county bonds, issued in their origin, irregularly, as ex. gr. in virtue of a popular vote ordered by a "county court," instead of one ordered by the "board of supervisors;" the vote, however, and other proceedings having been in all respects other than the source of order, regular. (In this case the tax had been levied and the interest paid by the county for nine years before it was set up that the bonds were void.) *Supervisors v. Schenck*, 5 Wall. 772, 18 L. Ed. 556.

In *County of Ray v. Vansycle*, 96 U. S. 675, 24 L. Ed. 800, the facts were as follows: In 1860, Rae County, in Missouri, under authority conferred by a statute, and the sanction of its legal voters, subscribed by its county court for the stock of railroad company A, and agreed to issue bonds in payment. Under an act passed in 1864, and pursuant to the popular vote of the county, company A transferred all its rights, privileges, property, and effects to company B. By an agreement between companies B and C and the county court, the subscription of the county for the stock of A was released, and in consideration of the release the county court subscribed for the same amount of the stock of C, and issued its bonds in payment. By this arrangement the county secured increased railroad facilities and it still held the certificates of stock. There had been no offer to return them. The county paid the interest on its bonds continuously for five years. It then repudiated. It was held that, as against a bona fide holder, it could not

be objected that the qualified voters had not assented to the subscription to C. *Pompton v. Cooper Union*, 101 U. S. 196, 203, 25 L. Ed. 803.

**63. Consent of council.**—*Atchison Board of Education v. De Kay*, 148 U. S. 591, 598, 37 L. Ed. 573.

A municipality issued bonds with the consent of the city council evidenced by its records. Twenty years thereafter interest having been duly paid upon such bonds, it was objected that such bonds were invalid because the consent of the council was given at a meeting at which all the members were not present, and because it did not appear that all were notified, or that a special meeting had been duly called, that it was not a regular but apparently an adjourned meeting; and that the first adjournment was without validity, because none of the councilmen were present, and the adjournment was ordered by the clerk alone. It was held that when bonds have been issued in reliance upon a consent thus evidenced and when for years thereafter interest has been duly paid upon such bonds, the courts will not, after the lapse of twenty years, in a suit on the bonds, pronounce them invalid on such technical and trivial grounds. *Atchison Board of Education v. De Kay*, 148 U. S. 591, 37 L. Ed. 573.

**64. Date and signature.**—*Weyauwega v. Ayling*, 99 U. S. 112, 25 L. Ed. 470; *Coler v. Claeburne*, 131 U. S. 162, 174, 33 L. Ed. 146.

In the case of *Weyauwega v. Ayling*, 99 U. S. 112, 25 L. Ed. 470, the bonds of a town bore date of June 1, and were signed by A as chairman of the board of supervisors, and by B as town clerk, and were delivered by A to a railroad company. When sued on the coupons by a bona fide purchaser of the bonds for value before maturity, the town pleaded that the bonds were not in fact signed by B until July 13, at which date he had ceased to be town clerk, and his successor was in office. It was held, that the town was estopped from denying the date of the bonds, because, in the absence of evidence to the contrary, it must be assumed that the bonds were delivered to the company by A with the assent of the then town clerk, and that they were, therefore, issued by the proper officers of the town. *Coler v. Claeburne*, 131 U. S. 162, 174, 33 L. Ed. 146. See *Anthony v. Jasper County*, 101 U. S. 693, 699, 25 L. Ed. 1005.

**65.** Where the bonds should have been made payable to the railroad company and "their successors and assigns," but were made payable to the company "or bearer," the irregularity was committed by the servants of the county, and the county is estopped to take advantage of it. *Supervisors v. Galbraith*, 99 U. S. 214, 217, 25 L. Ed. 410.

registration of the bonds.<sup>66</sup>

e. *Exchange of Old for New Bonds*.—The mere exchange of new bonds for old ones and the payment of interest on the former by the county authorities will not estop the county from challenging the validity of the new as well as that of the old bonds.<sup>67</sup>

f. *Representation That No Defense Exists*.—Where a municipality induces a purchase of its bonds by assuring a prospective buyer that they will be duly paid and that there is no defense against them, it estops itself from afterwards setting up fraud in their issuance.<sup>68</sup>

g. *Construction of Statute*.—A municipality having acted upon its own construction of a statute authorizing it to issue bonds, and drawn in others to take the securities and advance their money upon it, is concluded from denying that construction by the true one.<sup>69</sup> A practical construction having been put upon a statute authorizing a municipality to issue bonds, at the time the bonds were voted and issued, by those immediately interested in executing its provisions, it should ordinarily be acquiesced in by the courts.<sup>70</sup>

66. Where the bonds in suit did not disclose upon their face that they were deliverable upon the performance of certain terms and conditions, and therefore belonged to a class which, as a condition precedent to their negotiability, must have been delivered to the state treasurer and passed through his hands to the state auditor and been registered and certified as regularly and legally issued, but were made payable unconditionally, it is the fault of the county that these facts are not disclosed upon the face of the bonds, and it is estopped as against a bona fide purchaser to deny that they are of a class which might have been delivered at once, and without going through the hands of the state treasurer, to the auditor of the state, and been registered and certified as regularly and legally issued. In such a case, at least, the action and certificate of the auditor of the state must be deemed conclusive evidence as between the county and bona fide purchaser that the bonds were regularly and legally issued, and, therefore, negotiable. *Lewis v. Commissioners*, 105 U. S. 739, 26 L. Ed. 993.

67. *Graves v. Saline County*, 161 U. S. 359, 373, 40 L. Ed. 732.

68. *Representation that no defense exists*.—*County of Tipton v. Locomotive Works*, 103 U. S. 523, 539, 26 L. Ed. 340.

A county, having through its officers given assurance before a transfer of its bonds to a bona fide holder, that the bonds would be duly paid, is thereafter estopped from denying the validity in the hands of such holders. The subsequent discovery by the county of fraud and corrupt practices upon the part of the payee in procuring the issue of the bonds cannot be permitted to affect the rights of those who had, in good faith, acquired the bonds in reliance upon the explicit assurance which the county in effect gave that it would provide for the payment of the bonds and their coupons. *County of Tipton v. Locomotive Works*, 103 U. S. 523, 539, 26 L. Ed. 340. See, also, *New Buffalo v. Iron Co.*, 105 U. S. 73, 26 L. Ed. 1024;

*Livingston County v. First Nat. Bank*, 128 U. S. 102, 122, 32 L. Ed. 359.

69. *Construction of statute*.—*Meyer v. Muscatine*, 1 Wall. 384, 391, 17 L. Ed. 564; *Van Hostrup v. Madison City*, 1 Wall. 291, 17 L. Ed. 538; *Savannah v. Kelly*, 108 U. S. 184, 27 L. Ed. 696; *James v. Milwaukee*, 16 Wall. 159, 21 L. Ed. 267.

70. *Kirkbridge v. Lafayette County*, 108 U. S. 208, 211, 27 L. Ed. 705, citing *Van Hostrup v. Madison City*, 1 Wall. 291, 17 L. Ed. 538; *Meyer v. Muscatine*, 1 Wall. 384, 17 L. Ed. 564.

Even if the case is doubtful, and the city authorities have given the construction to the charter, which confers full power to issue bonds, and bonds have been issued and in the hands of bona fide purchasers, for value, the court will acquiesce in it. *Van Hostrup v. Madison City*, 1 Wall. 291, 297, 17 L. Ed. 538; *Evansville v. Dennett*, 161 U. S. 434, 444, 40 L. Ed. 760.

In *Savannah v. Kelly*, 108 U. S. 184, 191, 27 L. Ed. 696, it is said: "It does not detract from the force of this conclusion that the guaranty recites that it was authorized by a public meeting of the citizens thereof, as if it were the case of bonds issued under the act of 1856, which required the recommendation of such a meeting. But if the fact is immaterial, the recital is not injurious. And the official record of the transaction shows that such a meeting was held for the purpose of quieting doubts, and not to raise them. The authorities of the city at that time were only anxious to omit nothing which the most critical might regard as important in securing for its obligations all the weight and value properly belonging to an unquestionable pledge of its faith and credit; and certainly now, after the lapse of twenty years, in which no such question has been raised, it would, in the language of Mr. Justice Grier, in *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548, 'be contrary to good faith and common justice to permit them to allege a newly discovered construction of an



*h. Estoppel of Taxpayers.*—The acts of a municipality which estop it from denying the validity of its bonds in a suit by a bona fide holder of the same and the acquiescence of the taxpayers therein, conclude such taxpayers from contesting the validity of the bonds.<sup>71</sup>

equivocal power.' *Van Hostrup v. Madison City*, 1 Wall. 291, 17 L. Ed. 538; *Meyer v. Muscatine*, 1 Wall. 384, 17 L. Ed. 564; *James v. Milwaukee*, 16 Wall. 159, 21 L. Ed. 267."

**Construction of word "near."**—Under an act of the legislature of Missouri, county courts of counties were authorized to subscribe, in behalf of townships in their respective counties, to the capital stock of any railroad company within that state building or promising to build a railroad into, through, or near such township, and to issue bonds in the name of the county in payment of such subscription. There was a vote of a township in favor of issuing bonds in aid of a particular railroad company. The subscription was made and the bonds issued reciting that they were authorized by a vote of the people, and were issued under and pursuant to an order of the county court by authority of the act. When the vote was taken and the bonds issued, the company did not propose to build a road into or through the township, but it was proposing to build one from a point nine miles distant from the township to a farther distance. Interest on the bonds was paid for three years. In a suit on coupons of the bonds by a bona fide holder for value, held, that the courts should acquiesce in the determination by the qualified voters and the local authorities that the proposed road was near the township, and hold that there was legislative authority for issuing the bonds. *Kirkbridge v. Lafayette County*, 108 U. S. 208, 27 L. Ed. 705.

"The word 'near' is relative in its signification. What would be near in one locality would not be in another. Each case must be governed by its special circumstances. The main inquiry is whether a railroad, when constructed, would be near enough to contribute to the convenience or advance the business interests of the particular township involved. It cannot be said, as matter of law, that this road was not near enough to Lexington township to bring about such results. That was a question which the people of that township and the county court of the county were qualified and, within reasonable limits, authorized to settle for themselves. Their action in favor of a subscription was supplemented by payment of interest for three years. Under these circumstances, as between the township and a bona fide holder for value, as the plaintiff is conceded to be, the courts should acquiesce in the determination by the qualified voters and the local authorities, that the road in question was near to Lexington township. If there was error in this determination, it is not so

plain as to justify the courts in disturbing the practical construction put upon the statute, at the time the bonds were voted and issued, by those immediately interested in executing its provisions. *Van Hostrup v. Madison City*, 1 Wall. 291, 17 L. Ed. 538; *Meyer v. Muscatine*, 1 Wall. 384, 17 L. Ed. 564." *Kirkbridge v. Lafayette County*, 108 U. S. 208, 211, 27 L. Ed. 705.

**71. Estoppel of taxpayers.**—*Pompton v. Cooper Union*, 101 U. S. 196, 203, 25 L. Ed. 803; *County of Ray v. Vansycle*, 96 U. S. 675, 24 L. Ed. 800, citing *County of Schuyler v. Thomas*, 98 U. S. 169, 25 L. Ed. 88; *County of Callaway v. Foster*, 93 U. S. 567, 23 L. Ed. 911; *County of Scotland v. Thomas*, 94 U. S. 682, 24 L. Ed. 219; *Tulare Irrig. Dist. v. Shepard*, 185 U. S. 1, 46 L. Ed. 773, distinguishing *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. Ed. 369. See, also, *Bissell v. Jeffersonville*, 24 How. 287, 300, 16 L. Ed. 664.

In *County of Ray v. Vansycle*, 96 U. S. 675, 24 L. Ed. 800, the facts were as follows: In 1860, Ray County, in Missouri, under authority conferred by a statute, and the sanction of its legal voters, subscribed by its county court for the stock of railroad company A., and agreed to issue its bonds in payment. Under an act passed in 1864, and pursuant to a popular vote of the county, company A. transferred all its rights, privileges, property, and effects to company B. By an agreement between companies B. and C. and the county court, the subscription of the county for the stock of A. was released, and in consideration of the release the county court subscribed for the same amount of the stock of C., and issued its bonds in payment. By this arrangement the county secured increased railroad facilities, and it still held the certificates of stock. There had been no offer to return them. The county paid the interest on its bonds continuously for five years. It then repudiated. It was held, that the taxpayers were concluded by the act of the county court and by their failure to take action, if it could have availed them, to prevent the transfer from one company to the other. *Pompton v. Cooper Union*, 101 U. S. 196, 203, 25 L. Ed. 803. See, also, *County of Schuyler v. Thomas*, 98 U. S. 169, 25 L. Ed. 88; *County of Callaway v. Foster*, 93 U. S. 567, 23 L. Ed. 911; *County of Scotland v. Thomas*, 94 U. S. 682, 24 L. Ed. 219.

**The owners of land within an irrigation district in California, defectively organized** by reason of a defect in the notice of the intended presentation of the petition to the board of supervisors as required under the



i. *Collateral Conditions Existence of Which Withheld from Public*.—See post, "Collateral Conditions Existence of Which Withheld from Public," IV, V, 5, b, (4), (b).

j. *Operation and Effect of Recitals as Estoppel*.—See post "Operation and Effect of Recitals," IV, V.

k. *Bonds Containing No Recitals*—(1) *Statutory Requirements*.—Where there are no recitals in municipal bonds which supply proof of compliance with the statutory authority to issue the same, the county, city or town issuing the same is not estopped to deny compliance with such authority, but the holder of the bonds is bound to ascertain whether or not they were authorized.<sup>72</sup>

California act of March 7, 1887, cannot set up that fact against a bona fide holder for value and without notice of bonds issued by such district, where such landowners consented to the issue, and received full benefits therefrom; where the records shows the entry of an order by the board of supervisors declaring the district duly organized, such order being filed in the office of the county recorder; and where the bonds recite as provided by § 15 of said act "that they were issued by authority of this act, stating its title and day of approval." *Tulare Irrig. Dist. v. Shepard*, 185 U. S. 1, 46 L. Ed. 773.

Assuming the insufficiency of the notice of the intended presentation of the petition to the board of supervisors, the defendant landowners could have applied to the attorney general for the commencement of an action in the nature of a quo warranto, to raise and decide the questions, after the board had decided the organization was duly formed. Or they could have themselves commenced an action to restrain the proposed issue of bonds on the ground there was no valid corporation, and therefore no valid body to issue them. Their interest as landowners in the district would be sufficient to permit them to maintain such action. On the contrary, they did nothing, and in view of all the facts above detailed, and giving due effect to the provisions of the statute referred to and the determination of the supervisors, together with the recitals in the bonds, it is clear that they waived their right to thereafter object on the ground stated, as against a bona fide holder of the bonds for value. "We can properly use the language found in the opinion in *Bissell v. Jeffersonville*, 24 How. 287, 299, 16 L. Ed. 664: 'It was then too late to call in question the fact determined by the common council, and a fortiori it is too late to raise that question in a case like the present, where it is shown that the plaintiffs are innocent holders for value.'" *Tulare Irrig. Dist. v. Shepard*, 185 U. S. 1, 25, 46 L. Ed. 773.

The landowners acquiesced in the action of the board of supervisors from the time of the presentation of the petition to that body, so far that none questioned the validity of the organization by quo warranto or otherwise, and no suit of any kind was instituted to prevent the issue

of the bonds. Not only were no steps taken to prevent their issue or test the right of the district to issue them, but their sale was made after a public election, and the proceeds arising therefrom were used to create and build the irrigation system, which is still in active operation and now in the possession of the company. Interest has been paid on the bonds thus issued (which issue was not later than 1893) up to 1896. Assessments to pay the interest arising during that time have been levied and collected from the owners of lands in the district. Under these circumstances and by reason of the statute and the recitals in the bonds, the landowner is estopped from setting up the defense of the want of notice, as against the plaintiff in this case, because he is a bona fide holder for full value without notice, and because the landowners acquiesced in the issue of the bonds and have received the full benefit of their proceeds. *Tulare Irrig. Dist. v. Shepard*, 185 U. S. 1, 18, 46 L. Ed. 773.

In *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. Ed. 369, it was held that the statute providing for the organization of the irrigation district did provide for notice and opportunity to show that the land would not be benefited by being included in the district. It did not hold that under all circumstances the landowner could, at any time, show the absence of notice even against a bona fide purchaser of bonds subsequently issued, and the landowner may be prevented from showing want of notice in such a case as the one presented herein—a bona fide holder of bonds for full value without notice, and a landowner sleeping upon his rights. *Tulare Irrig. Dist. v. Shepard*, 185 U. S. 1, 16, 46 L. Ed. 773. See, also, the title *WATER AND WATERCOURSES* for treatment of law of irrigation.

**72. Statutory requirement.**—*Merchants' Bank v. Bergen County*, 115 U. S. 384, 391, 29 L. Ed. 430; *Carroll County v. Smith*, 111 U. S. 556, 561, 28 L. Ed. 517, citing *Northern Bank v. Porter Tp.*, 110 U. S. 608, 28 L. Ed. 258; *Dixon County v. Field*, 111 U. S. 83, 28 L. Ed. 360; *School District v. Stone*, 106 U. S. 183, 27 L. Ed. 90; *Coloma v. Eaves*, 92 U. S. 484, 492, 23 L. Ed. 579; *Block v. Commissioners*, 99 U. S. 686, 696, 25 L. Ed. 491; *Concord v. Robinson*, 121 U. S. 165, 170, 30 L. Ed.

(2) *Constitutional Requirements*.—Where no express reference is made in the bonds to the constitution, nor any statement made that the constitutional requirements have been observed, there is no estoppel as to any constitutional question, because there is no recital in regard to it.<sup>73</sup>

**Debt Limit.**—A municipal corporation is not estopped from pleading the constitutional limitation, where there is no recital in the bonds in regard to it. The mere fact that the bonds were issued, without any recitals of the circumstances bringing them within the limit fixed by the constitution, is not, in itself, conclusive proof, in favor of a bona fide holder, that the circumstances existed which authorized them to be issued.<sup>74</sup>

885; *Crow v. Oxford*, 119 U. S. 215, 30 L. Ed. 388. See, also, *Hopper v. Covington*, 118 U. S. 148, 150, 30 L. Ed. 190.

"This court, in *Buchanan v. Litchfield*, 102 U. S. 278, 292, 26 L. Ed. 138, upon full consideration held that the mere fact that the bonds were issued, without any recital of the circumstances bringing them within the power granted, was not in itself conclusive proof in favor of a bona fide holder, that the circumstances existed which authorized them to be issued." *Citizens' Sav., etc., Ass'n v. Perry County*, 156 U. S. 692, 701, 39 L. Ed. 585.

In the case of *Marsh v. Fulton County*, 10 Wall. 676, 19 L. Ed. 1040, there were no recitals in the bonds; and there was no decision that the conditions precedent to a subscription, or to the gift of authority to subscribe, had been performed. *Coloma v. Eaves*, 92 U. S. 484, 492, 23 L. Ed. 579.

In *Carroll County v. Smith*, 111 U. S. 556, 561, 28 L. Ed. 517, the bonds in question contained no statement of any election called or held, or of the vote by which the issue of the bonds was authorized. They did not embody even a general statement that the bonds were issued in pursuance of the statute or in compliance with the requirements of the statute in respect to which the board of supervisors were authorized and appointed to determine and certify. It was held that the utmost effect that can be given to them is that of a statement, that a subscription to the capital stock of the railroad company was authorized by the statutes mentioned, and that the sum mentioned in the bonds was part of it. They serve simply to point out the particular laws under which the transaction may lawfully have taken place.

They do not constitute an estoppel, which prevents inquiry into the alleged invalidity of the bonds. See, also, *Northern Bank v. Porter Tp.*, 110 U. S. 608, 28 L. Ed. 258; *Dixon County v. Field*, 111 U. S. 83, 28 L. Ed. 360; *School District v. Stone*, 106 U. S. 183, 27 L. Ed. 90.

Where the bonds contain no recitals importing a performance of precedent conditions before the power to subscribe was exercised, it is open to the municipality to show, even as against a bona fide purchaser, that the bonds were issued in disregard of the statute, and, therefore, did not impose any legal obligation upon it. *Evansville v. Dennett*, 161 U. S. 434, 441,

40 L. Ed. 760, citing *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138; *School District v. Stone*, 106 U. S. 183, 187, 27 L. Ed. 90.

**No recital as to election.**—In *Concord v. Robinson*, 121 U. S. 165, 170, 30 L. Ed. 885, the bonds contained no recital that they were issued pursuant to a vote of the people had before the adoption of the Illinois constitution of 1870. It was held that, therefore, the township is not estopped to deny the authority of its supervisors and clerk to execute them. See, also, *Crow v. Oxford*, 119 U. S. 215, 30 L. Ed. 388.

In *Block v. Commissioners*, 92 U. S. 686, 696, 25 L. Ed. 491, the bonds contained no recitals and it was held that the county was not estopped to deny that an election had been held and that a majority had voted for the issue of the bonds.

**Overissue.**—Where the recitals in the bonds do not import a valid issue bonds issued in a greater amount than that authorized by statute are unlawful and void, although purchased by one before maturity and for value. *Daviess County v. Dickinson*, 117 U. S. 657, 29 L. Ed. 1026.

**73. Constitutional requirements.**—*Lake County v. Graham*, 130 U. S. 674, 680, 32 L. Ed. 1065; *Carroll County v. Smith*, 111 U. S. 556, 28 L. Ed. 517; *School District v. Stone*, 106 U. S. 183, 27 L. Ed. 90; *Ackley School Dist. v. Hall*, 113 U. S. 135, 140, 28 L. Ed. 954; *Buchanan v. Litchfield*, 102 U. S. 278, 292, 26 L. Ed. 138.

A recital that the bonds were issued under the authority of a statute and in pursuance of a city ordinance does not necessarily import a compliance with the constitution. *Buchanan v. Litchfield*, 102 U. S. 278, 292, 26 L. Ed. 138; *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 264, 43 L. Ed. 689.

If the recitals of municipal bonds were merely to the effect that the issue was "under and by virtue of and in full compliance with" the statute, no express reference being made to the constitution nor any statement made that the constitutional requirements had been observed, the municipality is not estopped as to constitutional question. *Lake County v. Graham*, 130 U. S. 674, 680, 32 L. Ed. 1065.

**74. Debt limit.**—*Buchanan v. Litchfield*, 102 U. S. 278, 292, 26 L. Ed. 138; *Lake County v. Graham*, 130 U. S. 674, 32 L. Ed. 1065; *Chaffee County v. Potter*, 142



(3) *Conditions Imposed by Popular Vote*.—Where the recitals in the bonds issued to a railroad company neither expressly nor by necessary implication imported a compliance with the condition precedent imposed by popular vote it was open to the municipality to show that that condition was not performed when the bonds were issued and had never been performed.<sup>75</sup>

1. *Official Determination and Certificate*.—See ante, "Conclusiveness of Official Determination and Certificate," IV, S.

**V. Operation and Effect of Recitals**—1. *IN GENERAL*.—The effect of recitals in municipal bonds is like that given to words of negotiability in a promissory note. They simply relieve the paper in the hands of a bona fide holder from the burden of defenses other than the lack of power, growing out of the

U. S. 355, 362, 35 L. Ed. 1040; *Doon Tp. v. Cummins*, 142 U. S. 366, 373, 35 L. Ed. 1044; *Sutliff v. Lake County Comm'rs*, 147 U. S. 230, 237, 37 L. Ed. 145; *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 269, 43 L. Ed. 689; *Citizens' Sav., etc., Ass'n v. Perry County*, 156 U. S. 692, 701, 39 L. Ed. 585. See, also, *Dixon County v. Field*, 111 U. S. 83, 28 L. Ed. 360; *Litchfield v. Ballou*, 114 U. S. 190, 29 L. Ed. 132.

The twelfth section of the ninth article of the constitution of Illinois, adopted in 1870, declares that "no county, city, township, school district, or other municipal corporation, shall be allowed to become indebted in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness." Under a statute of that state, approved April 15, 1873, authorizing cities to construct waterworks, and for that purpose to appropriate and borrow money, and levy and collect a general tax in the same manner as other municipal taxes may be levied and collected, the city of Litchfield, by her ordinance, authorized and directed the issue for borrowing money for the erection, construction, and maintenance of waterworks for the use of the people of that city. Bonds in the form and amount prescribed were accordingly issued, bearing date Jan. 1, 1874. Each recites that it "is issued under authority of an act of the general assembly of the state of Illinois, entitled 'An act authorizing cities, incorporated towns, and villages to construct and maintain waterworks,' approved April 15, 1873, and in pursuance of an ordinance of the said city of Litchfield, No. 184, and entitled 'An ordinance to provide for the issuing of bonds for the construction of the Litchfield waterworks,' approved Dec. 4, 1873." The said twelfth section is not referred to in the statute or the ordinance, nor does the latter make mention of the city's indebtedness, although at the time of the issue of the bonds it exceeded the constitutional limit. A bona fide holder of them brought suit upon the unpaid coupons thereto attached. Held, that he

was not entitled to recover. *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138.

In *Sutliff v. Lake County Comm'rs*, 147 U. S. 230, 37 L. Ed. 145, an action was upon coupon bonds issued by a county of Colorado, each bond reciting that it was issued under and by virtue of and in compliance with the act of assembly approved March 24, 1877, and it was certified in each bond that "all the provisions of said act have been fully complied with by the proper officers in the issuing of this bond." There was no recital in the bonds that an indebtedness thus created was not in excess of the constitutional limit. The defense was that the bonds in fact increased the indebtedness of the county to an amount in excess of the limit prescribed by the state constitution and were therefore illegal and void. It was held that the plaintiff, although a purchaser for value and before the maturity of the bonds, was charged with the duty of examining the records of indebtedness provided for in the statute of Colorado, in order to ascertain whether the bonds increased the indebtedness of the county beyond the constitutional limit; and that the recitals in the bonds did not estop the county to prove by the records of the assessment and the indebtedness that the bonds were issued in violation of the constitution. *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 271, 43 L. Ed. 689.

In *Lake County v. Graham*, 130 U. S. 674, 32 L. Ed. 1065, it was held that the county was not estopped as against a bona fide holder for value to show that art. 11, § 6, of the constitution of Colorado of 1876, had been violated by issuing bonds which recited the whole amount issued, and that they were issued "under and by virtue of and in full compliance with" a certain statute, and that "all the provisions and requirements of said act have been fully complied with by the proper officers in the issuing of this bond." *Doon Tp. v. Cummins*, 142 U. S. 366, 375, 35 L. Ed. 1044. See *Chaffee County v. Potter*, 142 U. S. 355, 362, 35 L. Ed. 1044, *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 267, 43 L. Ed. 689.

**75. Conditions imposed by popular vote.**—*Citizens' Sav., etc., Ass'n v. Perry County*, 156 U. S. 692, 704, 39 L. Ed. 585.



original issue of the paper, and available as against the immediate payee.<sup>76</sup> A bona fide holder of such bonds is not bound to look beyond their recitals and the legislative enactment under which they were issued.<sup>77</sup>

2. **FORM AND CONSTRUCTION.**—The words employed in the bonds will be strictly construed and such ought to be the rule when it is proposed, by mere recitals upon the part of the officers of a municipal corporation, to exclude inquiry as to whether bonds, issued in its name, were made in violation of the constitution and of the statute, of the provisions of which all must take notice.<sup>78</sup> In all such cases, as a careful examination will show, the recitals fairly imported a compliance, in all substantial respects, with the statute giving authority to issue the bonds. The rule now established by numerous decisions ought not to be enlarged or extended. Sound public policy forbids it. Where the holder relies for protection upon mere recitals, they should, at least, be clear and unambiguous, in order to estop a municipal corporation, in whose name such bonds have been made, from showing that they were issued in violation, or without authority of law.<sup>79</sup> Recitals from which it is sought to imply that the indebtedness created was within the limit must fairly import a compliance with the statute or constitution in respect of the limit it imposed.<sup>80</sup> Where the statute itself contains, substantially, the same limitation upon indebtedness by independent school districts as is prescribed by the state constitution for county, or

So held as to condition in reference to the location of the company's shop at a town within a county voting municipal aid to a railroad company. *Citizens' Sav., etc., Ass'n v. Perry County*, 156 U. S. 692, 704, 39 L. Ed. 585.

That being shown, the case is not brought within the reservation or savings made by the Illinois constitution in favor of subscription authorized by popular vote prior to July 2, 1870. *Citizens' Sav., etc., Ass'n v. Perry County*, 156 U. S. 692, 704, 39 L. Ed. 585.

**76. Operation and effect of recitals.**—*Nesbit v. Riverside Independent Dist.*, 144 U. S. 610, 619, 36 L. Ed. 562.

The purchaser of bonds, issued by a municipal corporation, if he act in good faith and pay value, is entitled to the protection of such recitals of facts as the bonds may contain. *Lake County v. Graham*, 130 U. S. 674, 680, 32 L. Ed. 1065; *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 267, 43 L. Ed. 684.

**77.** *Walnut v. Wade*, 103 U. S. 683, 26 L. Ed. 526; *Pompton v. Cooper Union*, 101 U. S. 196, 204, 25 L. Ed. 803; *Orleans v. Platt*, 99 U. S. 676, 25 L. Ed. 404; *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548; *San Antonio v. Mehaffy*, 96 U. S. 312, 24 L. Ed. 816; *Moultrie County v. Rockingham, etc., Bank*, 92 U. S. 631, 23 L. Ed. 621; *Moran v. Commissioners*, 2 Black 732, 17 L. Ed. 342; *Board of Comm'rs v. Aspinwall*, 21 How. 539, 16 L. Ed. 208.

**78. Form and construction.**—*School District v. Stone*, 106 U. S. 183, 186, 27 L. Ed. 90.

**79.** *School District v. Stone*, 106 U. S. 183, 186, 27 L. Ed. 90. See, also, *Cairo v. Zane*, 149 U. S. 122, 141, 37 L. Ed. 673; *Ackley School Dist. v. Hall*, 113 U. S. 135, 140, 28 L. Ed. 954.

**80.** *School District v. Stone*, 106 U. S. 183, 185, 27 L. Ed. 90.

So held where the recitals imply nothing more than that the bonds were issued by authority of the electors, and that the election was held in conformity with the statute. The statute may have been pursued as to the notice required to be given of the time and place of the election, and as to the manner in which the will of the voters was to be ascertained, and yet it may have been disregarded in respect of the limit it imposed upon district indebtedness. The declaration, therefore, that the election was held in conformity with the statute does not, with sufficient distinctness, imply that the indebtedness voted was less than five per cent on the value of the taxable property of the district, as shown by the state and county tax lists. *School District v. Stone*, 106 U. S. 183, 186, 27 L. Ed. 90.

The recitals in the bonds do not, necessarily nor distinctly, import any determination of that question by the district officers invested with authority, under certain circumstances, to issue them. The court said: "Had the bonds recited that they were issued by authority of the election of July 31, 1869, and in conformity with the provisions of the statute referred to, there would, in view of the decisions of this court, be more force in the argument in behalf of the defendant in error. *Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579; *Venice v. Murdock*, 92 U. S. 494, 23 L. Ed. 583; *Converse v. Fort Scott*, 92 U. S. 503, 23 L. Ed. 621; *Marcy v. Oswego Tp.*, 92 U. S. 637, 23 L. Ed. 748; *Commissioners v. Bolles*, 94 U. S. 104, 24 L. Ed. 46; *Commissioners v. January*, 94 U. S. 202, 24 L. Ed. 110; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138." *School District v. Stone*, 106 U. S. 183, 185, 27 L. Ed. 90.

other political or municipal corporations, a distinct recital that the bonds were issued, in conformity with the statute, would fairly import a compliance with the constitution.<sup>81</sup>

**Form of Recitals as to Purpose.**—See post, "Recitals as to Purpose of Issue," IV, V, 10.

3. **OFFICERS WHO MAY MAKE BINDING RECITALS.**—It would seem that where the bonds were signed, not by regular officers, but by commissioners specially appointed, before a recital made by them can be held to conclude the town it must appear that they were duly appointed, and thus had authority to act. Giving full force to the distinction which exists between the action of general and special officers, there must be, even in respect to the latter, some point in the line of inquiry back of which a party dealing in bonds of a municipality is not bound to go in his investigations as to their authority to represent the municipality, and that point it would seem was reached when there is found an appointment in due form made by the appointing tribunal named in the statute.<sup>82</sup>

4. **RECITALS AS TO POWER TO ISSUE**—a. *In General.*—Where there is an absolute want of power in a municipal corporation to issue bonds, such power cannot be created by mere recitals in the bonds.<sup>83</sup>

b. *Municipal Aid Bonds.*—Mere recitals by the officers of a municipal corporation in bonds issued in aid of a railroad corporation will not preclude an inquiry, even where the rights of a bona fide holder are involved, as to the existence of legislative authority to issue them. The question of legislative authority in such corporation to issue such bonds cannot be concluded by mere recitals.<sup>84</sup>

81. *School District v. Stone*, 106 U. S. 183, 186, 27 L. Ed. 90.

82. **Officers who may make binding recitals.**—*Andes v. Ely*, 158 U. S. 312, 324, 39 L. Ed. 996.

In *Andes v. Ely*, 158 U. S. 312, 324, 39 L. Ed. 996, it was held sufficient that they were acting commissioners, whose authority was recognized by each bond's being registered in the office of the county clerk, and attested by the signature of the county clerk with the seal of the county; and if the records of the county judge, the appointing power, be inspected there appears there a separate order, in due form, appointing them commissioners, which order recites a prior adjudication of all the essential facts.

In *Northern Bank v. Porter Tp.*, 110 U. S. 608, 619, 28 L. Ed. 258, it was held that recitals by township officers in township aid bonds of a fact, arising out of the duties of county officers, and which the purchaser and all others must be presumed to know did not belong to the township to determine, so as to confer or create power which, under the law, did not exist, was not conclusive upon the township.

83. **Recitals as to power to issue.**—*Wilkes County v. Coler*, 180 U. S. 506, 45 L. Ed. 642; *Wilkes County v. Coler*, 190 U. S. 107, 113, 47 L. Ed. 971; *Commissioners v. Bolles*, 94 U. S. 104, 109, 24 L. Ed. 46; *Northern Bank v. Porter Tp.*, 110 U. S. 608, 619, 28 L. Ed. 258.

A recital in city bonds that they were issued "under and pursuant" to law, the charter of the city and a named ordinance does not estop the city from asserting the contrary, where legislative authority to

issue such bonds under any condition of facts was neither expressly nor impliedly conferred in the charter or any other law of the state. *Katzenberger v. Aberdeen*, 121 U. S. 172, 177, 30 L. Ed. 911.

The recital in its present form is of matter of law only, because it implies the existence of no special facts affecting the case, except the issue of the bonds under the ordinance, without any vote of the electors to be taxed therefor. It is in effect nothing more than a recital that bonds issued under such circumstances were "under and pursuant" to law and the charter of the city. Such a recital does not estop the city from asserting the contrary. To hold otherwise would be to invest a municipal corporation with full legislative power and make it superior to the laws by which it was created. *Katzenberger v. Aberdeen*, 121 U. S. 172, 176, 30 L. Ed. 911, citing *Dixon County v. Field*, 111 U. S. 83, 92, 28 L. Ed. 360.

84. **Municipal aid bonds.**—*Northern Bank v. Porter Tp.*, 110 U. S. 608, 614, 28 L. Ed. 258; *Concord v. Robinson*, 121 U. S. 165, 30 L. Ed. 885; *German Sav. Bank v. Franklin County*, 128 U. S. 526, 543, 32 L. Ed. 519; *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 264, 43 L. Ed. 689; *Citizens' Sav., etc., Ass'n v. Perry County*, 156 U. S. 692, 709, 39 L. Ed. 585.

Bonds issued July 1, 1877, under the laws of Mississippi bearing upon the right of the authorities of Pontotoc County to subscribe for stock in the Selma, Marion, and Memphis Railroad Company (formerly known as the Memphis, Holly Springs, Okolona, and Selma Railroad Company), in payment of such subscription, and reciting that they are "issued



c. *Bonds Issued in Violation of Constitutional Provision.*—Recital in bonds issued under legislative authority may estop the municipality from disputing their authority as against a bona fide holder for value, but when the municipal bonds are issued in violation of a constitutional provision, no such estoppel can arise by reason of any recitals contained in the bonds.<sup>85</sup>

d. *Erroneous Recitals of Act under Which Issued.*—The fact that the act under which the bonds were issued is erroneously referred to in their recitals does not render them void.<sup>86</sup> While a recital in the bonds of a municipal corporation to the effect that they are issued under authority of a named act of the legislature may be invoked by the holder of the bonds as an estoppel against the corporation, it is not conclusive in its favor as to the act under which the bonds were in fact issued.<sup>87</sup> Where the recital of the wrong act is a clerical error and the proceedings were intended to be had under another act which authorized the issue, and the records do not show a failure to comply with such act, the holder of the bonds are not estopped from showing that there was in fact authority to issue them.<sup>88</sup> Such holders cannot show that the bonds were authorized by an

under and pursuant to an order of the board of police of said county of Pontotoc, now known as the board of supervisors of said county, made under the authority of the constitution and laws of said state of Mississippi, authorized by a vote of the people of said county at a special election held for the purpose on the twentieth day of November, A. D. 1869," are void, there having been no authority of law to issue them. *Wells v. Supervisors*, 102 U. S. 625, 26 L. Ed. 122.

**Only donation to be paid by taxation authorized.**—In *Concord v. Robinson*, 121 U. S. 165, 30 L. Ed. 885, the railroad aid bonds in suit recited on their face that they were issued by the town under and by virtue of a specified law of Illinois, which law, however, only authorized towns, including the town in question, to make a donation in aid of the particular road in question, the money to be raised by taxation. It was held that the recital did not give validity to the bond. See, also, *German Sav. Bank v. Franklin County*, 128 U. S. 526, 543, 32 L. Ed. 519.

**Election and issuance unauthorized.**—Recitals in municipal aid bonds that they were issued in compliance in all respects with the law and pursuant to an election held in pursuance thereof do not estop the municipality to show that it was without legislative authority to order the election, and to issue the bonds in suit. *Northern Bank v. Porter Tp.*, 110 U. S. 608, 619, 28 L. Ed. 258.

**85. Bonds issued in violation of constitutional provision.**—*Hedges v. Dixon County*, 150 U. S. 182, 187, 37 L. Ed. 1044; *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 37 L. Ed. 93. See, also, *Lake County v. Rollins*, 130 U. S. 662, 32 L. Ed. 1060; *Lake County v. Graham*, 130 U. S. 674, 32 L. Ed. 1065; *Sutliff v. Lake County Comm'rs*, 147 U. S. 230, 37 L. Ed. 145.

**Bonds issued in violation of constitutional debt limit.**—See post, "Recitals as to Debt Limit," IV, V, 9.

**86. Erroneous recitals of act under which issued.**—*Commissioners v. January*,

94 U. S. 202, 24 L. Ed. 110; *Tulare Irrig. Dist. v. Shepard*, 185 U. S. 1, 23, 46 L. Ed. 773; *Anderson County Comm'rs v. Beal*, 113 U. S. 227, 238, 28 L. Ed. 966; *Crow v. Oxford*, 119 U. S. 215, 223, 30 L. Ed. 388.

**87. Knox County v. Ninth Nat. Bank**, 147 U. S. 91, 95, 37 L. Ed. 93; *Commissioners v. January*, 94 U. S. 202, 24 L. Ed. 110.

**88. Crow v. Oxford**, 119 U. S. 215, 223, 30 L. Ed. 388; *Anderson County v. Beal*, 113 U. S. 227, 28 L. Ed. 966.

In the case of *Anderson County Comm'rs v. Beal*, 113 U. S. 227, 28 L. Ed. 966, "although the bonds recited the wrong act, the records of the county officers who issued the bonds did not show any want of compliance with the later act, but showed a substantial compliance with it, and in fact the proceedings were had and were intended to be had under it. The reference in the bonds to the earlier act as the source of authority was thus a mere clerical error. \* \* \* Legislative authority having been given for the issue of bonds by a statute under which the authorities in fact acted, the recital in the bonds, that the bonds were issued in pursuance of the vote of the electors, was effective to cover any irregularity as to notice, which did not appear of record, but was sought to be proved aliunde." *Crow v. Oxford*, 119 U. S. 215, 223, 30 L. Ed. 388.

In *Anderson County Comm'rs v. Beal*, 113 U. S. 227, 236, 237, 238, 28 L. Ed. 966, it was said: "It is not disputed that the recital in the bond that it was issued under the act of February 26, 1866, Sess. Laws of Kansas, 1866, c. 24, p. 72, was an error. \* \* \* It is very clear that there was legislative authority, under the act of 1869, for the issuing of the bonds in question. There was an election, and the requisite majority of those who voted assented to the proposition for the subscription to the stock and the issue of the bonds, and the subscription was made by the proper officers, and they issued the



act under which the proceedings were not intended to be had and with which the

bonds. \* \* \* The bond recites the wrong act, but if that part of the recital be rejected, there remains the statement that the bond 'is executed and issued' 'in pursuance to the vote of the electors of Anderson County of September 13, 1869.' The act of 1869 provides that when the assent of a majority of those voting at the election is given to the subscription to the stock, the county commissioners shall make the subscription, and shall pay for it, and for the stock thereby agreed to be taken, by issuing to the company the bonds of the county." To the same effect, is *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 37 L. Ed. 93; *Wilkes County v. Coler*, 180 U. S. 506, 524, 45 L. Ed. 642.

So held where the bonds on their face recite that they are "issued under and pursuant to order of the county court of Knox County, for subscription to the stock of the Missouri and Mississippi Railroad Company, as authorized by an act of the general assembly of the state of Missouri, entitled 'An act to incorporate the Missouri and Mississippi Railroad Company,' approved February 20, 1865." *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 37 L. Ed. 93; *Commissioners v. January*, 94 U. S. 202, 24 L. Ed. 110.

In *Wilkes County v. Coler*, 180 U. S. 506, 526, 45 L. Ed. 642, it was held that the recital in each bond that it was issued under the authority of the act of 1879 did not estop the holders of bonds from showing that there was in fact ample authority to issue them, although such authority was not recited in the bonds. It therefore became necessary to inquire whether such authority could be found elsewhere in the legislation of the state. *Wilkes County v. Coler*, 180 U. S. 507, 109, 47 L. Ed. 971.

**Recital of repealed act.**—"In *Commissioners v. January*, 94 U. S. 202, 24 L. Ed. 110, an act was recited in the bonds which had been repealed by a later act. The order for the election was made while the earlier act was in force. The election was held after its repeal, and after the new act went into force, but there was no new order of election. Otherwise, all the proceedings after the new act went into force were in conformity with it. It was held that a recital in the bonds, that they were issued 'in pursuance of, and in accordance with, the vote of a majority of the qualified electors of the county,' 'at a regular election, held on' a day named, estopped the county from raising the objection of the want of an order under the new act, although the old act, and not the new act, was recited in the bonds, as the statute authority." *Crow v. Oxford*, 119 U. S. 215, 223, 30 L. Ed. 388.

After the passage of the act of 1869 all the proceedings were in substantial conformity to its requirements. It was in

force before the election was held and until after the bonds were issued and delivered. This act, like the act of 1868, authorized the commissioners to issue the bonds when the requirements of the law had been complied with. They were thus constituted a tribunal for the adjustment of all questions touching the subject. They were clothed with the power and charged with the duty to decide them. No appeal or review was provided for. Their issuing the bonds was the reflex and embodiment of their judgment that it was proper to do so. It implies a prior determination to that effect. The fact carries with it this presumption. The bonds recite that they were issued in conformity to law, and in pursuance of the election held on the 6th of April, 1869. It is true they refer to the wrong statute, but *falsa demonstratio non nocet*. The bad here does not hurt the good. The act of the commissioners was the act of the county, and the county is conclusively bound by what they have done. As between the county and a bona fide holder, no question involving the infirmity of the securities can be raised. The principle of estoppel applies, and it precludes the obligor from interposing such a defense. *Commissioners v. January*, 94 U. S. 202, 205, 24 L. Ed. 110.

**Recital of void statute in addition to that of charter authority.**—Where municipal bonds contained recitals that they were issued "by virtue of" the city's charter, the additional recitals that they were issued by virtue of another statute which was invalid did not, as between the city and a bona fide purchaser for value, prevent the latter from assuming the truth of the recital that the bonds were issued in compliance with the city's charter. *Evansville v. Dennett*, 161 U. S. 434, 442, 40 L. Ed. 760.

A bona fide purchaser for value of bonds issued to a railroad company in payment of a stock subscription is not charged by recitals in said bonds that they were issued "by virtue of a resolution of said city council passed May 23, 1870," with notice that they were issued in pursuance of an invalid act, and in pursuance of an election held under it. Such a purchaser has a right to assume from the recitals that the prerequisites of both the valid act and the invalid act had been observed by the common council before the issuance of such bonds. *Evansville v. Dennett*, 161 U. S. 434, 40 L. Ed. 760.

The charter of 1847 contemplated a petition of two-thirds of the resident freeholders of the city. The act of 1867 provided for an election by the qualified voters, who were also taxpayers. Notwithstanding the provisions of the charter of 1847 the city council before subscribing for the stock might well have ascertained what were the wishes of taxpayers, who

record shows a failure to comply.<sup>89</sup>

5. RECITALS AS TO COMPLIANCE WITH CONDITIONS PRECEDENT—*a. In General.*—Where municipal bonds on their face recite the circumstances which bring them within the power of the municipality to issue,<sup>90</sup> or where they recite on their face that steps which justify them have been taken,<sup>91</sup> and an action is brought by a bona fide holder, the municipality is estopped to deny the truth of such recitals.

*b. Compliance with Statute under Which Issued*—(1) *Doctrine Generally.*—Where municipal bonds on their face import a compliance with the law under which they were issued, the purchasers of them were not bound to look further for evidence of a compliance with the conditions annexed to the grant of power

were also qualified voters. So far as the recitals in the bonds are concerned, the purchaser of bonds might properly have assumed that both methods were pursued. Although, in strict law, he was chargeable with knowledge that the act of 1867 was invalid, and consequently, that an election held under it could not itself authorize a subscription of stock by the city, he was entitled to stand upon the validity of the city charter, and to act upon the assurance, given by the recitals in the bonds, that the provisions of that charter had been respected, and, therefore, that the subscription of stock had been preceded by a petition to the city council of two-thirds of the resident freeholders of the city. *Evansville v. Dennett*, 161 U. S. 434, 443, 40 L. Ed. 760.

89. In *Crow v. Oxford*, 119 U. S. 215, 223, 30 L. Ed. 388, the reference in the bonds to the act of March 1st, 1872, was not a clerical error, and the proceedings were intended to be had under that act, and the records showed a failure to comply with the act of March 2d, 1872, and an attempt to comply only with the act of March 1st, 1872. It was held that the doctrine applied in the case of *Anderson County Comm'rs v. Beal*, 113 U. S. 227, 28 L. Ed. 966, was not applicable to the case at bar.

In *Crow v. Oxford*, 119 U. S. 215, 223, 30 L. Ed. 388, the court speaking of the case of *Commissioners v. January*, 94 U. S. 202, 24 L. Ed. 110, said: "We think that case is distinguished from the present one by the fact that in it all the proceedings after the new law took effect were in conformity with it, while in the case at bar, none of the proceedings were in conformity with the act of March 2d, 1872."

Bonds of an Illinois town purporting to be under the act of February 18, 1857, which required a vote on "application in writing of fifty legal voters of said town," cannot be sustained under the act of March 6, 1867, which required an application by "twenty voters and taxpayers." *Gilson v. Dayton*, 123 U. S. 59, 31 L. Ed. 74.

It appears on the face of the bonds sued for that the subscription was made under and by virtue of the act of February 18, 1857, and that the vote of the town was taken at a special town meeting called upon the "application in writing

of fifty legal voters of said town," which is in accordance with the provisions of that act. The act of March 6, 1867, which the plaintiff claims is sufficient to support the bonds, requires that the application for the town meeting shall be made by "twenty voters and taxpayers." The record does not show that any of those who signed the application for the meeting at which the vote was taken were taxpayers. It thus appears from the bonds themselves not only that they were issued under the act of 1857, but that they were not issued under that of 1867. *Gilson v. Dayton*, 123 U. S. 59, 61, 31 L. Ed. 74, affirming judgment of lower court on authority of *Crow v. Oxford*, 119 U. S. 215, 30 L. Ed. 388. See, also, *Post v. Supervisors*, 105 U. S. 667, 691, 26 L. Ed. 1204.

**School bonds**, issued under an invalid special act which recite on their face that they were issued pursuant to such special act, cannot be held valid and a general law authorizing the raising of school funds. *School District v. Ins. Co.*, 103 U. S. 707, 709, 26 L. Ed. 601.

90. **Recitals as to compliance with conditions precedent.**—*Orleans v. Platt*, 99 U. S. 676, 682, 25 L. Ed. 404; *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548; *San Antonio v. Mehaffy*, 96 U. S. 312, 24 L. Ed. 816; *County of Moultrie v. Rockingham, etc.*, Sav. Bank, 92 U. S. 631, 23 L. Ed. 631; *Moran v. Commissioners*, 2 Black 722, 17 L. Ed. 342; *Board of Comm'rs v. Aspinwall*, 21 How. 539, 16 L. Ed. 208; *Cairo v. Zane*, 149 U. S. 122, 37 L. Ed. 673; *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 264, 43 L. Ed. 689; *Buchanan v. Litchfield*, 102 U. S. 278, 290, 26 L. Ed. 138; *Pompton v. Cooper Union*, 101 U. S. 196, 204, 25 L. Ed. 803.

91. *Andes v. Ely*, 158 U. S. 312, 324, 39 L. Ed. 996.

"Whether the various steps were taken which in this particular case justified the issue of the bonds was a question of fact; and when the bonds on their face recite that those steps have been taken it is the settled rule of this court that in an action brought by a bona fide holder the municipality is estopped from showing the contrary. See the many cases commencing with *Board of Comm'rs v. Aspinwall*, 21 How. 539, 16 L. Ed. 208, and ending with *Citizens' Sav., etc., Ass'n v. Perry*



to issue them and as against a bona fide purchaser the municipality is estopped from denying that they were complied with.<sup>92</sup> Recitals that precedent conditions prescribed by statute and subject to the determination of the county officers have been fully complied with, bind the municipality.<sup>93</sup> Probably the fullest statement of the settled doctrine of the supreme court of the United States is: Where legislative authority has been given to a municipality, or to its officers to issue municipal bonds, but only on some precedent condition, such as a popular vote favoring the same, and where it may be gathered from the legislative

County, 156 U. S. 692, 39 L. Ed. 585." *Andes v. Ely*, 158 U. S. 312, 324, 39 L. Ed. 996; *Tulare Irrig. Dist. v. Shepard*, 185 U. S. 1, 24, 46 L. Ed. 773.

92. *Board of Comm'rs v. Aspinwall*, 21 How. 539, 16 L. Ed. 208; *Walnut v. Wade*, 103 U. S. 683, 26 L. Ed. 526; *Bonham v. Needles*, 103 U. S. 648, 26 L. Ed. 451; *Harter v. Kernochan*, 103 U. S. 562, 26 L. Ed. 411; *County of Clay v. Society for Savings*, 104 U. S. 579, 26 L. Ed. 856; *Moultrie County v. Fairfield*, 105 U. S. 370, 26 L. Ed. 945; *Insurance Co. v. Bruce*, 105 U. S. 328, 26 L. Ed. 1121; *Mercer County v. Hackett*, 1 Wall. 83, 93, 17 L. Ed. 548; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138; *Ohio v. Frank*, 103 U. S. 697, 26 L. Ed. 531; *School District v. Stone*, 106 U. S. 183, 186, 27 L. Ed. 90; *Moran v. Commissioners*, 2 Black 722, 724, 17 L. Ed. 342; *Sherman County v. Simons*, 109 U. S. 735, 737, 27 L. Ed. 1093; *Northern Bank v. Porter Tp.*, 110 U. S. 608, 28 L. Ed. 258; *Dallass County v. McKenzie*, 110 U. S. 686, 28 L. Ed. 285; *Dixon County v. Field*, 111 U. S. 83, 28 L. Ed. 360; *Carroll County v. Smith*, 111 U. S. 556, 562, 28 L. Ed. 517; *Grenada County Supervisors v. Brogden*, 112 U. S. 261, 262, 267, 28 L. Ed. 704; *Anderson County Comm'rs v. Beal*, 113 U. S. 227, 239, 28 L. Ed. 966; *Merchants' Bank v. Bergen County*, 115 U. S. 384, 391, 29 L. Ed. 430; *Oregon v. Jennings*, 119 U. S. 74, 93, 30 L. Ed. 323; *Crow v. Oxford*, 119 U. S. 215, 223, 30 L. Ed. 388; *Chaffee County v. Potter*, 142 U. S. 355, 364, 35 L. Ed. 1040; *Lyons v. Munson*, 99 U. S. 684, 25 L. Ed. 451; *Bissell v. Jeffersonville*, 24 How. 287, 16 L. Ed. 664; *Citizens' Sav., etc., Ass'n v. Perry County*, 156 U. S. 692, 712, 39 L. Ed. 585; *Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579; *Cairo v. Zane*, 149 U. S. 122, 37 L. Ed. 673; *Tulare Irrig. Dist. v. Shepard*, 185 U. S. 1, 20, 46 L. Ed. 773; *Marcy v. Oswego Tp.*, 92 U. S. 637, 23 L. Ed. 748; *Lynde v. The County*, 16 Wall. 6, 13, 21 L. Ed. 272; *Livingston County v. First Nat. Bank*, 128 U. S. 102, 127, 32 L. Ed. 359; *Supervisors v. Galbraith*, 99 U. S. 214, 217, 25 L. Ed. 410; *Orleans v. Platt*, 99 U. S. 676, 25 L. Ed. 404; *Rock Creek Tp. v. Strong*, 96 U. S. 271, 24 L. Ed. 815; *Comanche County v. Lewis*, 133 U. S. 198, 206, 33 L. Ed. 604.

Recitals in the bonds that they were issued in pursuance of the authority conferred by certain statutes, import a compliance with the statutes, and the municipality is estopped to assert, as against a

bona fide holder for value, that such recitals are untrue. *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138; *Bonham v. Needles*, 103 U. S. 648, 650, 26 L. Ed. 451; *Harter v. Kernochan*, 103 U. S. 562, 26 L. Ed. 411.

A county or other municipal corporation being authorized by statute to borrow money and issue bonds for the payment thereof, if the bonds be made and delivered reciting the facts, which show them to have been regularly issued, the county is estopped to deny their regularity or to assert that they were not made in conformity to the statute. *Moran v. Commissioners*, 2 Black 722, 17 L. Ed. 342.

93. *Provident Life, etc., Co. v. Mercer County*, 170 U. S. 593, 601, 42 L. Ed. 1156; *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 43 L. Ed. 689; *Quinlan v. Green County*, 205 U. S. 410, 419, 51 L. Ed. 860.

In the leading case of *Board of Comm'rs v. Aspinwall*, 21 How. 539, 544, 16 L. Ed. 208, the decision was rested upon two grounds. One of them was that the mere issue of the bonds, containing a recital that they were issued under and in pursuance of the legislative act, was a sufficient basis for an assumption by the purchaser that the conditions on which the county (in that case) was authorized to issue them had been complied with; and it was said that the purchaser was not bound to look farther for evidence of such compliance, though the recital did not affirm it.

This position taken in *Board of Comm'rs v. Aspinwall*, 21 Wall. 539, 16 L. Ed. 208, has been more than once reaffirmed in this court. It was in *Moran v. Commissioners*, 2 Black 722, 732, 17 L. Ed. 342, in *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548, in *Supervisors v. Schenck*, 5 Wall. 772, 784, 18 L. Ed. 556, and in *Meyer v. Muscatine*, 1 Wall. 384, 17 L. Ed. 564. It has never been overruled. *Coloma v. Eaves*, 92 U. S. 484, 490, 23 L. Ed. 579.

In *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548, it was held that where a county issues its bonds payable to bearer, and solemnly pledges the faith and credit and property of the county, under authority of an act of the assembly, referred to on the face of the bonds by date, and the bonds pass into the hands of a bona fide holder for value, the county is bound to pay them; that it is no defense that the act of the assembly referred to on the face of the bonds authorized their



enactment that the officers of the municipality were invested with the power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them and held by a bona fide purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal.<sup>94</sup> And this is more emphatically true when the fact is one peculiarly within the knowledge of the

issue only on, and subject to, certain "limitations, restrictions, and conditions," which have not been formally complied with. *Grand Chute v. Winegar*, 15 Wall. 355, 371, 21 L. Ed. 170.

94. *Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579; *Dixon County v. Field*, 111 U. S. 83, 94, 28 L. Ed. 360; *Chaffee County v. Potter*, 142 U. S. 355, 364, 35 L. Ed. 1040; *Northern Bank v. Porter Tp.*, 110 U. S. 608, 616, 28 L. Ed. 258; *Anderson County Comm'rs v. Beal*, 113 U. S. 227, 239, 28 L. Ed. 966; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138; *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 266, 43 L. Ed. 689.

"There is a class of cases where recitals in obligations are held to supply such proof of compliance with the special authority delegated as to preclude the taking of any testimony on the subject, and estop the obligor from denying the fact. These have generally arisen upon municipal bonds, authorized by statute, upon the vote of the majority of the citizens of a particular city, county, or town, and in which certain persons or officers are designated to ascertain and certify as to the result. If, in such cases, the bonds refer to the statute, and recite a compliance with its provisions, and have passed for a valuable consideration into the hands of a bona fide purchaser, without notice of any defect in the proceedings, the municipality has been held to be estopped from denying the truth of the recitals." *Merchants' Bank v. Bergen County*, 115 U. S. 384, 391, 29 L. Ed. 430; *Northern Bank v. Porter Tp.*, 110 U. S. 608, 28 L. Ed. 258; *Dixon County v. Field*, 111 U. S. 83, 28 L. Ed. 360.

"This court has again and again decided that if a municipal body has lawful power to issue bonds or other negotiable securities, dependent only upon the adoption of certain preliminary proceedings, such as a popular election of the constituent body, the holder in good faith has the right to assume that such preliminary proceedings have taken place if the fact be certified on the face of the bonds by the authorities whose primary duty it is to ascertain it. *Lynde v. The County*, 16 Wall. 6, 21 L. Ed. 272; *Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579; *Commissioners v. January*, 94 U. S. 202, 24 L. Ed. 110; *Commissioners v. Bolles*, 94 U. S. 104, 24 L. Ed. 46; *County of Warren v. Marcy*, 97 U. S. 96, 24 L. Ed. 977." *Pana v. Bowler*, 107 U. S. 529, 539, 27 L. Ed. 424.

In *Dillon on Municipal Corporations*, § 418, the author, after reviewing the de-

cisions, states this conclusion: "If, upon a true construction of the legislative enactment conferring the authority, the corporation, or certain officers, or a given body or tribunal, are invested with power to decide whether the condition precedent has been complied with, then it may well be that their recital of their determination of a matter in pais, which they are authorized to decide, will, in favor of the bondholder for value, bind the corporation." *Venice v. Murdock*, 92 U. S. 494, 498, 23 L. Ed. 583; *St. Joseph Tp. v. Rogers*, 16 Wall. 644, 21 L. Ed. 328; *Genoa v. Woodruff*, 92 U. S. 502, 23 L. Ed. 586; *Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579, assert this rule.

And the rule has additional reason in its favor, where, as in the present case, the authority of the municipal officers to bind the municipality is made dependent upon a precedent condition of fact; and the fact is not of a nature to be ascertained by purchasers in the market, to whom it was contemplated the bonds might be sold. *Dillon*, in § 419, states this as another exception to the rule that an unauthorized representation by a municipal officer that he has power is not binding on the corporation. His language is: "The only exception to this rule (the rule above stated)—to wit, where it is the sole province of the officers who issued the bonds to decide whether conditions precedent have been complied with—is where both parties have not equal means of knowledge as to the extent and scope of their powers, and where the particular character of their commission and authority is, from its nature and circumstances, peculiarly known to the officer or agent; in which case the principal will, or may be bound by the false representations of the agent respecting its authority and its extent and scope." The present is exactly such a case. The town officers had means of knowledge which the purchaser had not. They procured the signatures to the assent, and they knew whether or not they were genuine. They had knowledge, which, from the nature of the case, the purchaser could not have. *Venice v. Murdock*, 92 U. S. 494, 499, 23 L. Ed. 583; *Genoa v. Woodruff*, 92 U. S. 502, 23 L. Ed. 586.

It was their appointed province to decide whether the condition precedent to the exercise of their authority to issue the bonds had been complied with. They did decide the question before they issued the bonds. Their statement, verified by their affidavit, filed in the county clerk's office,

persons to whom the power to issue the bonds has been conditionally granted.<sup>95</sup> The converse is embraced in the proposition and is equally true. If the officers authorized to issue bonds, upon a condition, are not the appointed tribunal to decide the fact, which constitutes the condition, their recital will not be accepted as a substitute for proof.<sup>96</sup> In other words, where the validity of the bonds depend upon an estoppel, claimed to arise upon the recitals of the instrument, the question being as to the existence of power to issue them, it is necessary to establish that the officers executing the bonds had lawful authority to make the recitals and to make them conclusive.<sup>97</sup> The very ground of the estoppel is that the recitals are the official statements of those to whom the law refers the public for authentic and final information on the subject.<sup>98</sup> The estoppel does not arise except upon matters of fact which the corporate officers had authority by law to determine and certify. It is not necessary that the recital should enumerate each particular fact essential to the existence of the obligation.<sup>99</sup>

was a decision, and the recital in the bonds was a declaration of the decision. That such a decision concludes the town against denying that the condition precedent had been performed, that it relieved the holder of the bonds from the obligation to look beyond it, is too firmly settled in the federal supreme court to admit of question. *Venice v. Murdock*, 92 U. S. 494, 498, 23 L. Ed. 583; *Genoa v. Woodruff*, 92 U. S. 502, 23 L. Ed. 586.

If an election or other fact is required to authorize the issue of the bonds of a municipal corporation, and if the result of that election, or the existence of that fact, is by law to be ascertained and declared by any judge, officer, or tribunal, and that judge, officer, or tribunal, on behalf of the corporation, executes, or issues the bonds, with a recital that the election has been held, or that the fact exists, or has taken place, this will be sufficient evidence of the fact to all bona fide holders of the bonds. *Kenicott v. Supervisors*, 16 Wall. 452, 464, 21 L. Ed. 319; *St. Josephs Tp. v. Rogers*, 16 Wall. 644, 21 L. Ed. 328; *Buchanan v. Litchfield*, 102 U. S. 278, 291, 26 L. Ed. 138.

A recital by the board in the bonds, showing that the condition precedent to the lawful issue of such bonds has been complied with, is, when they are in the hands of a bona fide holder for value, binding upon the county; and he is bound to look for nothing behind the recital except legislative authority for the issue of them. *Commissioners v. Bolles*, 94 U. S. 104, 24 L. Ed. 46.

<sup>95.</sup> *Marcy v. Oswego Tp.*, 92 U. S. 637, 639, 23 L. Ed. 748; *Humboldt Tp. v. Long*, 92 U. S. 642, 23 L. Ed. 752. See, also, *Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579.

<sup>96.</sup> *Dixon County v. Field*, 111 U. S. 83, 94, 28 L. Ed. 360; *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 267, 43 L. Ed. 689. See cases to preceding text.

<sup>97.</sup> *Dixon County v. Field*, 111 U. S. 83, 94, 28 L. Ed. 360; *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 267, 43 L. Ed. 689.

<sup>98.</sup> *Dixon County v. Field*, 111 U. S. 83,

94, 28 L. Ed. 360; *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 267, 43 L. Ed. 689.

"The ground of the estoppel is that the officers issuing the bonds and inserting the recitals are agents of the municipality, empowered to determine whether the statute has been followed, and thus bind the municipality by their determination." *Merchants' Bank v. Bergen County*, 115 U. S. 384, 391, 29 L. Ed. 430, citing *Northern Bank v. Porter Tp.*, 110 U. S. 608, 28 L. Ed. 258; *Dixon County v. Field*, 111 U. S. 83, 28 L. Ed. 360.

<sup>99.</sup> *Dixon County v. Field*, 111 U. S. 83, 92, 28 L. Ed. 360; *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 265, 43 L. Ed. 689.

"A general statement that the bonds have been issued in conformity with the law will suffice, so as to embrace every fact which the officers making the statement are authorized to determine and certify. A determination and statement as to the whole series, where more than one is involved, is a determination and certificate as to each essential particular. But it still remains, that there must be authority vested in the officers, by law, as to each necessary fact, whether enumerated or nonenumerated, to ascertain and determine its existence, and to guarantee to those dealing with them the truth and conclusiveness of their admissions. In such a case the meaning of the law granting power to issue bonds is that they may be issued, not upon the existence of certain facts, to be ascertained and determined whenever disputed, but upon the ascertainment and determination of their existence, by the officers or body designated by law to issue the bonds upon such a contingency. This becomes very plain when we suppose the case of such a power granted to issue bonds, upon the existence of a state of facts to be ascertained and determined by some persons or tribunal other than those authorized to issue the bonds. In that case, it would not be contended that a recital of the facts in the instrument itself, contrary to the finding of those charged by law with



**Express Directions Not Necessary.**—The act need not in terms say that the commissioners are to decide that all preliminary conditions have been complied with. Such express direction and authority is seldom found in acts providing for the issuing of bonds. It is enough that full control in the matter is given to the officers named.<sup>1</sup>

(2) *Municipal Aid Bonds.*—This doctrine has been frequently applied where legislative authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment,<sup>1</sup> but only on some precedent condition, such as a popular vote favoring the subscription,<sup>2</sup> the beginning of a road before the subscription “in which the cit-

that duty, would have any legal effect. So, if the fact necessary to the existence of the authority was by law to be ascertained, not officially by the officers charged with the execution of the power, but by reference to some express and definite record of a public character, then the true meaning of the law would be, that the authority to act at all depended upon the actual objective existence of the requisite fact, as shown by the record, and not upon its ascertainment and determination by any one; and the consequence would necessarily follow, that all persons claiming under the exercise of such a power might be put to proof of the fact, made a condition of its lawfulness, notwithstanding any recitals in the instrument. This principle is the essence of the rule declared upon this point by the court in the well considered words of Mr. Justice Story in *Coloma v. Eaves*, 92 U. S. 484, 491, 23 L. Ed. 579.” *Dixon County v. Field*, 111 U. S. 83, 93, 28 L. Ed. 360; *Gunnison County Comm’rs v. Rollins*, 173 U. S. 255, 265, 266, 43 L. Ed. 689.

This is the rule which has been constantly applied in the numerous cases in which it has been involved. The differences in the result of the judgments have depended upon the question, whether, in the particular case under consideration, a fair construction of the law authorized the officers issuing the bonds to ascertain, determine and certify the existence of the facts upon which their power, by the terms of the law, was made to depend; not including, of course, that class of cases in which the controversy related, not to conditions precedent, on which the right to act at all depended, but upon conditions affecting only the mode of exercising a power admitted to have come into being. *Dixon County v. Field*, 111 U. S. 83, 94, 28 L. Ed. 360, citing *Marcy v. Oswego Tp.*, 92 U. S. 637, 23 L. Ed. 748; *Commissioners v. Bolles*, 94 U. S. 104, 24 L. Ed. 46; *Commissioners v. Clark*, 94 U. S. 278, 24 L. Ed. 59; *County of Warren v. Marcy*, 97 U. S. 96, 24 L. Ed. 977; *Pana v. Bowler*, 107 U. S. 529, 27 L. Ed. 424.

1. *Bernards Tp. v. Morrison*, 133 U. S. 523, 528, 33 L. Ed. 726.

“In the case of *Oregon v. Jennings*, 119 U. S. 74, 92, 30 L. Ed. 323, the rule is thus stated by Mr. Justice Blatchford: ‘Within the numerous decisions by this court on

the subject, the supervisor and the town clerk, they being named in the statute as the officers to sign the bonds, and the “corporate authorities” to act for the town in issuing them to the company, were the persons entrusted with the duty of deciding, before issuing the bonds, whether the conditions determined at the election existed. If they have certified to that effect in the bonds, the town is estopped from asserting, as against a bona fide holder, that the conditions prescribed by the popular vote were not complied with.”’ *Bernards Tp. v. Morrison*, 133 U. S. 523, 528, 33 L. Ed. 726.

“They state, in each bond, that the faith, credit, and property of the town are, by the bond, solemnly pledged for the payment of the principal and interest named in it ‘under authority of’ the act of March 30th, 1869, reciting its title, and that the 60 bonds, amounting to \$50,000, ‘are the only bonds issued by said town of Oregon under and by virtue of said act.’ The provision in § 6 of the act, that the town shall, by its proper corporate authority, annually assess and levy a tax to pay the interest and principal of the bonds, is a warrant for the pledge made, in the bonds, of the faith, credit, and property of the town. The recitals are within the adjudged cases in this court, as to the effect of recitals in bonds, that they are issued ‘under authority of’ a specified statute, and ‘under and by virtue of’ that statute, and they estop the town from taking the defense that the first division of the road was not completed by the time specified, as against the plaintiff, as a bona fide holder of the bonds.” *Oregon v. Jennings*, 119 U. S. 74, 92, 30 L. Ed. 323.

2. *Municipal aid bonds.*—See the following cases, which either state or apply the rule. *Coloma v. Eaves*, 92 U. S. 484, 491, 23 L. Ed. 579; *Commissioners v. Bolles*, 94 U. S. 104, 108, 24 L. Ed. 46; *Northern Bank v. Porter Tp.*, 110 U. S. 608, 616, 28 L. Ed. 258; *Anderson County Comm’rs v. Beal*, 113 U. S. 227, 239, 28 L. Ed. 966; *Dixon County v. Field*, 111 U. S. 83, 93, 28 L. Ed. 360; *Gunnison County Comm’rs v. Rollins*, 173 U. S. 255, 264, 43 L. Ed. 689; *Tulare Irrig. Dist. v. Shepard*, 185 U. S. 1, 23, 46 L. Ed. 773; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138; *Chaffee County v. Potter*, 142 U. S. 355,



izens of the county may have an interest,"<sup>3</sup> or the existence of the road at the date of the act.<sup>4</sup> The adjudged cases, examined in the light of their special

364, 35 L. Ed. 1040; *Marcy v. Oswego Tp.*, 92 U. S. 637, 639, 23 L. Ed. 748; *Humboldt Tp. v. Long*, 92 U. S. 642, 23 L. Ed. 752; *Otoe County v. Baldwin*, 111 U. S. 1, 28 L. Ed. 331; *Grenada County Supervisors v. Brogden*, 112 U. S. 261, 267, 28 L. Ed. 704; *Livingston County v. First Nat. Bank*, 128 U. S. 102, 32 L. Ed. 359; *Provident Life, etc., Co. v. Mercer County*, 170 U. S. 593, 602, 42 L. Ed. 1156; *Orleans v. Platt*, 99 U. S. 676, 25 L. Ed. 404; *Lynde v. The County*, 16 Wall. 6, 21 L. Ed. 272; *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548; *Board of Comm'rs v. Aspinwall*, 21 How. 539, 16 L. Ed. 208; *Rock Creek Tp. v. Strong*, 96 U. S. 271, 24 L. Ed. 815.

Legislative authority existing in a municipal corporation to issue bonds in aid of railroad company, "the municipality may be estopped by recitals to prove irregularities in the exercise of that power; or, when the law prescribes conditions upon the exercise of the power granted, and commits to the officers of such municipality the determination of the question whether those conditions have been performed, the corporation will also be estopped by recitals which import such performance." *Northern Bank v. Porter Tp.*, 110 U. S. 608, 619, 28 L. Ed. 258; *Gunnison County Comm'rs v. Rolins*, 173 U. S. 255, 264, 43 L. Ed. 689; *Citizens' Sav., etc., Ass'n v. Perry County*, 156 U. S. 692, 39 L. Ed. 585.

"In *Bissell v. Jeffersonville*, 24 How. 287, 16 L. Ed. 664, the court found that there was power to issue the bonds, and that after they were issued and delivered to the railroad company it was too late, as against a bona fide holder, to call in question the determination of the facts, which the law prescribed as the basis of the exercise of the power granted, and which the city authorities were authorized and required to determine before bonds were issued." *Northern Bank v. Porter Tp.*, 110 U. S. 608, 616, 28 L. Ed. 258.

In *Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579, the authority to make the subscription was made, by the statute, to depend upon the result of the submission of the question to a popular vote, and its approval by a majority of the legal votes cast. But whether the statute in these particulars was complied with, was left to the decision of certain persons who held official relations with the municipality in whose behalf the proposed subscription was to be made. It was in reference to such a case that the court laid down the above rule. *Northern Bank v. Porter Tp.*, 110 U. S. 608, 616, 28 L. Ed. 258.

In *Grenada County Supervisors v. Brogden*, 112 U. S. 261, 267, 28 L. Ed. 704, the court said: "Under the acts in question, assuming them to be constitu-

tional, the county had authority, upon certain conditions, to make a subscription to the capital stock of the Grenada, Houston & Eastern Railroad Company, now the Vicksburg & Nashville Railroad Company, and its board of supervisors was invested with power to determine whether those conditions were performed, and, upon their being performed, to issue bonds in payment of such subscription. According to the settled doctrines of this court, the county is estopped, as against the plaintiffs, to say that the conditions were not duly performed; for, the recitals in the bonds import that they were issued in pursuance of the acts of 1860 and 1871, and in obedience to a vote at an election held in accordance with the provisions of said acts. *Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138; *Northern Bank v. Porter Tp.*, 110 U. S. 608, 617, 28 L. Ed. 258; *Otoe County v. Baldwin*, 111 U. S. 1, 28 L. Ed. 331."

The bonds issued by the county of Leavenworth, Kansas, bearing date July 1, 1865, and reciting that they are issued in payment of the subscription of said county to the capital stock of the Leavenworth and Missouri Pacific Railroad Company, under the provisions of the act of the legislature of Kansas, entitled "An act to authorize counties and cities to issue bonds to railroad companies," approved Feb. 10, 1865, are, in the hands of a bona fide holder for value, valid and binding upon the country. *County of Leavenworth v. Barnes*, 94 U. S. 70, 24 L. Ed. 63.

3. Where county bonds to pay a subscription to railroad stock contain recitals to the effect that their issuance was authorized by N. C. Code, §§ 1996-99, a bona fide holder has the right to assume that the county had the interest claimed and that the railroad had been begun as prescribed by those sections, before the county had exercised its power to issue such bonds. *Stanly County v. Coler*, 190 U. S. 437, 47 L. Ed. 1126.

"It makes no difference whether the existence or nonexistence of those conditions could have been ascertained by inquiry." *Stanly County v. Coler*, 190 U. S. 437, 447, 47 L. Ed. 1126.

4. Existence of road at date of act.—A municipal corporation was authorized by statute to extend aid to any organized railroad. The common council passed an ordinance authorizing an issue of bonds to a named amount to one company, and the issue of a like amount to another company. Both ordinances were approved and ratified by popular vote, as prescribed by the statute. The bonds and coupons were thereupon executed and delivered, and purported on their face to be issued

circumstances, show that the facts which a municipal corporation, issuing bonds in aid of the construction of a railroad, was not permitted, against a bona fide holder, to question, in face of a recital in the bonds of their existence, were those connected with or growing out of the discharge of the ordinary duties of such of its officers as were invested with authority to execute them, and which the statute conferring the power made it their duty to ascertain and determine before the bonds were issued; not merely for themselves, as the ground of their own action, in issuing the bonds, but, equally, as authentic and final evidence of their existence, for the information and action of all others dealing with them in reference to it.<sup>5</sup>

in pursuance of the act of the legislature authorizing their issue and of the several acts mandatory thereto. It was held that the municipality is estopped from denying the validity of the bonds on the ground that the statute applied only to railroads in existence at the date of the act. *James v. Milwaukee*, 16 Wall. 159, 21 L. Ed. 267.

5. *Northern Bank v. Porter Tp.*, 110 U. S. 608, 616, 28 L. Ed. 258; *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 264, 43 L. Ed. 639; *Citizens' Sav., etc., Ass'n v. Perry County*, 156 U. S. 692, 709, 39 L. Ed. 585. See ante, "Conclusiveness of Official Determination or Certificate," IV, S.

"In *Northern Bank v. Porter Tp.*, 110 U. S. 608, 28 L. Ed. 258, \* \* \* the existence of the power to issue the township bonds in suit, depended upon the fact that the county commissioners had not been previously authorized by a popular vote, or an unreasonable delay in taking one, to make a subscription on behalf of the county. It was there said: 'Whether they had not been so authorized, that is, whether the question of subscription had or had not been submitted to a county vote, or whether the county commissioners had failed for so long a time to take the sense of the people as to show that they had not, within the meaning of the law, been authorized to make a subscription, were matters with which the trustees of the township, in the discharge of their ordinary duties, had no official connection and which the statute had not committed to their final determination. Granting that the recital in the bonds that they were issued "in pursuance of the provisions of the several acts of the general assembly of Ohio," is equivalent to an express recital that the county commissioners had not been authorized by a vote of the county to subscribe to the stock of this company, and that, consequently, the power conferred upon the township was brought into existence, still it is the recital of a fact arising out of the duties of county officers, and which the purchaser and all others must be presumed to know did not belong to the township to determine, so as to confer or create power, which under the law did not exist.'" *Dixon County v. Field*, 111 U. S. 83, 96, 28 L. Ed. 360.

Power to issue bonds to aid in the construction of a railroad is frequently conferred upon a municipality, to be exercised in a special manner, or subject to certain regularities, conditions, or qualifications; but if it appears that the bonds issued show by their recitals that the power was exercised in the manner required by the legislature, and that the bonds were issued in conformity to the prescribed regulations and pursuant to the required conditions and qualifications, proof that any or all of the recitals are incorrect will not constitute a defense to the corporation in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulations, conditions, or qualifications which it is alleged were not fulfilled. *Commissioners v. Clark*, 94 U. S. 278, 287, 24 L. Ed. 59. See, to the same effect, *St. Joseph Tp. v. Rogers*, 16 Wall. 644, 21 L. Ed. 328; *Coloma v. Eaves*, 92 U. S. 484, 489, 492, 23 L. Ed. 579.

The bonds themselves recite that they "are issued under and by virtue of the act incorporating the railroad company," approved March 24, 1869, and in accordance with the vote of the electors of said township of Coloma, at a regular election held July 28, 1869, in accordance with said law." After all this, it is not an open question, as between a bona fide holder of the bonds and the township, whether all the prerequisites to their issue had been complied with. Apart from and beyond the reasonable presumption that the officers of the law, the township officers, discharged their duty, the matter has passed into judgment. The persons appointed to decide whether the necessary prerequisites to their issue had been completed have decided, and certified their decision. They have declared the contingency to have happened, on the occurrence of which the authority to issue the bonds was complete. Their recitals are such a decision; and beyond those a bona fide purchaser is not bound to look for evidence of the existence of things in pais. He is bound to know the law conferring upon the municipality power to give the bonds on the happening of a contingency; but whether that has happened or not is a question of fact, the decision of which is by the law confided to others—to those most com-



(3) *Particular Recitals Which Preclude Inquiry*.—Where a statute confers power upon a municipal corporation, upon the performance of certain precedent conditions, to execute bonds in aid of the construction of a railroad, or for other like purposes, and imposes upon certain officers—invested with authority to determine whether such conditions have been performed—the responsibility of issuing them when such conditions have been complied with, recitals, by such of-

petent to decide it—and which the purchaser is, in general, in no condition to decide for himself. *Coloma v. Eaves*, 92 U. S. 484, 490, 23 L. Ed. 579.

The statute in terms authorizes the issue of negotiable bonds. The bonds are negotiable, and issued by the proper county officers; carry on their face recitals that they have "been issued pursuant to the authority conferred" by an act of the legislature, which is named, and "pursuant to an order entered by the county judge of said county in conformity with said act subscribing in behalf of said county for the capital stock" of the railroad company. By a long series of decisions such recitals are held conclusive in favor of a bona fide holder of bonds that precedent conditions prescribed by statute and subject to the determination of those county officers have been fully complied with. *Provident Life, etc., Co. v. Mercer County*, 170 U. S. 593, 601, 42 L. Ed. 1156, citing *Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579; *Warren County v. Marcy*, 97 U. S. 96, 24 L. Ed. 977; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138; *Northern Bank v. Porter Tp.*, 110 U. S. 608, 28 L. Ed. 258; *Bernards Tp. v. Morrison*, 133 U. S. 523, 33 L. Ed. 726; *Citizens' Sav., etc., Ass'n v. Perry County*, 156 U. S. 692, 39 L. Ed. 585, and *Andes v. Ely*, 158 U. S. 312, 39 L. Ed. 996.

As said in *Andes v. Ely*, 158 U. S. 312, 321, 39 L. Ed. 996: "While courts may properly see to it that proceedings for casting burdens upon a community comply with all the substantial requisitions of a statute in order that no such burden may be recklessly or fraudulently imposed, yet such statutes are not of a criminal character, and proceedings are not to be so technically construed and limited as to make them a mere snare to those who are encouraged to invest in the securities of the municipality. These considerations are appropriate to this case. The proceedings on the part of the town and the railroad company were carried on in evident good faith. No one questioned their validity, no effort was made to review the action of the county judge, the bonds were issued, more than \$100,000 was spent within the limits of the town in the construction of the road, and years went by during which the town paid the interest and part of the principal before any question was made as to their validity." *Provident Life, etc., Co. v. Mercer County*, 170 U. S. 593, 600, 42 L. Ed. 1156. See, also, *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548; *Van Hostrop v. Madison City*, 1 Wall.

291, 17 L. Ed. 538; *County of Ray v. Vansycle*, 96 U. S. 675, 24 L. Ed. 800.

A county court was designated by statute as the proper authority to determine that the conditions existed which authorized the making of a subscription, to be followed by the issuing of bonds by the county court, under its seal. The court issued the bonds with recitals that they were issued in pursuance of an order of that court authorized by a popular vote. The records of the county court show that that court made an order stating that, under and by virtue of the statute of the state, the county for the use and in behalf of the municipal township, had issued and delivered the bonds in question to the railroad company. It is also found as a fact by the circuit court, that the county of Livingston had made eleven semiannual payments of interest on the bonds, from the proceeds of taxes levied in each year on the taxable property of the township. It was held that "the fact of the issue of the bonds by the county court, under its seal, with the recitals contained in the bonds and the other facts above stated, estop the county from urging, as against a bona fide holder of the bonds and coupons, the existence of any mere irregularity in the making of the subscription or the issuing of the bonds. On the foregoing facts, it must be presumed that the subscription to the stock was made by the county court in behalf of the township, and the county is estopped from asserting the contrary." *Livingston County v. First Nat. Bank*, 128 U. S. 102, 127, 32 L. Ed. 359.

In *Lyons v. Munson*, 99 U. S. 684, 685, 25 L. Ed. 451, the recital in the bonds sets forth the judgment of the county judge, that it was duly rendered, that the bonds were issued pursuant to the statutes referred to, for the object specified in the petition of the taxpayers, and by persons properly appointed and charged by law with the duty of subscribing for the stock and issuing the bonds to pay for it. The sufficiency of the statutory authority under which the proceedings were had is not denied. It was held that under such circumstances the recital is an estoppel. A bona fide holder of the bonds was not bound to look further, and the obligor cannot go behind it.

**Kansas statute.**—Where, upon the performance of certain conditions precedent the issue of bonds to a railroad company by the board of commissioners of a county in Kansas is authorized by law, the bonds, when issued, if they recite such



ficers, that the bonds have been issued "in pursuance of,"<sup>6</sup> or "in conformity with,"<sup>7</sup> or "by virtue of,"<sup>8</sup> or "by authority of,"<sup>9</sup> the statute, have been held in favor of bona fide purchasers for value to import full compliance with the statute, and to preclude inquiry as to whether the precedent conditions had been performed before the bonds were issued.<sup>10</sup> Recitals in bonds that they are is-

performance, are, in the hands of a bona fide holder for value, binding upon the county. *Commissioners v. January*, 94 U. S. 202, 24 L. Ed. 110.

6. "In pursuance of statute."—*School District v. Stone*, 106 U. S. 183, 27 L. Ed. 90; *Evansville v. Dennett*, 161 U. S. 434, 442, 40 L. Ed. 760; *Grenada County Supervisors v. Brogden*, 112 U. S. 261, 267, 28 L. Ed. 704; *Board of Comm'rs v. Aspinwall*, 21 How. 539, 545, 16 L. Ed. 208; *James v. Milwaukee*, 16 Wall. 159, 21 L. Ed. 267; *Stanly County v. Coler*, 190 U. S. 437, 450, 47 L. Ed. 1126; *Bonham v. Needles*, 103 U. S. 648, 650, 26 L. Ed. 451, reaffirming *Harter v. Kernochan*, 103 U. S. 562, 569, 26 L. Ed. 411; *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 262, 43 L. Ed. 689; *Waite v. Santa Cruz*, 184 U. S. 302, 318, 46 L. Ed. 552; *Chaffee County v. Potter*, 142 U. S. 355, 363, 35 L. Ed. 1040; *Pompton v. Cooper Union*, 101 U. S. 196, 25 L. Ed. 803. See, also, *Buchanan v. Litchfield*, 102 U. S. 278, 291, 26 L. Ed. 138; *Bernards Tp. v. Morrison*, 133 U. S. 523, 527, 33 L. Ed. 726; *Montclair v. Ramsdell*, 107 U. S. 147, 158, 27 L. Ed. 431; *Bernards Tp. v. Stebbins*, 109 U. S. 341, 27 L. Ed. 956; *New Providence v. Halsey*, 117 U. S. 336, 29 L. Ed. 904; *Northern Bank v. Porter Tp.*, 110 U. S. 608, 614, 28 L. Ed. 258; *Pana v. Bowler*, 107 U. S. 529, 538, 27 L. Ed. 424.

Recitals in bonds of a municipal corporation to the effect that they are issued pursuant to a named act of the legislature estop the municipality to deny their validity when in the hands of a bona fide holder for value before maturity. *Provident Life, etc., Co. v. Mercer County*, 170 U. S. 593, 42 L. Ed. 1156; *Stanly County v. Coler*, 190 U. S. 437, 47 L. Ed. 1126.

Where township bonds recite that they were issued in pursuance of the authority conferred by certain statutes, such recitals import a compliance with the statutes, and the township is estopped to assert as against a bona fide holder for value, that such recitals are untrue. *Bonham v. Needles*, 103 U. S. 648, 650, 26 L. Ed. 451.

The bonds of "the inhabitants of the township of Pompton, in the county of Passaic" and state of New Jersey, for \$1,000 each, bearing date Jan. 1, 1870, issued by the commissioners appointed for that township, and reciting that they are issued in pursuance of an act of the legislature of New Jersey, approved April 9, 1868, entitled "An act to authorize certain townships, towns, and cities to issue bonds and take the bonds of the Montclair Railway Company," are valid in the

hands of a bona fide purchaser for value before maturity. *Pompton v. Cooper Union*, 101 U. S. 196, 25 L. Ed. 803.

7. *School District v. Stone*, 106 U. S. 183, 27 L. Ed. 90; *Evansville v. Dennett*, 161 U. S. 434, 442, 40 L. Ed. 760; *Stanly County v. Coler*, 190 U. S. 437, 450, 47 L. Ed. 1126; *County of Clay v. Society for Savings*, 104 U. S. 579, 589, 26 L. Ed. 856; *Northern Bank v. Porter Tp.*, 110 U. S. 608, 616, 28 L. Ed. 258; *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 264, 43 L. Ed. 689; *Provident Life, etc., Co. v. Mercer County*, 170 U. S. 593, 601, 42 L. Ed. 1156.

There being ample authority for the issue of the county bonds in suit under the laws of the state of Illinois, the recital that they were issued in conformity with the laws of the state, is binding on the county, when the suit is brought on the bonds by a bona fide holder, and concludes the county from setting up any irregularities in their issue, if any existed. *County of Clay v. Society for Savings*, 104 U. S. 579, 589, 26 L. Ed. 856.

8. *School District v. Stone*, 106 U. S. 183, 27 L. Ed. 90; *Evansville v. Dennett*, 161 U. S. 434, 442, 40 L. Ed. 760; *Insurance Co. v. Bruce*, 105 U. S. 328, 26 L. Ed. 1121; *Citizens' Sav., etc., Ass'n v. Perry County*, 156 U. S. 692, 703, 39 L. Ed. 585; *German Sav. Bank v. Franklin County*, 128 U. S. 526, 540, 32 L. Ed. 519; *Stanly County v. Coler*, 190 U. S. 437, 450, 47 L. Ed. 1126.

In *Insurance Co. v. Bruce*, 105 U. S. 328, 26 L. Ed. 1121, the bonds in suit recited that they were issued "in (by) virtue of" the act of April 16, 1869—implying thereby that they were issued conformably, in all respects, to the provisions of that act. This fact was alluded to in *German Sav. Bank v. Franklin County*, 128 U. S. 526, 540, 542, 32 L. Ed. 519. *Citizens' Sav., etc., Ass'n v. Perry County*, 156 U. S. 692, 703, 39 L. Ed. 585.

9. *School District v. Stone*, 106 U. S. 183, 27 L. Ed. 90; *Evansville v. Dennett*, 161 U. S. 434, 442, 40 L. Ed. 760; *Stanly County v. Coler*, 190 U. S. 437, 456, 47 L. Ed. 1126; *Tulare Irrig. Dist. v. Shepard*, 185 U. S. 1, 46 L. Ed. 773.

10. *School District v. Stone*, 106 U. S. 183, 27 L. Ed. 90, citing *Coloma v. Faves*, 92 U. S. 484, 23 L. Ed. 579; *Commissioners v. Bolles*, 94 U. S. 104, 24 L. Ed. 46; *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548; *Anderson County Comm'rs v. Beal*, 113 U. S. 227, 239, 28 L. Ed. 966, and *Cairo v. Zane*, 149 U. S. 122, 37 L. Ed. 673; *Evansville v. Dennett*, 161 U. S. 434, 442, 40 L. Ed. 760; *Stanly County v. Coler*, 190 U. S. 437, 450, 47 L. Ed. 1126;

sued "under authority of,"<sup>11</sup> "as authorized by,"<sup>12</sup> "under and by virtue of,"<sup>13</sup> "in virtue of,"<sup>14</sup> "in accordance with,"<sup>15</sup> "pursuant to,"<sup>16</sup> "pursuant to the authority conferred by,"<sup>17</sup> "in conformity to,"<sup>18</sup> "in conformity to the provisions of,"<sup>19</sup> "under the provisions of,"<sup>20</sup> a specified act, have the same effect. So also a recital that "all the requirement of law had been fully complied with by the proper officers in the issuing of the bonds,"<sup>21</sup> "in pursuance of and in accordance with the act" of the legislature,<sup>22</sup> "by the authority of the statute, and also pursuant to the provisions thereof and in accordance with the vote of the qualified electors," are conclusive.<sup>23</sup>

*Comanche County v. Lewis*, 133 U. S. 198, 205, 33 L. Ed. 604.

11. *Oregon v. Jennings*, 119 U. S. 74, 92, 30 L. Ed. 323; *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548.

12. *Moran v. Commissioners*, 2 Black 722, 17 L. Ed. 342.

Even if the bonds had been issued irregularly, and not in strict conformity with the power of the county to borrow money, the county is, nevertheless, estopped by the bonds themselves, which, on their face, express that they were issued for a loan of the amount to the county, as authorized by the act of the general assembly to borrow money, and such bonds being habitually received and passed as commercial securities, and being bona fide in the hands of the plaintiff, they are entitled to recover the amount of interest sued for, notwithstanding there might be equities between the original parties to the transaction. *Moran v. Commissioners*, 2 Black 722, 731, 17 L. Ed. 342, citing *Zabriskie v. Cleveland*, etc., R. Co., 23 How. 381, 16 L. Ed. 488.

13. *Oregon v. Jennings*, 119 U. S. 74, 92, 30 L. Ed. 323.

14. *Commissioners v. Bolles*, 94 U. S. 104, 105, 24 L. Ed. 46.

15. *Comanche County v. Lewis*, 133 U. S. 198, 206, 33 L. Ed. 604; *Commissioners v. Bolles*, 94 U. S. 104, 105, 24 L. Ed. 46; *San Antonio v. Mehaffy*, 96 U. S. 312, 24 L. Ed. 816. See, also, *Board of Comm'rs v. Aspinwall*, 21 How. 539, 16 L. Ed. 208; *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548; *Grand Chute v. Winegar*, 15 Wall. 355, 21 L. Ed. 170.

16. *Henry County v. Nicolay*, 95 U. S. 619, 24 L. Ed. 394; *Cass Count v. Gillett*, 100 U. S. 585, 25 L. Ed. 585.

17. *Provident Life, etc., Co. v. Mercer County*, 170 U. S. 593, 601, 42 L. Ed. 1156.

18. *Moultrie County v. Rockingham, etc., Bank*, 92 U. S. 631, 23 L. Ed. 631.

19. *Moultrie County v. Rockingham, etc., Bank*, 92 U. S. 631, 23 L. Ed. 631; *Buchanan v. Litchfield*, 102 U. S. 278, 292, 26 L. Ed. 138.

20. *County of Leavenworth v. Barnes*, 94 U. S. 70, 24 L. Ed. 63.

21. *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 43 L. Ed. 689; *Stanly County v. Coler*, 190 U. S. 437, 451, 47 L. Ed. 1126; *Waite v. Santa Cruz*, 184 U. S. 302, 46 L. Ed. 552.

22. *Humboldt Tp. v. Long*, 92 U. S. 642, 645, 23 L. Ed. 752; *Comanche County*

*v. Lewis*, 133 U. S. 198, 206, 33 L. Ed. 604; *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 262, 43 L. Ed. 689; *Waite v. Santa Cruz*, 184 U. S. 302, 318, 46 L. Ed. 552; *Chaffee County v. Potter*, 142 U. S. 355, 363, 35 L. Ed. 1040.

A recital in bridge bonds is in these words: "This bond is executed and issued in pursuance of and in accordance with an act of the legislature of the state of Kansas, entitled 'An act to authorize counties, incorporated cities, and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, waterpower or other works of internal improvement, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith,' approved March 2, 1872, and also in accordance with the vote of a majority of the qualified electors of said county of Comanche, at a special election duly and regularly held therefor on the 31st of January, 1884 (1874)." "The act referred to therein gave to counties full power to issue bonds for the building of bridges and prescribed the proceedings, including therein a vote of the people, essential to the vesting of authority in the county commissioners. The recital that the bond was executed and issued in pursuance of and in accordance with that act, and also in accordance with the vote of the majority of the qualified electors, is, within repeated rulings of this court, sufficient to validate the bonds in the hands of a bona fide holder. It shows, in the language of *School District v. Stone*, 106 U. S. 183, 27 L. Ed. 90 'a compliance in all substantial respects with the statute giving authority to issue the bonds.'" *Comanche County v. Lewis*, 133 U. S. 198, 205, 33 L. Ed. 604.

23. The bonds in this case contained a recital in accordance with the provisions of the statute, as follows: "This bond is one of a series of bonds amounting in the aggregate to \$500,000, caused to be issued by the board of directors of said Tulare irrigation district, by authority and pursuant to the provisions of an act of the legislature of the state of California entitled 'An act to provide for the organization and government of irrigation districts and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes, approved March 7, 1887,' and also



**Charter, Ordinance or Resolution of Council Also Recited.**—This is the rule where the bonds recite that they were “made in pursuance of an act of the legislature and ordinance of the city council passed in pursuance thereof,” or where they recite that they were issued “by virtue of the city’s charter, by virtue of a certain act of assembly, and by virtue of certain resolutions of the city council” of named dates.<sup>24</sup>

by authority of and in accordance with the vote of the qualified electors of said irrigation district at a special election held on the 7th day of June, 1890.” The provision in the statute, that the bonds should express on their face that they were issued by authority of the act, stating its title and date of approval, was evidently for the purpose of giving them greater negotiability. A recital as directed by the statute, that the bond was issued by the authority of the statute, and also pursuant to the provisions thereof, and in accordance with the vote of the qualified electors, was a statement upon which a purchaser would have the right to rely, and to assume therefrom that all prior acts necessary to be done to give the bond validity had been done, because otherwise the bond would not be issued under the authority and pursuant to the provisions of an act which provided for certain things to be done when they were not done in the particular case in hand. *Tulare Irrig. Dist. v. Shepard*, 185 U. S. 1, 19, 46 L. Ed. 773.

**24. Ordinance or resolution of city council.**—*Evansville v. Dennett*, 161 U. S. 434, 40 L. Ed. 760; *Stanly County v. Coler*, 190 U. S. 437, 450, 47 L. Ed. 1126. See *Insurance Co. v. Bruce*, 105 U. S. 328, 26 L. Ed. 1121; *Citizens’ Sav., etc., Ass’n v. Perry County*, 156 U. S. 692, 702, 39 L. Ed. 585. See post, “Recital of Compliance with Ordinance,” IV, V, 5, c; “Recital of Compliance with Charter,” IV, V, 5, d.

A recital in a series of bonds, issued in payment of a subscription to a railroad company, that they were issued “in pursuance of an act of the legislature of the state of Indiana and ordinances of the city council of said state, passed in pursuance thereof,” does not put a purchaser upon inquiry as to the terms of the ordinances under which the bonds were issued. *Evansville v. Dennett*, 161 U. S. 434, 40 L. Ed. 760.

A recital in bonds issued on account of a subscription to the stock of a railroad company that the subscription was “made in pursuance of an act of the legislature and ordinances of the city council passed in pursuance thereof,” imports not only compliance with the act of the legislature, but that the ordinances of the city council were in conformity with the statute. It is as if the city had declared, in terms, that all had been done that was required to be done in order that the power given might be exercised. *Evansville v. Dennett*, 161 U. S. 434, 442, 40 L. Ed. 760;

*Stanly County v. Coler*, 190 U. S. 437, 450, 47 L. Ed. 1126.

A recital in a series of bonds issued to a railroad company by a municipal corporation in payment of subscription, that they were issued “by virtue of the city’s charter, by virtue of a certain act of assembly” and “by virtue of a resolution of a said city council,” does not put a purchaser upon inquiry as to the terms of that resolution and charge him with knowledge of its terms. *Evansville v. Dennett*, 161 U. S. 434, 40 L. Ed. 760.

Recitals in bonds issued to a railroad company in payment of a stock subscription that they were issued “by virtue of a resolution of said city council passed May 23, 1870,” do not put a bona fide purchaser for value upon inquiry to ascertain whether a proper petition of two-thirds of the resident freeholders of that city, had been presented to the common council, before that body had subscribed for stock in a said railroad company. *Evansville v. Dennett*, 161 U. S. 434, 40 L. Ed. 760.

Recitals in bonds issued to a railroad company in payment of a stock subscription that they were issued “by virtue of a resolution of said city council passed May 23, 1870,” estop the city from asserting that such bonds were not issued for stock subscribed, upon a petition of two-thirds of the resident freeholders of the city, distinctly setting forth the company in which the stock was to be taken and the number and amount of shares to be subscribed. *Evansville v. Dennett*, 161 U. S. 434, 40 L. Ed. 760.

The charter of a city gave authority to subscribe to the stock of a railroad corporation. The express power given to borrow money necessarily implied “the power to determine the time of payment, and also the power to issue bonds or other evidences of indebtedness.” *Evansville v. Dennett*, 161 U. S. 434, 443, 40 L. Ed. 760.

*Evansville v. Dennett*, 161 U. S. 434, 443, 40 L. Ed. 760, was an action on negotiable bonds payable to bearer and issued by the city of Evansville, Indiana, in payment of a subscription of stock in a railroad company. Each bond recited that it was issued in payment of such subscription, “made in pursuance of an act of the legislature of the state of Indiana, and ordinances of the city council of said city, passed in pursuance thereof.” There were other negotiable bonds involved in that suit, which were issued by the city, each reciting that it was issued by virtue of the city’s charter, by virtue of a certain act of assembly (its title and date being given),



(4) *Conditions as to Which Inquiry Respecting Compliance Precluded*—(a) *In General*.—Whether petition of taxpayers was sufficient,<sup>25</sup> whether an election has been held,<sup>26</sup> whether it had been regularly conducted<sup>27</sup> and with sufficient notice,<sup>28</sup> whether at such an election a majority voted in favor of the issue

and by virtue of certain resolutions of the city council of named dates; and that the faith, credit, real estate, revenues and all resources of the city were irrevocably pledged for the payment of principal and interest. It was contended in that case that the ordinances of the city, if examined, would show that the election held in the city upon the question of issuing bonds was not legally held, and therefore that the bonds were issued without authority and were void. *Waite v. Santa Cruz*, 184 U. S. 302, 317, 46 L. Ed. 552.

In *Evansville v. Dennett*, 161 U. S. 434, 40 L. Ed. 760, the court said: "As therefore the recitals in the bonds import compliance with the city's charter, purchasers for value having no notice of the nonperformance of the conditions precedent were not bound to go behind the statute conferring the power to subscribe, and to ascertain, by an examination of the ordinances and records of the city council, whether those conditions had, in fact, been performed. With such recitals before them they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the legislature." *Stanly County v. Coler*, 190 U. S. 437, 450, 47 L. Ed. 1126; *Waite v. Santa Cruz*, 184 U. S. 302, 317, 46 L. Ed. 552.

The city having authority, under some circumstances, to put these bonds upon the market and having issued them under the corporate seal of the city, and under the attestation of its highest officer, certifying that they were issued in payment of a subscription of stock made in pursuance of the city's charter, the principles of justice demand that the bonds, in the hands of bona fide holders for value, should be met according to their terms, unless some clear, well-settled rule of law stands in the way. *Evansville v. Dennett*, 161 U. S. 434, 446, 40 L. Ed. 760.

"In *Insurance Co. v. Bruce*, 105 U. S. 328, 26 L. Ed. 1121, the bonds there in suit recited that they were issued by virtue of the charter, approved April 15, 1869, of the particular company to which they were delivered, as well as by virtue of the act of April 16, 1869. The court held that the latter act did not make it obligatory to impose conditions upon the issuing of bonds, but only gave the right to prescribe conditions; that the recitals fairly imported that nothing remained to be done in order to make the bonds binding obligations upon the town in the hands of bona fide purchasers. 'Under these circumstances,' the court said, 'the town, by every principle of justice, is estopped, as against a bona fide holder, to plead conditions, the existence of which

were withheld from the public either to facilitate the negotiation of the bonds in the markets of the country, or because it had full confidence that the railroad company would meet the prescribed conditions. It should not now be heard to make a defense inconsistent with the recitals upon its bonds, or upon the ground that the conditions imposed, of which the purchasers had no notice, have not been performed.' " *Citizens' Sav., etc., Ass'n v. Perry County*, 156 U. S. 692, 702, 39 L. Ed. 585.

25. *Petition of taxpayers*.—*Van Hostrop v. Madison City*, 1 Wall. 291, 296, 17 L. Ed. 538; *Evansville v. Dennett*, 161 U. S. 434, 444, 40 L. Ed. 760.

26. *Provident Life, etc., Co. v. Mercer County*, 170 U. S. 593, 601, 42 L. Ed. 1156; *County of Clay v. Society for Savings*, 104 U. S. 579, 586, 26 L. Ed. 856.

27. *Humboldt Tp. v. Long*, 92 U. S. 642, 23 L. Ed. 752.

"In *Pana v. Bowler*, 107 U. S. 529, 539, 27 L. Ed. 424, this court upheld the effectiveness of a recital in bonds, in favor of a bona fide holder, as against an alleged defect in the mode of conducting an election, held prior to the adoption of this same constitution of Illinois (July 2, 1870), the bonds being issued after its adoption, although that instrument forbade the issuing of the bonds, unless their issue should have been authorized under then existing laws, by a vote of the people prior to the adoption of the constitution." *Oregon v. Jennings*, 119 U. S. 74, 93, 30 L. Ed. 323.

Certain bonds or securities issued by the city of San Antonio, March 1, 1852, recite that this debt is authorized by a vote of the electors of the city of San Antonio, taken in accordance with the provisions of an act to incorporate the San Antonio and Mexican Gulf Railroad Company, approved Sept. 5, 1850, etc. Held, that the city is estopped from denying the verity of the recital, and that the bonds or securities are valid in the hands of a bona fide purchaser for value before maturity. A bona fide purchaser had a right to regard it as true, and was not bound to look further. *San Antonio v. Mehaffy*, 96 U. S. 312, 24 L. Ed. 816; *Board of Comm'rs v. Aspinwall*, 21 How. 539, 16 L. Ed. 208; *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548; *Grand Chute v. Winegar*, 15 Wall. 355, 21 L. Ed. 170.

28. *Notice*.—*Humboldt Tp. v. Long*, 92 U. S. 642, 23 L. Ed. 752.

Although the election authorizing the issue of the bonds was held within less than thirty days after the date of the order calling it, they are not thereby rendered invalid in the hands of a bona fide holder

of bonds,<sup>29</sup> whether the terms of the subscription have been complied

for value, who, without any knowledge of the process through which the legislative authority was exercised, relied upon the recitals in them that they had been issued "in pursuance of and in accordance with the act of the legislature." The recitals are conclusive in a suit brought by him against the township. *Humboldt Tp. v. Long*, 92 U. S. 642, 23 L. Ed. 752.

The bonds are not invalid, because all the notice of the popular election was not given which the legislative act directed. The election was a step in the process of execution of the power granted to issue bonds in payment of a municipal subscription to the stock of a railroad company. It did not itself confer the power. Whether that step had been taken or not, and whether the election had been regularly conducted with sufficient notice, and whether the requisite majority of votes had been cast in favor of a subscription, and consequent bond issue, were questions which the law submitted to the board of county commissioners, and which it was necessary for them to answer before they could act. The board passed upon them and issued the bonds, asserting by the recitals that they were issued "in pursuance of and in accordance with the act of the legislature." Thus the plaintiff below took them, without knowledge of any irregularities in the process through which the legislative authority was exercised, and relying upon the assurance given by the board, that the bonds had been issued in accordance with the law. In his hands, therefore, they are valid instruments. *Humboldt Tp. v. Long*, 92 U. S. 642, 645, 23 L. Ed. 752.

"In *Board of Comm'rs v. Aspinwall*, 21 How. 539, 16 L. Ed. 208, power was given to county commissioners to subscribe stock to be paid for by county bonds, in aid of a railroad corporation, the power to be exercised if the electors, at an election duly called, should approve the subscription. It was adjudged that as the power existed, and since the statute committed to the board of commissioners authority to decide whether the election was properly held, and whether the subscription was approved by a majority of the electors, the recital in bonds executed by those commissioners, that they were issued in pursuance of the statute giving the power, estopped the county from alleging or proving, to the prejudice of a bona fide holder, that requisite notices of the election had not been given." *Northern Bank v. Porter Tp.*, 110 U. S. 608, 615, 28 L. Ed. 258.

In *Board of Comm'rs v. Aspinwall*, 21 Wall. 539, 16 L. Ed. 208, the decision is stated by the reporter in the following language: "Where the statute of a state provided that the board of commissioners of a county should have power to sub-

scribe for railroad stock, and issue bonds therefor, in case a majority of the voters of the county should so determine after a certain notice should be given of the time and place of election, and the board subscribed for the stock and issued the bonds, purporting to act in compliance with the statute, it is too late to call in question the existence or regularity of the notices in a suit against them by the holders of the coupons attached to the bonds, who were innocent holders. In such a suit, according to the true interpretation of the statute, the board were the proper judges whether or not a majority of the votes of the county had been cast in favor of the subscription. The bonds on their face import a compliance with the law under which they were issued, and the purchaser was not bound to look further for evidence of a compliance with the condition of the grant of the power." *Grand Chute v. Winegar*, 15 Wall. 355, 372, 21 L. Ed. 170. See *Moran v. Commissioners*, 2 Black 722, 732, 17 L. Ed. 342.

29. *Provident Life, etc., Co. v. Mercer County*, 170 U. S. 593, 601, 42 L. Ed. 1156.

In *Marcy v. Oswego Tp.*, 92 U. S. 637, 23 L. Ed. 748, "the statute authorizing a municipal subscription, with the sanction of three-fifths of the voters interested, and the issue of bonds in payment thereof, required particular facts to exist and certain acts to be performed before the right to make the subscription and to issue bonds in discharge thereof could be exercised. The statute contained, amongst other things, a proviso to the effect that the amount of bonds sold by the township should not exceed such a sum as would require a levy of more than one per cent per annum on the taxable property of the township to pay the yearly interest. It appeared that the statute had not, in some of these respects, been complied with; that is, that the conditions had not been performed which the statute required before any subscription should be made or bonds issued. But, adhering to the rule announced in *Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579, the defense was overruled in favor of a bona fide holder for value, because of the recital in the bonds that their issue was 'by virtue of, and in accordance with,' the statute, and 'in pursuance of, and in accordance with, the vote of three-fifths of the legal voters of the township.'" *Buchanan v. Litchfield*, 102 U. S. 278, 291, 26 L. Ed. 138.

The subsequent issue of the bonds containing the recital above quoted, that they were issued "by virtue of and in accordance with" the legislative act, and in "pursuance of and in accordance with the vote of three-fifths of the legal voters of the township," was another determination not only of the result of the popular vote, but that all the facts existed which the stat-



with,<sup>30</sup> whether the bonds were sold at par,<sup>31</sup> and matters of a kindred nature which either expressly or by necessary implication are to be determined in the first instance by the officers of the county, will in favor of a bona fide holder be conclusively presumed to have been fully performed, provided the bonds contain recitals similar to those just considered.<sup>32</sup> Such recitals conclude the municipality from setting up irregularities in the issuance of the bonds;<sup>33</sup> defects in the proceedings of the board of county commissioners,<sup>34</sup> that the bonds were not made until after the authority to issue them had expired;<sup>35</sup> that a requirement of the statute as to whom the bonds should be made payable was not complied with;<sup>36</sup> that the bonds were issued to a company with which the railroad com-

ute required in order to justify the issue of the bonds. *Marcy v. Oswego Tp.*, 92 U. S. 637, 641, 23 L. Ed. 748; *Humboldt Tp. v. Long*, 92 U. S. 642, 23 L. Ed. 752.

**Illinois.**—"The bonds recite that they were issued under and pursuant to the orders of the board of supervisors of Clay County, as authorized by virtue of the laws of the state of Illinois. The act of Nov. 6, 1849, authorized the judges of the county court to issue the bonds only in case a majority of the voters of the county, taking as a standard the number of votes thrown at the next preceding general election, should vote in favor of the proposition to subscribe to the stock of some designated railroad company, and pay for it by the issue of county bonds. The ultimate decision of the question whether such a vote had been cast was, therefore, left with the judges of the county court. The recital of the bonds, that they were issued pursuant to the orders of the board, the successor of the county court, as authorized by virtue of the laws of the state of Illinois, is equivalent to a declaration by the board, upon the face of the bond, that the election had \* \* \* resulted so as to authorize the lawful issuing of the bonds. When the bonds are in the hands of a bona fide holder this recital is conclusive and binding upon the municipality. *Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579; *Marcy v. Oswego Tp.*, 92 U. S. 637, 23 L. Ed. 748." *County of Clay v. Society for Savings*, 104 U. S. 579, 586, 26 L. Ed. 856.

**30.** *Provident Life, etc., Co. v. Mercer County*, 170 U. S. 593, 601, 42 L. Ed. 1156.

That railroad completed through a county to the limits of a named town so that a train of cars shall have passed over same. *Provident Life, etc., Co. v. Mercer County*, 170 U. S. 593, 602, 42 L. Ed. 1156.

**Conditions imposed by popular vote.**—See post, "Conditions Imposed by Popular Vote," IV, V, 5, b, (4), (b), bb.

**31.** *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548.

The bonds were sold at less than par, when the act authorizing their issue and referred to by date on the face of the instrument, declared that they should, "in no case," nor "under any pretense," be so sold. *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548. See ante, "Sale at Less than Par by Payee," IV, Q, 2, b, (13), (b), bb.

**32.** *Provident Life, etc., Co. v. Mercer County*, 170 U. S. 593, 601, 42 L. Ed. 1156.

**33.** *Irregularities in issue.*—*County of Clay v. Society for Savings*, 104 U. S. 579, 589, 26 L. Ed. 856.

**34.** *Defects in the proceedings of the board of county commissioners* were suggested in the case of *Board of Comm'rs v. Aspinwall*, 21 How. 539, 16 L. Ed. 208, but the court held that the board were the proper judges whether or not a majority of the votes in the county had been cast in favor of the subscription to the stock, and that where the bonds on their face imported a compliance with the law under which they were issued, the purchaser and holder for value was not bound to look further for evidence of a compliance with the conditions in the grant of power. Precisely the same rule was applied to cities in the case of *Bissell v. Jeffersonville*, 24 How. 287, 299, 16 L. Ed. 664, where it was again held that it was too late to make such objections as against innocent holders, or even against the railroad, when it appeared that the bonds purporting on their face to have been executed by authority, had been issued and delivered. Very stringent application of the same rule was made in the case of *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548; *Larned v. Burlington*, 4 Wall. 275, 276, 18 L. Ed. 353. See *Grand Chute v. Winegar*, 15 Wall. 255, 272, 21 L. Ed. 170.

**35.** *Expiration of authority to issue.*—The holder of the bonds purchased them before their maturity, and without notice of any defense. They recite that they are issued by the county in pursuance of the subscription to the capital stock of said company, made by the board of supervisors of the county, December, 1869, in conformity to the provisions of an act of the general assembly above mentioned. The purchaser was thus assured that the subscription was made when they had authority to make it; and it would be tolerating a fraud to permit the county, when called upon for payment, to set up that it was not made until after July 2, 1870, when their authority had expired. *Moultrie County v. Rockingham, etc., Bank*, 92 U. S. 631, 23 L. Ed. 631.

**36.** An act of the legislature of Mississippi, approved Feb. 10, 1860, authorized the county of Calhoun, among others, to subscribe to the capital stock of a railroad



pany in whose favor the vote for subscribing for stock was had, becomes consolidated under a law existing at the time of said election,<sup>37</sup> that the amount of issue was in excess of that allowed by law,<sup>38</sup> and objections as to the nature and extent of the indebtedness to refund which the bonds were issued.<sup>39</sup>

(b) *Collateral Conditions Existence of Which Withheld from Public*—aa. *In General*.—A municipality is estopped, as against a bona fide holder to plead conditions or agreements or a breach thereof which did not appear in the statute authorizing the bonds or on the face of the bonds, and the existence of which was

company, provided that at an election in the county, of which and of the amount to be subscribed, and in what number of installments, twenty days' notice should be given, a majority of the qualified electors voting should be in favor of the subscription. The proposition, when first submitted, was rejected; but at a second election the vote was in favor of the subscription. An act, passed March 25, 1871, declared that the bonds issued in payment of previous subscriptions should be made payable to the president and directors of the company and their successors and assigns. The bonds were issued Sept. 1, 1871, payable to the railroad company, or bearer, ten years thereafter, at the agency of the company in the city of New York. They recite that they are issued in payment of the county subscription to the capital stock of the company, in pursuance of the said acts, and in obedience to a vote of the people of the county, at an election held in accordance therewith. In a suit on the bonds, held, that the requirement that they should be made payable to the president and directors of the company, and their successors and assigns, is only directory; and that the recital therein estops the county from taking any advantage of the irregularity committed by its servants. *Supervisors v. Galbraith*, 99 U. S. 214, 25 L. Ed. 410.

Where the bonds should have been made payable to the railroad company and "their successors and assigns" but were made payable to the company "as bearer," and recited that they were executed in conformity to "the statute," the recital of conformity to the statute is conclusive. *Supervisors v. Galbraith*, 99 U. S. 214, 217, 25 L. Ed. 410, citing *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898, and *Rock Creek Tp. v. Strong*, 96 U. S. 271, 24 L. Ed. 815. See, also, *Moran v. Commissioners*, 2 Black 722, 17 L. Ed. 342.

37. Bonds of a township in Kansas payable to A., a railroad company, or bearer, were duly executed by the township trustee and township clerk, acting in their official capacity, as its legal representatives. They recite that they were issued pursuant to an order of the proper officers of the township, made by authority of an act of the legislature which is therein cited, and were ordered by the qualified electors of the township, at an election duly held. An action was brought by a bona fide

holder for value of the interest coupons attached to some of the bonds, who had no notice of any fact impairing their validity. Held, that after the vote at said election had been cast in favor of subscribing for stock in B., a railroad company, the subscription was made for stock in A., and said bonds issued in payment therefor, B. having, under a law existing at the time of said election, become merged and consolidated with A. to form a continuous line of road. *Wilson v. Salamanca*, 99 U. S. 499, 25 L. Ed. 330, distinguishing from *Harshman v. Bates County*, 92 U. S. 569, 23 L. Ed. 747.

38. *Overissue*.—Bonds of a township in Kansas payable to A., a railroad company, or bearer, were duly executed by the township trustee and township clerk, acting in their official capacity, as its legal representatives. They recite that they were issued pursuant to an order of the proper officers of the township, made by authority of an act of the legislature which is therein cited, and were ordered by the qualified electors of the township, at an election duly held. An action was brought by a bona fide holder for value of the interest coupons attached to some of the bonds, who had no notice of any fact impairing their validity. Held, that it is not a defense to the action that at the time of voting and that of issuing the bonds their entire amount was in excess of the proportion which by law they should bear to the taxable property of the township. *Wilson v. Salamanca*, 99 U. S. 499, 25 L. Ed. 330, distinguishing *Harshman v. Bates County*, 92 U. S. 569, 23 L. Ed. 747.

39. *Act authorizing city to refund outstanding indebtedness*.—The city of Santa Cruz had power, under the constitution and laws of California, to refund its outstanding indebtedness, evidenced by bonds and warrants. The nature and extent of such indebtedness were matters peculiarly within the knowledge of its constituted authorities. When, therefore, the refunding bonds in suit were issued with the recitals therein contained, the city thereby represented that it issued them under and in pursuance of and in conformity with the act of 1893 and the constitution of the state. As nothing on the face of the bonds suggested that such representations were false, purchasers had the right to assume that they were true, especially in view of the broad recital that everything required by law to be done and per-

withheld from the public, as a defense against the enforcement of such bonds by a bona fide purchaser.<sup>40</sup>

bb. *Conditions Imposed by Popular Vote.*—The statement on the face of municipal bonds that by virtue of a statute they are issued for subscription to railroad stock authorized by popular vote, no mention being made of a condition to such subscription, and the county having the right to make an unconditional subscription, estops the county as against a bona fide purchaser to plead a breach of such condition.<sup>41</sup>

(5) *Inquiry as to Genuineness of Official Signature.*—When a statute makes

formed before executing the bonds had been done and performed by the city. As there was power in the city to issue refunding bonds to be used in discharging its outstanding indebtedness of a specified kind, purchasers were entitled to rely upon the truth of the recitals in the bonds that they were of the class which the act of 1893 authorized to be refunded. They were under no duty to go further and examine the ordinances of the city to ascertain whether the recitals were false. On the contrary, purchasers could assume that the ordinances would disclose nothing in conflict with the recitals in the bonds. *Waite v. Santa Cruz*, 184 U. S. 302, 320, 46 L. Ed. 552.

Recitals in bonds of a municipality, issued to refund its outstanding indebtedness, evidenced by bonds and warrants thereof, that "all acts, conditions and things required by law to be done precedent to and in the issue of said bonds have been properly done, happened and performed in legal and due form, as required by law" and that they were issued "in pursuance of and in conformity with the constitution of the state and the ordinances of the municipality and in conformity with a two-thirds vote of all the qualified electors," estop the municipality from setting up as a defense, as against a bona fide holder for value of the bonds, that the original bonds for which the refunding bonds were issued were not a part of the city's bonded debt, and that this fact was disclosed by the ordinance, under which the special election was held, such ordinance showing that eighty-nine of the first mortgage bonds of the water company were included in the proposed funding. Purchasers could assume that the ordinances would disclose nothing in conflict with the recitals in the bonds. *Waite v. Santa Cruz*, 184 U. S. 302, 46 L. Ed. 552.

40. *Collateral conditions existence of which withheld from public.*—*Graves v. Saline County*, 161 U. S. 359, 40 L. Ed. 732.

41. *Conditions imposed by popular vote.*—*Graves v. Saline County*, 161 U. S. 359, 40 L. Ed. 732; *Insurance Co. v. Bruce*, 105 U. S. 328, 26 L. Ed. 1121; *Lewis v. Commissioners*, 105 U. S. 739, 26 L. Ed. 993; *Oregon v. Jennings*, 119 U. S. 74, 93, 30 L. Ed. 323; *German Sav. Bank v. Franklin County*, 128 U. S. 526, 541, 32 L. Ed. 519.

Township bonds contained the state-

ment that they were issued by virtue of the statutes of Illinois of April 15, 1869, and April 16, 1869—the first of which contains an absolute requirement that the bonds be issued and delivered upon the subscription being voted, while the second gives the right, but does not make it imperative, to impose conditions—and the further statement that the people had voted for subscription and to issue township bonds therefor. It was held that such statement fairly imported that nothing remained to be done in order to make the bonds binding obligations upon the town in the hands of bona fide purchasers. "Under these circumstances, the town, by every principle of justice, is estopped, as against a bona fide holder, to plead conditions, the existence of which was withheld from the public, either to facilitate the negotiation of the bonds in the markets of the country, or because it had full confidence that the railroad company would meet the prescribed conditions. It should not now be heard to make a defense inconsistent with the representations contained in the recitals upon its bonds, or upon the ground that the conditions imposed, of which purchasers had no notice, have not been performed." *Insurance Co. v. Bruce*, 105 U. S. 328, 331, 26 L. Ed. 1121; *Graves v. Saline County*, 161 U. S. 359, 369, 40 L. Ed. 732. See *German Sav. Bank v. Franklin County*, 128 U. S. 526, 541, 32 L. Ed. 519; *Oregon v. Jennings*, 119 U. S. 74, 93, 30 L. Ed. 323.

What was said in *Brooklyn v. Insurance Co.*, 99 U. S. 362, 25 L. Ed. 416, may be repeated here: "It is now too late for the town to claim exemption, as against bona fide purchasers, upon the ground that the railroad company disregarded its promise to construct the road, or upon the ground that its own officers delivered the bonds in violation of special conditions, of which the purchasers had no knowledge or notice, either from the statute or otherwise." *Insurance Co. v. Bruce*, 105 U. S. 328, 333, 26 L. Ed. 1121.

In *Insurance Co. v. Bruce*, 105 U. S. 328, 26 L. Ed. 1121, "it was held that recitals in bonds estopped a town in Illinois, as against a bona fide holder, from showing that conditions imposed on its liability by the vote of the people had not been complied with, although the statute declared that the bonds should not be valid and binding until such conditions precedent had been complied with." Ore-



the signature of a particular officer essential to the validity of bonds issued by a township in payment of a subscription to railway stock, bonds issued without the signature of that officer are not the bonds of the township, and the municipality is not estopped from disputing their validity by reason of recitals in the bond, setting forth the provisions of the statute, and a compliance with them.<sup>42</sup>

c. *Recitals of Compliance with Ordinance*.—The same rule applies where the bonds recite that they were issued in compliance with a named ordinance.<sup>43</sup>

d. *Recitals of Compliance with Charter*.—If recitals in municipal bonds import compliance with the city's charter, purchasers for value having no notice of

gon v. Jennings, 119 U. S. 74, 93, 30 L. Ed. 323.

In *German Sav. Bank v. Franklin County*, 128 U. S. 526, 540, 32 L. Ed. 519, "where one of the questions was whether a county in Illinois, issuing bonds which, upon their face, made no reference whatever to the act of April 16, 1869, was estopped to show that they were issued in disregard of certain conditions precedent imposed by popular vote. The court, referring to the grounds of the decision in *Insurance Co. v. Bruce*, 105 U. S. 328, 26 L. Ed. 1121, said: 'The view taken was that, as the town of Bruce had power, under the seventh section of the act of April 16, 1869, to make an unconditional subscription, and to issue and deliver its bonds in advance of the construction of the road, and as the bonds recited that they were issued by virtue of the act of April 16, 1869, it was too late to claim that they had been issued in violation of the special conditions. In the case now before us, as before said, there is no reference, in the bonds, to the act of April 16, 1869, and no statement in the bonds that they were issued by virtue of that act.'" *Citizens' Sav., etc., Ass'n v. Perry County*, 156 U. S. 692, 703, 39 L. Ed. 585.

Similar conclusions were reached in the case of *Oregon v. Jennings*, 119 U. S. 74, 30 L. Ed. 323, where, citing *Insurance Co. v. Bruce*, 105 U. S. 328, 26 L. Ed. 1121, it was held that bonds issued by the town of Oregon, a municipal corporation of the state of Illinois, in compliance with a vote of the people held prior to the adoption of the Illinois constitution of 1870, in pursuance of a law providing therefor, were valid, although a condition as to the completion of the road was not complied with, because the recitals in the bonds were made by the officers entrusted under the statute with the duty of determining whether the condition had been complied with, and the town was thereby estopped from asserting the contrary. *Graves v. Saline County*, 161 U. S. 359, 371, 40 L. Ed. 732.

Recitals on municipal aid bonds, that they are issued "under authority of" a specified statute, and "under and by virtue of" that statute, estop the municipality from taking the defense that the first division of the road was not completed by the time specified, as against a bona fide holder of the bonds. *Oregon v. Jennings*,

119 U. S. 74, 92, 30 L. Ed. 323. See *German Sav. Bank v. Franklin County*, 128 U. S. 526, 543, 32 L. Ed. 519.

**42. Inquiry as to genuineness of official signature.**—*Bissell v. Spring Valley Tp.*, 110 U. S. 162, 28 L. Ed. 105; *Citizens' Sav., etc., Ass'n v. Perry County*, 156 U. S. 692, 704, 39 L. Ed. 585. The same principle is recognized in *Northern Bank v. Porter Tp.*, 110 U. S. 608, 618, 619, 28 L. Ed. 258, and *Merchants' Bank v. Bergen County*, 115 U. S. 384, 390, 29 L. Ed. 430; *Coler v. Claeburne*, 131 U. S. 162, 174, 33 L. Ed. 146.

**43. Recitals of compliance with ordinance.**—*Evansville v. Dennett*, 161 U. S. 434, 443, 40 L. Ed. 760; *Van Hostrup v. Madison City*, 1 Wall. 291, 17 L. Ed. 538. See ante, "Particular Recitals Which Preclude Inquiry," IV, V, 5, b, (3).

Where authority is given to a city to take stock in a road, provided the act be "on the petition of two-thirds of the citizens," this proviso will be presumed to have been complied with where the bonds show, on their face, that they were issued in virtue of an ordinance of council of the city making the subscription; the bonds being in the hands of bona fide holders for value. In the case before the court the minutes of council recorded that the citizens, "with great unanimity," had petitioned. *Van Hostrup v. Madison City*, 1 Wall. 291, 17 L. Ed. 538.

"Ordinarily the recital of the fact that the bonds were issued in pursuance of a certain ordinance would be notice that they were issued for a purpose specified in such ordinance, *Hackett v. Ottawa*, 99 U. S. 86, 25 L. Ed. 363, and the city would be estopped to show the fact to be otherwise. *Ottawa v. National Bank*, 105 U. S. 342, 26 L. Ed. 1127." *Barnett v. Denison*, 145 U. S. 135, 139, 36 L. Ed. 652. See post, "Recitals as to Purpose of Issue," IV, V, 10.

In *Van Hostrup v. Madison City*, 1 Wall. 291, 297, 17 L. Ed. 538, the bonds were signed by the mayor and clerk of the city and recited on their face that they were issued by virtue of an ordinance of the common council of the city, passed September 2, 1852. It was held that this concludes the city as to any irregularities that may have existed in carrying into execution the power granted to subscribe the stock and issue the bonds. *Evansville v. Dennett*, 161 U. S. 434, 444, 40 L. Ed. 760.



the nonperformance of certain conditions precedent, are not bound to go behind the statute conferring the power to subscribe, and to ascertain by an examination of the ordinances and records of the city council, whether those conditions had in fact been performed.<sup>44</sup>

6. RECITALS AS TO EXECUTION OF BONDS.—Recitals as to the execution of the bonds are conclusive.<sup>45</sup>

7. RECITALS AS TO PRELIMINARY PROCEEDINGS—*a. In General.*—If a municipal body has lawful power to issue bonds or other negotiable securities, dependent only upon the adoption of certain preliminary proceedings, such as a popular election of the constituent body, the holder in good faith has a right to assume that such preliminary proceedings have taken place, if the fact be certified on the face of the bonds themselves, by the authorities whose primary duty it is to ascertain it.<sup>46</sup> Behind such a recital, a bona fide holder for value paid is bound to look for nothing except legislative authority given for the issue of municipal bonds to railroad companies. He is not required to examine whether the conditions upon which such authority may be exercised have been fulfilled. He may rely upon the decision made by the tribunal selected by the legislature.<sup>47</sup>

*b. Recitals as to Assent of Taxpayers.*—(1) *Election.*—Recitals in municipal bonds as to the holding of an election, the mode of conducting the same, and its conformity to the statute authorizing it, estop the municipality to assert the contrary against a bona fide holder.<sup>48</sup>

**44. Recital of compliance with charter.**—*Evansville v. Dennett*, 161 U. S. 434, 443, 40 L. Ed. 760. See ante, "Particular Recitals Which Preclude Inquiry," IV, V, 5, b, (3).

**45. Recitals execution of bond.**—*Commissioners v. Clark*, 94 U. S. 278, 283, 24 L. Ed. 59. See, also, *Marcy v. Oswego Tp.*, 92 U. S. 637, 23 L. Ed. 748.

In *Commissioners v. Clark*, 94 U. S. 278, 283, 24 L. Ed. 59: "All of the bonds recite on their face that the county has caused the same 'to be signed in their behalf by the chairman of the board of county commissioners, attested by the county clerk, and the seal of said county affixed.' They bear date the 3d of September, 1872, but they were not issued and delivered until the 4th of November following. Instruments of the kind must be tested in that regard by the law of the jurisdiction where they are executed; and by the law of the state in force at that time it is provided that 'such bonds, if issued by a county, shall be signed by the chairman of the board of county commissioners, and be attested by the county clerk.' The bonds were held void in the hands of a bona fide holder, citing *Marcy v. Oswego Tp.*, 92 U. S. 637, 23 L. Ed. 748, as authority.

**46. Recitals as to preliminary proceedings.**—*County of Warren v. Marcy*, 97 U. S. 96, 104, 24 L. Ed. 977; *Commissioners v. January*, 94 U. S. 202, 24 L. Ed. 110; *Commissioners v. Bolles*, 94 U. S. 104, 108, 24 L. Ed. 46; *Coloma v. Eaves*, 92 U. S. 484, 488, 23 L. Ed. 579; *Lynde v. The County*, 16 Wall. 6, 21 L. Ed. 272; *Humboldt Tp. v. Long*, 92 U. S. 642, 645, 23 L. Ed. 752.

**47. Commissioners v. Bolles**, 94 U. S. 104, 109, 24 L. Ed. 46.

The existence of sufficient taxable prop-

erty to warrant the amount of the subscription and issue was no more essential to the exercise of the authority conferred upon the board of county commissioners than was the petition for the election, or the fact that fifty freeholders had signed, or that three-fifths of the legal voters had voted for, the subscription. These are all extrinsic facts, bearing not so much upon the authority vested in the board to issue the bonds, as upon the question whether that authority should be exercised. They are all, by the statute, referred to the inquiry and determination of the board, and they were all determined before the bonds and coupons came into the hands of the plaintiff. He was, therefore, not bound when he purchased to look beyond the act of the legislature and the recitals which the bonds contained. *Marcy v. Oswego Tp.*, 92 U. S. 637, 641, 23 L. Ed. 748; *Humboldt Tp. v. Long*, 92 U. S. 642, 23 L. Ed. 752.

**48. Recitals as to election.**—*Northern Bank v. Porter Tp.*, 110 U. S. 608, 614, 28 L. Ed. 258; *Grenada County Supervisors v. Brogden*, 112 U. S. 261, 267, 28 L. Ed. 704; *Pana v. Bowler*, 107 U. S. 529, 539, 27 L. Ed. 424; *Oregon v. Jennings*, 119 U. S. 74, 93, 30 L. Ed. 323; *German Sav. Bank v. Franklin County*, 128 U. S. 526, 542, 32 L. Ed. 519; *Anderson County Comm'rs v. Beal*, 113 U. S. 227, 238, 28 L. Ed. 966; *Tulare Irrig. Dist. v. Shepard*, 185 U. S. 1, 23, 46 L. Ed. 773; *Nauvoo v. Ritter*, 97 U. S. 389, 24 L. Ed. 1050; *Commissioners v. Bolles*, 94 U. S. 104, 108, 24 L. Ed. 46; *Block v. Commissioners*, 99 U. S. 686, 696, 25 L. Ed. 491; *Harter v. Kernochan*, 103 U. S. 562, 26 L. Ed. 411; *Lynde v. The County*, 16 Wall. 6, 13, 21 L. Ed. 272. See, also, *Northern Bank v. Porter Tp.*, 110 U. S. 608, 615, 28 L. Ed. 258; *Board*

(2) *Petition of Taxpayers.*—A recital that the taxpayers' petition conformed

of *Comm'r's v. Aspinwall*, 21 How. 539, 16 L. Ed. 208.

If the bonds, contain a recital that an election had been held, and that a majority had voted for the issue of the bonds, the recital would have been conclusive upon the county, and a purchaser would have needed to look no farther than to the act of the legislature. *Block v. Commissioners*, 99 U. S. 686, 696, 25 L. Ed. 491.

In *Lynde v. The County*, 16 Wall. 6, 13, 21 L. Ed. 272, the county judge was the officer designated by the statute to decide whether the voters have given the required sanction. He executed and issued the bonds, and the requisite popular sanction was set forth upon their face. The bonds were in the hands of a bona fide purchaser. It was held that under the circumstances he was not bound to look beyond the averment on their face.

In *Commissioners v. Bolles*, 94 U. S. 104, 108, 24 L. Ed. 46, the recitals were that "the bonds were executed and issued \* \* \* in pursuance of and in accordance with the vote of a majority of the qualified electors of the county." It was held that the truth or falsehood of the assertion cannot be inquired after for the recitals are practically an announcement of the judgment of the board, that all the steps required by the law had been taken. See ante, "Conclusiveness of Official Determination and Certificate," IV, S.

That municipal bonds certify on their face that they are issued in conformity with the vote of the electors of said county, cast at an election held on the twenty-third day of September, 1869, is a sufficient authentication of the fact that an election was duly held, to protect a bona fide holder for value. *County of Warren v. Marcy*, 97 U. S. 96, 104, 24 L. Ed. 977.

The bonds of a township, upon their face, purport to have been issued "in pursuance \* \* \* of a vote of the qualified electors in said township of Porter, taken in pursuance" of the several acts of the general assembly of the state. It was held that the township is estopped by the recitals in the bonds from saying that no township election was held, or that it was not called and conducted in the particular mode required by law. *Northern Bank v. Porter Tp.*, 110 U. S. 608, 614, 28 L. Ed. 258.

**Notice.**—In *Anderson County Comm'r's v. Beal*, 113 U. S. 227, 28 L. Ed. 966, the question arose as to whether there had been the requisite length of notice of the election to determine the question whether or not the bonds should be issued. The statute required that at least thirty days' notice of the election should be given, and it was thereby made the duty of the board of county commissioners to subscribe for the stock and issue the bonds after such

assent of the majority of the voters had been given. Subsequently in a suit against the board of county commissioners on coupons due on the bonds that had been issued and which had been bought by a bona fide purchaser, the record showed an order for the election made thirty-three days before it was to be held, and that subsequently to the election the board canvassed the returns and certified that there was a majority of the voters in favor of the proposition, and that the board had made such vote the basis of their action in subscribing to the stock and issuing the bonds to the company. The bonds recited on their face that they were issued "in pursuance to the vote of the electors of Anderson County, of September 13, 1869." It was held that the statement in the bonds as to the vote was equivalent to a statement that the vote was one lawful and regular in form, such as the law then in force required as to prior notice, and that as respected the plaintiff, evidence by the defendant to show less than thirty days' notice of the election could not avail. *Tulare Irrig. Dist. v. Shepard*, 185 U. S. 1, 22, 46 L. Ed. 773.

In *Anderson County Comm'r's v. Beal*, 113 U. S. 227, 238, 28 L. Ed. 966: "The bond recites the wrong act, but if that part of the recital be rejected, there remains the statement that the bond 'is executed and issued' 'in pursuance to the vote of the electors of Anderson County, of September 13, 1869.' The act of 1869 provides that when the assent of a majority of those voting at the election is given to the subscription to the stock, the county commissioners shall make the subscription, and shall pay for it, and for the stock thereby agreed to be taken, by issuing to the company the bonds of the county. The provision of § 51 is 'that when such assent shall have been given,' it shall be the duty of the county commissioners to make the subscription. What is the meaning of the words 'such assent?' They mean the assent of the prescribed majority, as the result of an election held in pursuance of such notice as the act prescribes. The county commissioners were the persons authorized by the act to ascertain and determine whether 'such assent' had been given; and necessarily so, because, on the ascertainment by them of the fact of 'such assent,' they were charged with 'the duty'—that is the language—of making the subscription, and the duty of issuing the bonds. They were equally charged with the duty of ascertaining the fact of the assent. The record evidence of their proceedings shows that their order for the election was made thirty-three days before the election was to be held; that they met 'pursuant to law for the purpose of canvassing returns of the election;' that they discharged that



to law binds the town.<sup>49</sup>

8. RECITALS AS TO COMPLIANCE WITH CONDITIONS PRESCRIBED BY POPULAR VOTE.—Where the corporate authorities have certified in the bonds that conditions prescribed by popular vote have been complied with, the town is estopped to deny these facts as against a bona fide purchaser for value.<sup>50</sup>

**Where Wrong Act Recited.**—See ante, "Erroneous Recital of Act under Which Issued," IV, V, 4, d.

9. RECITALS AS TO DEBT LIMIT.—**Statutory Limitation.**—Municipal bonds are not invalid in the hands of a bona fide holder, by reason of their having been voted and issued in excess of the statutory limit, if the recitals imported a valid issue. As against a bona fide holder for value before maturity, a municipal cor-

duty and certified that there was a majority of votes in favor of the proposition; that, in November, 1869, they resolved that, 'in accordance with the vote, heretofore, had and taken, of the electors of said county to that effect,' they subscribed for the stock; and that, in July, 1870, in their order authorizing the bonds to be delivered by Joy to the company, they recited that the bonds were issued 'according to the provisions of the vote of the electors of said county.' In view of all this, the statement by the commissioners, in the bond, that it is issued 'in pursuance to the vote of the electors of Anderson County, of September 13, 1869,' is equivalent to a statement that 'the vote' was a vote lawful and regular in form, and such as the law then in force required, in respect to prior notice. The case is, therefore, brought within the cases, of which there is a long line in this court, illustrated by *Coloma v. Eaves*, 92 U. S. 484, 491, 23 L. Ed. 579." *Tulare Irrig. Dist. v. Shepard*, 185 U. S. 1, 23, 46 L. Ed. 773. See ante, "Erroneous Recitals of Act under Which Issued," IV, V, 4, d.

**Illinois.**—The bonds issued by the county court of Randolph County, Ill., bearing date Jan. 1, 1872, and reciting that they are issued in payment of a subscription of \$100,000 to the capital stock of the Chester and Tamaroa Coal and Railway Company, in pursuance of an election held by the legal voters of said county, on the sixth day of June, 1870, and by virtue of the provisions of an act of the general assembly of the state of Illinois, entitled "An act supplemental to an act to provide for a general system of railroad corporations," are, with the coupons thereto attached, valid, and binding upon the county. *County of Randolph v. Post*, 93 U. S. 502, 23 L. Ed. 957.

A recital that the bond was executed and issued "in accordance with the vote of the majority of the qualified electors," sufficient to validate the bonds in the hands of a bona fide holder. *Comanche County v. Lewis*, 133 U. S. 198, 206, 33 L. Ed. 604.

49. **Petition.**—*Bissell v. Jeffersonville*, 24 How. 287, 16 L. Ed. 664; *Tulare Irrig. Dist. v. Shepard*, 185 U. S. 1, 20, 46 L. Ed. 773.

In *Bissell v. Jeffersonville*, 24 How. 287,

16 L. Ed. 664, it appeared that the common council of the city were authorized by the legislature to subscribe for stock in a railroad company, and to issue bonds for the subscription, on the petition of three-fourths of the legal voters of the city. The council adopted a resolution to subscribe, reciting in the preamble that more than three-fourths of the legal voters had petitioned for it, and authorized the mayor and city clerk to sign and deliver bonds for the sum subscribed. The bonds recited that they were issued by authority of the common council, and that three-fourths of the legal voters had petitioned for the same, as required by the charter. In a suit subsequently brought by an innocent holder for value to recover the amount of unpaid coupons for interest, it was held inadmissible for the defendants to show that three-fourths of the legal voters of the city had not signed the petition for the stock subscription. A similar ruling was made in *Van Hostrup v. Madison City*, 1 Wall. 291, 17 L. Ed. 538, and in *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548. *Coloma v. Eaves*, 92 U. S. 484, 492, 23 L. Ed. 579.

50. **Recitals as to compliance with conditions prescribed by popular vote.**—*Oregon v. Jennings*, 119 U. S. 74, 92, 30 L. Ed. 323; *Pana v. Bowler*, 107 U. S. 529, 27 L. Ed. 424; *German Sav. Bank v. Franklin County*, 128 U. S. 526, 542, 32 L. Ed. 519. See, also, *Insurance Co. v. Bruce*, 105 U. S. 328, 331, 26 L. Ed. 1121; *Brooklyn v. Insurance Co.*, 99 U. S. 362, 25 L. Ed. 416; *Citizens' Sav., etc., Ass'n v. Perry County*, 156 U. S. 692, 203, 39 L. Ed. 585.

"In *Pana v. Bowler*, 107 U. S. 529, 27 L. Ed. 424, the bonds were issued by the town of Pana, in Illinois, June 23d, 1873, prior to the decision in *Town of Eagle v. Kohn*. The vote of the people of the township was had on April 30th, 1870, while the act of April 16th, 1869, was in force, and the bonds, as in the case of *Insurance Co. v. Bruce*, recited on their face, not only that they were issued in compliance with the vote, but that they were issued in accordance with the provisions of the act of April 16th, 1869. No point was raised in that case that, the bonds having been issued after the new constitution of Illinois came into force, on July 2d, 1870, in pursuance of a vote of the



poration is estopped to deny that its statutory limitation of indebtedness has been exceeded where the bonds evidencing such indebtedness recites that such limit has not been exceeded.<sup>51</sup>

**Constitutional Limitation.**—Where upon the face of the bonds of a municipal corporation there is an express recital that the constitutional limitation of indebtedness had not been passed, and the bonds themselves do not show that it had, a purchaser of such bonds in open market is bound to look no further. An examination of any particular bond would not disclose as a matter of fact, that the constitutional limitation had been exceeded in the issue in a series of bonds. In such case the recital in the bonds estops the municipality from pleading the constitutional limitation against a bona fide holder for value.<sup>52</sup> But if the face

people had on April 30th, 1870, conditions prescribed by that vote had not been complied with." *German Sav. Bank v. Franklin County*, 128 U. S. 526, 542, 32 L. Ed. 519.

**51. Statutory limitation.**—*Marcy v. Oswego Tp.*, 92 U. S. 637, 639, 23 L. Ed. 748; *Humboldt Tp. v. Long*, 92 U. S. 642, 23 L. Ed. 752; *Moultrie County v. Fairfield*, 105 U. S. 370, 374, 26 L. Ed. 945; *Wilson v. Salamanca*, 99 U. S. 499, 503, 25 L. Ed. 330; *Dallas County v. McKenzie*, 110 U. S. 686, 687, 28 L. Ed. 285; *Daviess County v. Dickinson*, 117 U. S. 657, 29 L. Ed. 1026; *Sherman County v. Simons*, 109 U. S. 735, 737, 27 L. Ed. 1093. See, also, *Dixon County v. Field*, 111 U. S. 83, 95, 28 L. Ed. 360; *Lynde v. The County*, 16 Wall. 6, 21 L. Ed. 272; *Lexington v. Butler*, 14 Wall. 282, 20 L. Ed. 809.

A bona fide holder for value of municipal bonds is not bound to go behind the law and the recital of the bonds to inquire into the amount of the county indebtedness. *Marcy v. Oswego Tp.*, 92 U. S. 637, 23 L. Ed. 748; *Humboldt Tp. v. Long*, 92 U. S. 642, 23 L. Ed. 752; *Wilson v. Salamanca*, 99 U. S. 499, 25 L. Ed. 330; *Sherman County v. Simons*, 109 U. S. 735, 737, 27 L. Ed. 1093; *Moultrie County v. Fairfield*, 105 U. S. 370, 374, 26 L. Ed. 945.

An act of the legislature of Kansas of Feb. 25, 1870, authorizing municipal townships to take stock in any railroad proposed to be constructed into or through such township, provided, that the amount of bonds voted shall not be above such a sum as will require a levy of more than one per cent per annum on the taxable property of the township, to pay the yearly interest on the amount of bonds issued. The bonds in question were regularly executed and recited that they are issued in accordance with said act. It was held, that, in a suit brought on some of the coupons by a bona fide holder for value, it cannot be shown as a defense to a recovery, that, at the time of voting and issuing the bonds, the value of the taxable property of the township was not in amount sufficient to authorize the voting and issuing of the whole series of them. *Marcy v. Oswego Tp.*, 92 U. S. 637, 23 L. Ed. 748; *Humboldt Tp. v. Long*, 92 U. S.

642, 23 L. Ed. 752. See, also, *Dixon County v. Field*, 111 U. S. 83, 95, 28 L. Ed. 360.

**52. Constitutional limitation.**—*Chaffee County v. Potter*, 142 U. S. 355, 363, 35 L. Ed. 1040; *Doon Tp. v. Cummins*, 142 U. S. 366, 373, 35 L. Ed. 1044; *Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579; *Buchanan v. Litchfield*, 102 U. S. 278, 290, 26 L. Ed. 138; *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 43 L. Ed. 689, following *Chaffee County v. Potter*, 142 U. S. 355, 363, 35 L. Ed. 1040, and stating that *Sutliff v. Lake County Comm'rs*, 147 U. S. 230, 37 L. Ed. 145, neither modified nor intended to modify, but distinctly recognized the principle announced in *Chaffee County v. Potter*, supra. *Stanly County v. Coler*, 190 U. S. 437, 451, 47 L. Ed. 1126. See, also, *School District v. Stone*, 106 U. S. 183, 27 L. Ed. 90; *Ackley School Dist. v. Hall*, 113 U. S. 135, 140, 28 L. Ed. 954; *Nesbit v. Riverside Independent Dist.*, 144 U. S. 610, 617, 36 L. Ed. 562; *Waite v. Santa Cruz*, 184 U. S. 302, 46 L. Ed. 552.

In *Chaffee County v. Potter*, 142 U. S. 355, 35 L. Ed. 1040, the bonds contained an express recital "that the total amount of this issue does not exceed the constitutional limit of the state," and did not show upon their face how many bonds were issued, or how large each series was; in other words, did not show on their face the amount of issue, and the county records showed only the valuation of property. It was held that the purchaser is not bound to look beyond the recital. *Sutliff v. Lake County Comm'rs*, 147 U. S. 230, 237, 37 L. Ed. 145; *Waite v. Santa Cruz*, 184 U. S. 302, 318, 46 L. Ed. 552; *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 270, 43 L. Ed. 689.

*Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 262, 274, 275, 43 L. Ed. 689, was a suit upon negotiable coupons attached to negotiable bonds executed by the board of commissioners of Gunnison County, Colorado, and which recited that the total amount of the issue did "not exceed the limit prescribed by the constitution of the state of Colorado." The question presented was whether such recitals estopped the county from asserting against a bona fide holder for value that the bonds created an indebtedness in excess of the

of one of the bonds discloses that, as a matter of fact, the recital in it, with respect to the constitutional limitation, is false, the corporation is not bound by that recital, and is not estopped from pleading the invalidity of the bonds in this particular.<sup>53</sup> As where the bonds recite the whole amount of the issue and the

limit prescribed by the constitution of Colorado. The principal defense was that the purchaser of the bonds was bound to take notice of the orders and records of the county commissioners authorizing the issue of the refunding bonds, and that an examination of those orders would have disclosed the fact that the bonds were in excess of the limit prescribed by the constitution of the state. After a review of previous cases, namely *Buchanan v. Litchfield*, 102 U. S. 278, 290, 292, 26 L. Ed. 138; *Orleans v. Platt*, 99 U. S. 676, 25 L. Ed. 404; *Northern Bank v. Porter Tp.*, 110 U. S. 608, 616, 619, 28 L. Ed. 258; *Dixon County v. Field*, 111 U. S. 83, 92, 94, 28 L. Ed. 360; *Lake County v. Graham*, 130 U. S. 674, 680, 683, 684, 32 L. Ed. 1065; *Chaffee County v. Potter*, 142 U. S. 355, 363, 364, 366, 35 L. Ed. 1040, and *Sutliff v. Lake County Comm'rs*, 147 U. S. 230, 235, 237, 238, 37 L. Ed. 145, the court held that the Gunnison case was controlled by the decision in *Chaffee County v. Potter*, which was a suit on coupons of negotiable municipal bonds that contained the same recitals as were made in the Gunnison County bonds; and that the county was estopped from asserting against a bona fide holder for value that the bonds so issued created an indebtedness in excess of the limit prescribed by the constitution of Colorado. *Waite v. Santa Cruz*, 184 U. S. 302, 318, 46 L. Ed. 552. See, also, *Stanly County v. Coler*, 190 U. S. 437, 451, 47 L. Ed. 1126.

"The purchaser might even know, indeed it may be admitted that he would be required to know, the assessed valuation of the taxable property of the county and yet he could not ascertain by reference to one of the bonds and the assessment roll whether the county had exceeded its power, under the constitution, in the premises." *Chaffee County v. Potter*, 142 U. S. 355, 363, 35 L. Ed. 1040; *Sutliff v. Lake County Comm'rs*, 147 U. S. 230, 237, 37 L. Ed. 145; *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 270, 43 L. Ed. 689.

"True, if a purchaser had seen the whole issue of each series of bonds and then compared it with the assessment roll, he might have been able to discover whether the issue exceeded the amount of indebtedness limited by the constitution. But that is not the test to apply to a transaction of his nature. It is not supposed that any one person would purchase all of the bonds at one time, as that is not the usual course of business of this kind. The test is—What does each individual bond disclose?" *Chaffee County v. Potter*, 142 U. S. 355, 363, 35 L. Ed. 1040; *Gunnison*

*County Comm'rs v. Rollins*, 173 U. S. 255, 270, 43 L. Ed. 689.

"Here, by virtue of the statute under which the bonds were issued, the county commissioners were to determine the amount to be issued, which was not to exceed the total amount of the indebtedness at the date of the first publication of the notice requesting the holders of county warrants to exchange their warrants for bonds, at par. The statute, in terms, gave to the commissioners the determination of a fact, that is, whether the issue of bonds was in accordance with the constitution of the state and the statute under which they were issued, and required them to spread a certificate of that determination upon the records of the county. The recital in the bond to the effect that such determination has been made, and that the constitutional limitation had not been exceeded in the issue of the bonds, taken in connection with the fact that the bonds themselves did not show such recital to be untrue, under the law, estops the county from saying that it is untrue. *Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579; *Venice v. Murdock*, 92 U. S. 494, 23 L. Ed. 583; *Marcy v. Oswego Tp.*, 92 U. S. 637, 23 L. Ed. 748; *Wilson v. Salamanca*, 99 U. S. 499, 25 L. Ed. 330; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138; *Northern Bank v. Porter Tp.*, 110 U. S. 608, 28 L. Ed. 258." *Chaffee County v. Potter*, 142 U. S. 355, 364, 35 L. Ed. 1040; *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 270, 43 L. Ed. 689.

**A person taking such bonds in exchange for county warrants that he owned and held is entitled to assume such recital to be true.** *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 275, 43 L. Ed. 689.

**Where the constitution of the state prescribes the amount which the county might donate to a railroad company, that provision operates as an absolute limitation upon the power of the county to exceed that amount, and it is well settled that no recitals in the bonds, or endorsed thereon, could estop the county from setting up their invalidity, based upon a want of constitutional authority to issue the same.** *Hedges v. Dixon County*, 150 U. S. 182, 187, 37 L. Ed. 1044; *Lake County v. Rollins*, 130 U. S. 662, 32 L. Ed. 1060; *Lake County v. Graham*, 130 U. S. 674, 32 L. Ed. 1065; *Sutliff v. Lake County Comm'rs*, 147 U. S. 230, 37 L. Ed. 145.

**53.** *Chaffee County v. Potter*, 142 U. S. 355, 363, 35 L. Ed. 1040; *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 270, 43 L. Ed. 689.

Such was the case of *Lake County v. Graham*, 130 U. S. 674, 32 L. Ed. 1065, and



recorded valuation of property shows that amount to be in excess of the constitutional limit.<sup>54</sup>

In the issuance of county bonds in Colorado, no recital involving the amount of the assessed taxable valuation of the property to be taxed for the payment of the bonds, can take the place of the assessment itself, for the amount as fixed by reference to that record is made by the constitution the standard for measuring the limit of the municipal power. Nothing in the way of ascertainment of that fact is submitted to the county officers.<sup>55</sup>

*Dixon County v. Field*, 111 U. S. 83, 28 L. Ed. 360. In those cases an examination of any particular bond would disclose that, as a matter of fact, the constitutional limitation had been exceeded. *Chaffee County v. Potter*, 142 U. S. 355, 363, 35 L. Ed. 1040; *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 270, 43 L. Ed. 689.

54. *Lake County v. Graham*, 130 U. S. 674, 32 L. Ed. 1065; *Chaffee County v. Potter*, 142 U. S. 355, 362, 35 L. Ed. 1040; *Dixon County v. Field*, 111 U. S. 83, 95, 28 L. Ed. 360.

The recitals in the bonds are as follows: "This bond is one of a series of eighty-seven thousand dollars issued under and in pursuance of an order of the county commissioners of the county of Dixon, in the state of Nebraska, and authorized by an election held in the said county on the twenty-seventh day of December, A. D. 1875, and under and by virtue of chapter 35 of the General Statutes of Nebraska, and amendments thereto, and the constitution of the said state, article XII, adopted October, A. D. 1875." It was held that the municipality is not estopped by the recitals in the bonds to deny their validity; and that having been issued in contravention of the constitution of the state, they are without warrant of law and are void. *Dixon County v. Field*, 111 U. S. 83, 90, 28 L. Ed. 360.

In *Dixon County v. Field*, 111 U. S. 83, 95, 28 L. Ed. 360, it is said: "There was no power at all conferred to issue bonds in excess of an amount equal to ten per cent upon the assessed valuation of the taxable property in the county. In determining the limit of power, there were necessarily two factors; the amount of the bonds to be issued, and the amount of the assessed value of the property for purposes of taxation. The amount of the bonds issued was known. It is stated in the recital itself. It was \$87,000. The holder of each bond was apprised of that fact."

In *Dixon County v. Field*, 111 U. S. 83, 28 L. Ed. 360, which arose under an article of the constitution of Nebraska, limiting the power of a county to issue bonds to ten per cent of the assessed valuation of the county, it was adjudged that a county issuing bonds, each reciting that it was one of a series of \$87,000 issued under and by virtue of this article of the constitution and the statutes of Nebraska upon the subject, was not estopped to show by the assessed valuation on the

books of public record of the county that the bonds were in excess of the constitutional limit. *Sutliff v. Lake County Comm'rs*, 147 U. S. 230, 235, 37 L. Ed. 145. See, also, *Doon Tp. v. Cummins*, 142 U. S. 366, 374, 35 L. Ed. 1044.

It was held in *Lake County v. Graham*, 130 U. S. 674, 32 L. Ed. 1065, that the county was not estopped from pleading the constitutional limitation, because the bonds showing upon their face that they were issued to the amount of \$500,000, the purchaser, having that data before him, was bound to ascertain from the records the total assessed valuation of the taxable property of the county, and determine for himself, by a simple arithmetical calculation, whether the issue was in harmony with the constitution; and that the bonds, having been issued in violation of that provision of the constitution, were not valid obligations of the county. "Our decision was based largely upon the ruling of this court in *Dixon County v. Field*, 111 U. S. 83, 28 L. Ed. 360. To the views expressed in that case we still adhere." *Chaffee County v. Potter*, 142 U. S. 355, 362, 35 L. Ed. 1040. See, also, *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 269, 43 L. Ed. 689.

It was suggested that the purchaser was not chargeable with knowledge of the fact that the maximum of 12 mills on the dollar had been exceeded—for the \$500,000 of debt ascertained to be due on the day of notice, and for which bonds were issued, might have been partly or wholly created before the constitution was adopted, and therefore be excluded from the rule by the very terms of the constitution itself. It was held that the plaintiff is not entitled to an estoppel even if such an inference might have been drawn from the recital of conformity. The records are the only source of information. *Lake County v. Graham*, 130 U. S. 674, 682, 32 L. Ed. 1065.

55. *Lake County v. Graham*, 130 U. S. 674, 683, 32 L. Ed. 1065; *Doon Tp. v. Cummins*, 142 U. S. 366, 374, 35 L. Ed. 1044; *Sutliff v. Lake County Comm'rs*, 147 U. S. 230, 236, 37 L. Ed. 145. See, also, *Dixon County v. Field*, 111 U. S. 83, 95, 28 L. Ed. 360.

They are bound, it is true, to learn from the assessment what the limit upon their authority is, as a necessary preliminary in the exercise of their functions and the performance of their duty; but the information is for themselves alone. All the world besides must have it from the same



### Whether Facts Required to Be Made Matter of Public Record or Not.

—Those cases in which a municipal corporation has been held to be estopped by recitals in its bonds to assert that they were issued in excess of the limit imposed by the constitution or statutes of the state, the statutes, as construed by the court, left it to the officers issuing the bonds to determine whether the facts existed which constituted the statutory or constitutional condition precedent, and did not require those facts to be made a matter of public record. But if the statute expressly requires those facts to be made a matter of public record, open to the inspection of every one, there can be no implication that it was intended to leave that matter to be determined and concluded, contrary to the facts so recorded, by the officers charged with the duty of issuing the bonds.<sup>56</sup>

### 10. RECITALS AS TO PURPOSE OF ISSUE.—Where there is legislative authority

source, and for themselves. The fact, as it is recorded in the assessment itself, is extrinsic, and proves itself by inspection, and concludes all determinations that contradict it. *Lake County v. Graham*, 130 U. S. 674, 682, 32 L. Ed. 1065; *Sutliff v. Lake County Comm'rs*, 147 U. S. 230, 236, 37 L. Ed. 145; *Dixon County v. Field*, 111 U. S. 83, 95, 28 L. Ed. 360.

The amount of the assessed value of the taxable property in the county is not stated; but, *ex vi termini*, it was ascertainable in one way only, and that was by reference to the assessment itself, a public record equally accessible to all intending purchasers of bonds, as well as to the county officers. This being known, the ratio between the two amounts was fixed by an arithmetical calculation. *Lake County v. Graham*, 130 U. S. 674, 682, 32 L. Ed. 1065; *Dixon County v. Field*, 111 U. S. 83, 95, 28 L. Ed. 360; *Sutliff v. Lake County Comm'rs*, 147 U. S. 230, 236, 37 L. Ed. 145.

In *Lake County v. Graham*, 130 U. S. 674, — L. Ed. — the court said, in disposing of the contention that, under the doctrine of certain adjudged cases, the county was estopped to deny that the bonds were issued in conformity to the constitution, "the question here is distinguishable from that in the case relied on by counsel for defendant in error. In this case the standard of validity is created by the constitution. In that standard two features are to be considered; one the amount of assessed value, and the other ration between that assessed value and the debt proposed. These being exactions of the constitution itself, it is not within the power of the legislature to dispense with them either directly or indirectly, by the creation of a ministerial commission whose finding shall be taken in lieu of the fact. *Gunnison County v. Rollins*, 173 U. S. 255, 268, 43 L. Ed. 684.

56. *Sutliff v. Lake County Comm'rs*, 147 U. S. 230, 235, 37 L. Ed. 145, citing *Marcy v. Oswego Tp.*, 92 U. S. 637, 23 L. Ed. 748; *Humboldt Tp. v. Long*, 92 U. S. 642, 23 L. Ed. 752; *Dixon County v. Field*, 111 U. S. 83, 28 L. Ed. 360; *Lake County v. Graham*, 130 U. S. 674, 682, 32 L. Ed. 1065, and *Chaffee County v. Potter*, 142 U. S. 355, 363, 35 L. Ed. 1040; *Gunnison County Comm'rs v.*

*Rollins*, 173 U. S. 255, 272, 43 L. Ed. 689.

If the fact necessary to the existence of the authority of a municipality to issue bonds was by law to be ascertained, not officially by the officers charged with the execution of the power, but by reference to some express and definite record of a public character, then the authority to act at all depends upon the actual objective existence of the requisite fact, as shown by the record, and not upon its ascertainment and determination by any one; and the consequence would necessarily follow, that all persons claiming under the exercise of such a power might be put to proof of the fact made a condition of its lawfulness, notwithstanding any recitals in the instrument. *Lake County v. Graham*, 130 U. S. 674, 682, 32 L. Ed. 1065.

The constitution of Colorado, as well as the statute of the state, forbade a county to issue bonds to such an amount as would increase its indebtedness beyond a fixed amount; and the statute moreover, required the county commissioners, in submitting the question to a vote of the electors, to enter of record an order specifying the amount required and the object of the debt; and also made it their duty to publish, and to cause to be entered on their records, open to the inspection of the public at all times, semiannual statements, exhibiting in detail the debts, expenditures and receipts of the county for the preceding six months, and striking the balance so as to show the amount of any deficit and the balance in the treasury. At the time of the issue of the bonds in question the county was in fact indebted beyond the constitutional and statutory limit. The plaintiff bought the bonds, upon the faith of the recitals therein, and without making any examination into the facts appearing on the records of the county. It was held that the plaintiff, although a purchaser for value and before maturity of the bonds was charged with the duty of examining the record of indebtedness provided for in the statute of Colorado, in order to ascertain whether the bonds increased the indebtedness of the county beyond the constitutional limit; and that the recitals in the bonds did not estop the county to prove by the records of the assessment and the indebtedness that the

to issue bonds for municipal purposes, and it was recited in the bonds sued on that they were issued for such purposes, the municipality is estopped from proving, as against bona fide holders, that the recitals were untrue.<sup>57</sup> A requirement of a charter that all bonds issued by a municipal corporation "shall specify for what purpose they were issued," is not so far satisfied by a bond

bonds were issued in violation of the constitution. *Sutliff v. Lake County Comm'rs*, 147 U. S. 230, 234, 37 L. Ed. 145.

In *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 43 L. Ed. 689, the supreme court said: "It was expressly decided in the Chaffee County case that the statute under which the bonds there in suit (the bonds here in suit being of the same class), authorized the county commissioners to determine whether the proposed issue of bonds would in fact exceed the limit prescribed by the constitution and the statute; and that the recital in the bond to the effect that such determination had been made, and that the constitutional limitation had not been exceeded, taken in connection with the fact that the bonds themselves did not show such recital to be untrue, estopped the county, under the law, from saying that the recital was not true. We decline to overrule *Chaffee County v. Potter*, 142 U. S. 355, 35 L. Ed. 1040, and upon the authority of that case, and without re-examination or enlarging upon the grounds upon which the decision therein proceeded, we adjudge that as against the plaintiff the county of Gunnison is estopped to question the recital in the bonds in question to the effect that they did not create a debt in excess of the constitutional limit, and were issued by virtue of and in conformity with the statute of 1881, and in full compliance with the requirements of law." Again: "It is insisted with much earnestness that the principles we have announced render it impossible for a state, by a constitutional provision, to guard against excessive municipal indebtedness. By no means. If a state constitution, in fixing a limit for indebtedness of that character, should prescribe a definite rule or test for determining whether that limit has already been exceeded or is being exceeded by any particular issue of bonds, all who purchase such bonds would do so subject to that rule or test, whatever might be the hardship in the case of those who purchased them in the open market in good faith. Indeed, it is entirely competent for a state to provide by statute that all obligations, in whatever form executed by a municipality under its existing laws, shall be subject to any defense that would be allowed in cases of nonnegotiable instruments. But for reasons that every one understands, no such statutes have been passed. Municipal obligations executed under such a statute could not be readily disposed of to those who invest in such securities." *Waite v. Santa Cruz*, 184 U. S. 302, 319, 46 L. Ed. 552.

The decision in *Dixon County v. Field*, 111 U. S. 83, 28 L. Ed. 360, and the grounds upon which it rests were approved and affirmed in *Lake County v. Graham*, 130 U. S. 674, 32 L. Ed. 1065, and *Chaffee County v. Potter*, 142 U. S. 355, 35 L. Ed. 1040, each of which arose under the article of the constitution of Colorado now in question, but under a different statute, which did not require the amount of indebtedness of the county to be stated on its records. *Sutliff v. Lake County Comm'rs*, 147 U. S. 230, 237, 37 L. Ed. 145; *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 273, 43 L. Ed. 689.

In *Sutliff v. Lake County Comm'rs*, 147 U. S. 230, 238, 37 L. Ed. 145, it was said: "The case at bar does not fall within *Chaffee County v. Potter*, 142 U. S. 355, 35 L. Ed. 1040, and cannot be distinguished in principle from *Dixon County v. Field*, 111 U. S. 83, 28 L. Ed. 360, or from *Lake County v. Graham*, 130 U. S. 674, 32 L. Ed. 1065. The only difference worthy of notice is that in each of these cases the single fact required to be shown by the public record was the valuation of the property of the county, whereas here two facts are to be so shown, the valuation of the property, and the amount of the county debt. But, as both these facts are equally required by the statute to be entered on the public records of the county, they are both facts of which all the world is bound to take notice, and as to which, therefore, the county cannot be concluded by any recitals in the bonds." *Gunnison County Comm'rs v. Rollins*, 173 U. S. 255, 273, 43 L. Ed. 689.

**57. Recitals as to purposes of issue.**—*Hackett v. Ottawa*, 99 U. S. 86, 25 L. Ed. 363; *Ottawa v. National Bank*, 105 U. S. 342, 26 L. Ed. 1127; *Ottawa v. Carey*, 108 U. S. 110, 118, 27 L. Ed. 669, reaffirmed in *Lewis v. Shreveport*, 108 U. S. 282, 27 L. Ed. 728; *Cole v. LaGrange*, 113 U. S. 1, 17, 28 L. Ed. 896; *Comanche County v. Lewis*, 133 U. S. 198, 207, 33 L. Ed. 604; *Barnett v. Denison*, 145 U. S. 135, 139, 36 L. Ed. 652; *Waite v. Santa Cruz*, 184 U. S. 302, 315, 46 L. Ed. 552.

If a city issues bonds under its corporate seal, and in accordance with its charter, which empowers the council, with the sanction of a majority of voters attending an election for the purpose, to borrow money generally and to issue bonds therefor, and the bonds recite upon their face that they are issued in accordance with certain ordinances of the city, the titles of which, being quoted alone in bonds, characterize the ordinances as providing for a loan for municipal purposes, the city



which purported on its face to be issued by virtue of an ordinance, the date of which is given, but not its title or its contents, as to cut off defenses which might otherwise be made.<sup>58</sup>

11. RECITALS AS TO MATTER OF RECORD.—Where facts which are matters of record are recited in municipal bonds, a purchaser of such bonds is not entitled to rely on such recitals.<sup>59</sup>

12. RECITALS AS TO MATTER OF LAW.—**In General.**—Matters of law are not covered by recitals in municipal and county bonds.<sup>60</sup>

is estopped, in a suit upon the bonds by an innocent purchaser for value, to set up that the ordinances appropriated the money to other purposes, and that the bonds were, therefore, void. *Hackett v. Ottawa*, 99 U. S. 86, 25 L. Ed. 363; *Ottawa v. National Bank*, 105 U. S. 342, 344, 26 L. Ed. 1127; *Waite v. Santa Cruz*, 184 U. S. 302, 315, 46 L. Ed. 552. See, also, *Supervisors v. Schenck*, 5 Wall. 772, 18 L. Ed. 556.

**Borrowing money to erect county buildings.**—The recital in a series of bonds known as "courthouse bonds," so named on the face of the bonds themselves, "is as follows: 'This bond is executed and issued for the purpose of erecting county buildings in pursuance of and in accordance with an act of the legislature of the state of Kansas, entitled, "An act relating to counties and county officers," approved February 29, 1868, and "An act to authorize counties," ' etc., reciting the title of the act referred to in the bridge bonds, as well as a vote similar thereto. On the back of each bond appears the auditor's certificate." It was held that "There is no force in the suggestion that the purpose expressed in the recital is that of erecting county buildings, instead of borrowing money for the erection of county buildings." *Comanche County v. Lewis*, 133 U. S. 198, 206, 33 L. Ed. 604.

"A general statement of the purpose, with direct reference to the act granting authority, is sufficient." *Comanche County v. Lewis*, 133 U. S. 198, 207, 33 L. Ed. 604.

58. *Barnett v. Denison*, 145 U. S. 135, 139, 36 L. Ed. 652; *Evansville v. Dennett*, 161 U. S. 431, 445, 40 L. Ed. 760.

It is certainly a reasonable requirement that the bonds issued shall express upon their face the purpose for which they were issued. In any event, it was a requirement of which the purchaser was bound to take notice, and if it appeared upon their face that they were issued for an illegal purpose they would be void. If they were issued without any purpose appearing at all upon their face, the purchaser took the risk of their being issued for an illegal purpose, and, if that proved to be the case, they are as void in his hands as if he had received them with express notice of their illegality. Where the statute requires such purpose to be stated upon the face of the bonds, it is no answer to say that the ordinance authorized them for a legal purpose, if in fact they were issued without consideration, and for a dif-

ferent purpose. *Barnett v. Denison*, 145 U. S. 135, 139, 36 L. Ed. 652.

59. **Recitals as to matter of record.**—*Nesbit v. Riverside Independent Dist.*, 144 U. S. 610, 36 L. Ed. 562.

"If the fact necessary to the existence of the authority was by law to be ascertained, not officially by the officers charged with the execution of the power, but by reference to some express and definite record of a public character, then the true meaning of the law would be that the authority to act at all depended upon the actual objective existence of the requisite fact, as shown by the record, and not upon its ascertainment and determination by any one; and the consequence would necessarily follow, that all persons claiming under the exercise of such a power might be put to the proof of the fact, made a condition of its lawfulness, notwithstanding any recitals in the instrument." *Sutliff v. Lake County Comm'rs*, 147 U. S. 230, 236, 37 L. Ed. 145; *Dixon County v. Field*, 111 U. S. 83, 28 L. Ed. 360; *Lake County v. Graham*, 130 U. S. 674, 682, 32 L. Ed. 1065.

**Recitals as to debt limit where statute requires fact to be a matter of record.**—See ante, "Recitals as to Debt Limit," IV, V, 9; post, "Party Having Notice of Invalidity," IV, V, 15.

60. **Recitals as to matters of law.**—*Dixon County v. Field*, 111 U. S. 83, 92, 28 L. Ed. 360; *Lake County v. Graham*, 130 U. S. 674, 681, 32 L. Ed. 1065; *Katzenberger v. Aberdeen*, 121 U. S. 172, 176, 30 L. Ed. 911.

"In the case of *Dixon County v. Field*, 111 U. S. 83, 92, 28 L. Ed. 360, this court said: 'Recurring, then, to a consideration of the recitals in the bonds, we assume, for the purposes of this argument, that they are in legal effect equivalent to a representation, or warranty, or certificate on the part of the county officers, that everything necessary by law to be done has been done, and every fact necessary by law to have existed did exist, to make the bonds lawful and binding. Of course, this does not extend to or cover matters of law. All parties are equally bound to know the law; and a certificate reciting the actual facts and that thereby the bonds were conformable to the law, when, judicially speaking, they are not, will not make them so, nor can it work an estoppel upon the county to claim the protection of the law. Otherwise it would always be in the power of a municipal body to



**Power to Issue.**—See ante, "Recitals as to Power to Issue," IV, V, 4.

13. **RECITALS SHOWING WANT OF AUTHORITY TO ISSUE.**—If the recitals show a want of authority to issue county bonds, a bona fide holder cannot maintain a suit thereon.<sup>61</sup>

14. **BONDS SHOWING NONPERFORMANCE OF CONDITIONS PRECEDENT.**—Where municipal bonds show that essential conditions precedent to their issue, prescribed by statute, have not been complied with, the municipality is not estopped to deny their validity.<sup>62</sup>

15. **PARTY HAVING NOTICE OF INVALIDITY.**—A party having actual notice or chargeable with knowledge of the original invalidity cannot rely upon recitals to the contrary. The effect of recitals is one thing, that of recitals coupled with notice is another.<sup>63</sup>

**Overissue—Constitutional Debt Limit Exceeded.**—A purchaser of municipal bonds to whom they were originally issued by the municipality, and who knows that they exceed the constitutional limit, as appearing by public record of which he is bound to take notice, has no right to rely on the recitals to the contrary in the bonds, even if these could otherwise have any effect against the plain provision of the constitution of the state.<sup>64</sup>

## V. Federal Securities.

**A. In General.**—When the United States becomes a party to commercial paper, it incurs all the responsibilities of private persons.<sup>65</sup> From the daily and unavoidable use of commercial paper by the United States it is as much interested as the community at large can be in maintaining these principles.<sup>66</sup>

**B. Certificates of Loan.**—The United States are under no obligation to pay certificates of loan which were not countersigned in conformity with the prescribed regulation of congress, nor used for their benefit. It is conceded, that if such certificates were not executed as required by the legislation on the subject, that they were irregularly issued, and the United States is under no obligation to pay them unless they are estopped in some way from interposing this defense.<sup>67</sup>

**C. Bills of Exchange or Drafts—Floyd Acceptances.**—The government of the United States has a right to use bills of exchange in conducting its fiscal operations, as it has the right to use any other appropriate means of accomplishing its legitimate purposes.<sup>68</sup> When the government becomes a party to such a

which power was denied, to usurp the forbidden authority, by declaring that its assumption was within the law. This would be the clear exercise of legislative power, and would suppose such corporate bodies to be superior to the law itself." *Lake County v. Graham*, 130 U. S. 674, 681, 32 L. Ed. 1065.

61. **Recitals showing want of authority to issue.**—*Citizens' Sav., etc., Ass'n v. Perry County*, 156 U. S. 692, 39 L. Ed. 585.

62. **Bonds showing that conditions precedent not performed.**—*German Sav. Bank v. Franklin County*, 128 U. S. 526, 32 L. Ed. 519.

63. **Party having notice of invalidity.**—*Nesbit v. Riverside Independent Dist.*, 144 U. S. 610, 619, 36 L. Ed. 562.

64. **Overissue—Constitutional debt limit.**—*Doon Tp. v. Cummins*, 142 U. S. 366, 378, 35 L. Ed. 1044; *Chaffee County v. Potter*, 142 U. S. 355, 35 L. Ed. 1040. See ante, "Recitals as to Debt Limit," IV, V, 9.

65. **Federal securities.**—*Cooke v. United States*, 91 U. S. 389, 396, 23 L. Ed. 237, citing *The Floyd Acceptances*, 7 Wall. 666, 19 L. Ed. 169; *United States v. Bank*, 15 Pet. 377, 10 L. Ed. 774.

66. *United States v. Bank*, 15 Pet. 377, 10 L. Ed. 774; *Cooke v. United States*, 91 U. S. 389, 396, 23 L. Ed. 237.

67. **Certificates of loan.**—*Ward v. United States*, 10 Wall. 593, 600, 19 L. Ed. 1033.

An ancient claim against the United States, founded on loan certificates issued by the Continental Congress in 1777, and sent to the loan office in Georgia, to be given in exchange for money when countersigned by the loan officer of that state, rejected; there being no sufficient evidence that the certificates were countersigned and issued as required by the legislation which authorized them; the same claim having been rejected in 1792 by Alexander Hamilton, then secretary of the treasury, and there being no sufficient evidence now that the facts then assumed by him as the basis of his conclusions were unfounded, the claim being moreover considered by the federal supreme court as without equity. *Ward v. United States*, 10 Wall. 593, 19 L. Ed. 1033.

68. **Power to use bills of exchange.**—*The Floyd Acceptances*, 7 Wall. 666, 19 L. Ed. 169.

bill, it is bound by the same rules in determining its rights and its liabilities as individuals are.<sup>69</sup>

**Authority of Officers to Issue.**—As the United States can only become a party to a bill of exchange by the action of an officer or other authorized agent of the government, the authority of the officer or agent may be inquired into as in the case of the agent of an individual.<sup>70</sup> This authority, in case of bills of exchange, depends upon the same principles that determine such authority in other contracts and is not aided by the doctrine, that, when once lawfully made, negotiable paper has a more liberal protection than other contracts in the hands of innocent holders.<sup>71</sup> Where no express authority is found for any officer to draw or accept bills of exchange, such authority can only exist when these are the appropriate means of carrying into effect some other power belonging to such officer under his prescribed duties.<sup>72</sup> It does not follow that because an officer may lawfully issue bills of exchange for some purposes, he can in that mode bind the government in other cases where he has no such authority.<sup>73</sup>

**Effect of Unauthorized Acceptance.**—Where under existing laws there can be no lawful occasion for an officer to accept drafts on behalf of the government, such acceptances cannot bind it, though there may be occasions for drawing or paying drafts which may bind the government.<sup>74</sup>

**D. United States Bonds and Treasury Notes**—1. IN GENERAL.—See ante, "In General," V, A.

2. NEGOTIABILITY AND TRANSFER—a. *In General.*—The bonds and treasury notes of the United States payable to holder or bearer at a definite future time are negotiable commercial paper, and their transferability is subject to the commercial law of other paper of that character.<sup>75</sup>

**Negotiability of Overdue United States Bonds.**—See post, "Holder of Overdue Bonds and Coupons Attached," V, D, 2, e, (1).

b. *Unsigned Notes Fraudulently Circulated.*—The United States is liable to a bona fide holder of interest bearing treasury notes, printed by the treasury department from genuine plates and perfect in form, complete and ready for issue, and never issued by any authorized officer, but fraudulently or surreptitiously put in circulation.<sup>76</sup>

**69. Rules governing liability.**—The Floyd Acceptances, 7 Wall. 666, 19 L. Ed. 169.

**70. Authority of officers to issue.**—The Floyd Acceptances, 7 Wall. 666, 19 L. Ed. 169. See the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 307.

**71. The Floyd Acceptances**, 7 Wall. 666, 19 L. Ed. 169.

**72. The Floyd Acceptances**, 7 Wall. 666, 19 L. Ed. 169.

**73. The Floyd Acceptances**, 7 Wall. 667, 19 L. Ed. 169.

**74. Unauthorized acceptance.**—The Floyd Acceptances, 7 Wall. 666, 667, 19 L. Ed. 169.

The acceptances known as the "Floyd Acceptances" (certain acceptances on long time, made by the Hon. J. B. Floyd, secretary of war, of drafts drawn on him by army contractors, before the services contracted for were received, or the supplies to be furnished were delivered)—were mere accommodation loans of the credit of the United States, without authority, and therefore void. The Floyd Acceptances, 7 Wall. 666, 667, 19 L. Ed. 169.

If they had been given and received as payment (which they were not), they

were payments in advance of the services rendered and supplies furnished, and were void, because forbidden by the act of January 31st, 1823 (3 Stat. at Large, 723). The Floyd Acceptances, 7 Wall. 666, 19 L. Ed. 169.

**75. Negotiability and transfer.**—*Vermilye & Co. v. Adams Express Co.*, 21 Wall. 138, 22 L. Ed. 609; *Cooke v. United States*, 91 U. S. 389, 396, 23 L. Ed. 237. See the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 269.

**76.** It was so held in the case of *Cooke v. United States*, 91 U. S. 389, 23 L. Ed. 237, and in the opinion, much stress was laid upon the considerations, that the notes were perfect and complete as soon as printed, and did not require the signature of any officer, but, as soon as they had received the impression of all the plates and dies necessary to perfect their form, were ready for circulation and use; that in this respect they did not differ from coins of the mint when fully stamped and prepared for issue; and that these notes were intended to circulate and take the place of money, to some extent, for commercial purposes; were made a legal tender for their face value, exclusive of interest, as between the government and its creditors,



c. *Power of State Owning United States Bonds to Limit Their Negotiability.*

—It was at one time held that when a state by public statute requires the indorsement of its governor as a prerequisite to the valid transfer of bonds belonging to it, and payable to itself or bearer, the holder of such bonds, without such indorsement, will have no title as against the state, unless he can show the consent of the state otherwise given to the transfer, but this was subsequently overruled.<sup>77</sup> An act repealing such statute passed by the legislature when the state is in rebellion against the United States, is a nullity as to bonds issued without such indorsement, and for the purpose of aiding the rebellion.<sup>78</sup> The existence of the rebellion at the time of the repealing act, was a public fact with notice of which all persons were charged, and when the bonds were purchased after they had become payable, the purchaser took them subject to all the equitable rights of the state when its relations to the Union had been restored.<sup>79</sup> And the bonds remain the property of the state and may be reclaimed, or the proceeds thereof recovered in a proper action by that state when the rebellion has ceased, against any one in possession of the same, with notice of the intent with which they were issued and used.<sup>80</sup> But it must be observed that the court has not held that such a repealing act was absolutely void, and that the title of the state could in no case be divested. On the contrary, it may be fairly inferred from the case that if the bonds were issued and used for a lawful purpose, the title passed to the holder unaffected by any claim of the state.<sup>81</sup> No presumption can arise from the absence of such indorsement on the bonds, that they had been issued without authority, and for an unlawful purpose, and the presumption that they had been issued with authority and for a lawful purpose is in favor of the holders of the bonds, especially after payment by the United States.<sup>82</sup> No one other than a holder of the bonds, or one who, having held them, has received the proceeds with notice of the illegal transfer for an illegal purpose, can be held liable to the claim of the reconstituted state. After presentment, recognition, and order of payment, any one never having held or controlled the bonds may receive the proceeds on a proper order.<sup>83</sup>

and passed readily from hand to hand as, or in lieu of, money. *District of Columbia v. Cornell*, 130 U. S. 655, 659, 32 L. Ed. 1041.

77. See the title CONSTITUTIONAL LAW, vol. 4, p. 191.

78. *Huntington v. Texas*, 16 Wall. 402, 21 L. Ed. 316; *Texas v. White*, 7 Wall. 700, 19 L. Ed. 227.

79. *Huntington v. Texas*, 16 Wall. 402, 21 L. Ed. 316; *Texas v. White*, 7 Wall. 700, 19 L. Ed. 227.

80. *Huntington v. Texas*, 16 Wall. 402, 21 L. Ed. 316; *Texas v. White*, 7 Wall. 700, 19 L. Ed. 227.

81. *Huntington v. Texas*, 16 Wall. 402, 410, 21 L. Ed. 316; *Texas v. White*, 7 Wall. 700, 19 L. Ed. 227; *National Bank v. Texas*, 20 Wall. 72, 83, 22 L. Ed. 295.

Whether an alienation of the bonds by the usurping government divested the title of the state, depends on other circumstances than the quality of the government. If the object and purpose of it were just in themselves and laudable, the alienation was valid; but if, on the contrary, the object and purpose were to break up the Union and overthrow the constitutional government of the Union, the alienation was invalid. *Huntington v. Texas*, 16 Wall. 402, 21 L. Ed. 316.

There is no competent evidence in this

chancery suit that the bonds in controversy, which were issued by the United States to the state of Texas, though overdue when they passed from the treasury of the state, were issued by the state or received by the person to whom they were delivered for any treasonable or other unlawful purpose. *National Bank v. Texas*, 20 Wall. 72, 22 L. Ed. 295.

82. *Huntington v. Texas*, 16 Wall. 402, 21 L. Ed. 316.

The absence of the indorsement of the governor of the state on the bonds does not raise a presumption of such unlawful purpose under the circumstances of this case. *National Bank v. Texas*, 20 Wall. 72, 22 L. Ed. 295.

The court say: "Especially after payment by the United States," because, it was primarily the duty of the government, as it was the obligor in the bonds, and as the rebellion was waged against it, to ascertain and decide whether bonds presented to and paid by it had or had not been issued and used in aid of the rebellion, and had, therefore, presumptively passed into the hands of holders who were not entitled to payment as against the reconstituted state. *Huntington v. Texas*, 16 Wall. 402, 21 L. Ed. 316.

83. *Huntington v. Texas*, 16 Wall. 402, 21 L. Ed. 316.



d. *Acceptance of Treasury Notes.*—See the title **BILLS, NOTES AND CHECKS**, vol. 3, pp. 285, 307, 351.

e. *Rights of Holder*—(1) *Holder of Overdue Securities.*—It has been held that negotiable government securities, redeemable at the pleasure of the government after a specified day, but in which no date is fixed for final payment, cease to be negotiable as overdue after the day named when they first become redeemable.<sup>84</sup> But this rule must be regarded as limited to cases where the title of the purchaser is acquired with notice of the defect of title, or under circumstances which discredit the instrument, such as would affect the title to negotiable paper payable on demand, when purchased after an unreasonable length of time from the date of issue.<sup>85</sup> The rule that purchasers of past due negotiable paper take nothing but the actual right and title of the vendor applies to a purchase of United States bonds which have become redeemable except where a distinction between redeemability and payability is made by law, and shown on the face of the bonds, because of the known usage of the United States to pay all bonds as soon as the right of payment accrues.<sup>86</sup> Where the bonds and treasury notes of the United States payable to holder or bearer at a definite future time are overdue, a purchaser takes subject to the rights of antecedent holders to the same extent as in other paper bought after its maturity.<sup>87</sup> No usage or custom among bankers and brokers dealing in such paper can be proved in contravention of this rule of law. They cannot, in their own interest, by violations of the law, change it.<sup>88</sup>

(2) *United States Bond Negotiated in Aid of Rebellion.*—See ante, "Power of State Owning United States Bonds to Limit Their Negotiability," V, D, 2, c.

3. **RIGHTS AND LIABILITIES OF PARTIES ON FORGED TREASURY NOTES.**—See the titles **BILLS, NOTES AND CHECKS**, vol. 3, pp. 350, 351; **FORGERY AND COUNTERFEITING**, vol. 6, p. 383.

**E. Remedies.**—See post, "Remedies," VI.

## VI. Remedies.

**A. Remedies on Warrants, Orders, etc.**—1. **JURISDICTION.**—**Adequate Remedy at Law.**—Where the warrants of a town if valid are legal causes of

<sup>84</sup>. *Texas v. White*, 7 Wall. 700, 19 L. Ed. 227.

<sup>85</sup>. *Morgan v. United States*, 113 U. S. 476, 28 L. Ed. 1044.

<sup>86</sup>. *Rights of holder.*—*Texas v. Hardenberg*, 10 Wall. 68, 19 L. Ed. 839; *Texas v. White*, 7 Wall. 700, 19 L. Ed. 227; *Morgan v. United States*, 113 U. S. 476, 477, 28 L. Ed. 1044. See the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 304.

A party buying bonds of the United States with overdue and unpaid coupons, is to be taken as affected with knowledge of prior equities when he purchases them after the date when they are redeemable, and for which the coupons run, knowing that the government, paying promptly all its bonds generally, objects at that time to redeeming these, and does not in fact redeem them or the overdue coupons, and where notice has been given in public papers of great circulation that payment of the bonds was forbidden, and that there was difficulty about them. *Texas v. Hardenberg*, 10 Wall. 68, 19 L. Ed. 839.

Bonds of the United States of the issue of 1865, known as "consols," redeemable after 1870 and payable July 1st, 1885, are not over due in the sense of the law merchant until after July 1st, 1885, and this even though calls have been made for their

redemption prior to that time. *Morgan v. United States*, 113 U. S. 476, 477, 497, 28 L. Ed. 1044.

A presumption of dishonor does not arise to effect the title of a holder of the bonds of the United States, acquired by a bona fide purchaser for value prior to a date fixed in the bonds themselves for their ultimate payment. *Morgan v. United States*, 113 U. S. 476, 500, 28 L. Ed. 1044.

"The fact that interest was to cease to accrue three months after the date of call (for redemption), has no tendency to discredit the bonds or affect the title of a bona fide purchaser for value in the due course of trade." *Morgan v. United States*, 113 U. S. 476, 501, 28 L. Ed. 1044.

<sup>87</sup>. *Vermilye & Co. v. Adams Express Co.*, 21 Wall. 138, 22 L. Ed. 609.

Treasury notes of the United States stolen from an express company and sold for value after due in the regular course of business may be recovered of the purchaser by the express company, which had succeeded to the right of the original owner. *Vermilye & Co. v. Adams Express Co.*, 21 Wall. 138, 22 L. Ed. 609.

<sup>88</sup>. *Vermilye & Co. v. Adams Express Co.*, 21 Wall. 138, 22 L. Ed. 609.

It is their duty when served with notice of the loss of such paper by the right-

action enforceable in a court of law, the remedy of the holder is at law and not in equity and it is error for a court of equity to consider and determine such legal controversy in a suit for specific performance and for an injunction, but the bill should be dismissed without prejudice to the holder's right to bring an action at law.<sup>89</sup>

**In respect to the jurisdiction of the Federal Courts,** the negotiability of municipal bonds does not cease, whenever the maker is permitted as against a bona fide holder for value, to establish a defense based upon equities between the original parties.<sup>90</sup>

2. **INTERVENTION.**—On a bill brought by a holder of municipal warrants on his own behalf, as well as on behalf of all other parties holding obligations of the same nature and kind, the object being to recover the amount of such warrants from funds alleged to have been misapplied by the municipality, or parties holding obligations of the same nature and kind may be allowed to come in and prove their claims without formal intervention or special leave.<sup>91</sup> This is the method commonly resorted to in bills for the foreclosure of railway mortgages, or other securities, under which bonds have been issued and are widely scattered in the hands of holders, many of whom are unknown and impossible to ascertain except by advertisement. In cases of this character decrees are treated as decrees in favor of all in like situation as the plaintiff who come in and claim the benefit of them.<sup>92</sup>

3. **AVERMENTS IN ACTION ON ACCEPTED ORDERS.**—See the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 360.

4. **VERIFICATION OF PLEADING.**—See post, "Evidence," V, A, 7. See the titles **BILLS, NOTES AND CHECKS**, vol. 3, p. 361; **EQUITY**, vol. 5, p. 868; **PLEADING**.

5. **DEMURRER.**—It is only after a failure to state a prima facie case that a general demurrer will lie for failure to state a cause of action.<sup>93</sup>

6. **LIMITATION OF ACTIONS.**—**As to limitation of suit against a city** constituting itself a trustee, see the title **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, p. 982.

7. **EVIDENCE.**—It seems that county and state warrants, signed by the proper officers, are prima facie binding and legal and that the officers will be presumed to have done their duty where the warrants have been, in fact, signed by the proper officers.<sup>94</sup> But in the absence of a statute to that effect, a paper upon which is written or printed an obligation of a county, bearing certain names, cannot be put in evidence, without proof that the signatures on the paper were

ful owner after maturity to make memoranda or lists, or adopt some other reasonable mode of reference, where the notice identifies the paper, to enable them to recall the service of notice. *Vermilye & Co. v. Adams Express Co.*, 21 Wall. 138, 22 L. Ed. 609.

89. **Remedies.**—*Raton Waterworks Co. v. Raton*, 174 U. S. 360, 43 L. Ed. 1005. See the titles **APPEAL AND ERROR**, vol. 2, p. 375; **DISMISSAL, DISCONTINUANCE AND NONSUIT**, vol. 5, p. 356; **EQUITY**, vol. 5, p. 816.

A waterworks company was in possession of warrants that had been issued to it by a town in pursuance of the provision of a contract between the company and the town. Those warrants were in the form of drafts drawn on the treasurer of the town, signed by the mayor and countersigned by the recorder of the town. These were for specific sums of money, payable at fixed periods, bearing interest from date, and some of them were passed

due when the town refused to pay the warrants upon the ground that they were illegal. The waterworks company filed a bill in equity for specific performance of the contract and for an injunction. It was held that the remedy of the company was at law and not in equity and that the bill should be dismissed without prejudice to the company's rights to bring the action at law. *Raton Waterworks Co. v. Raton*, 174 U. S. 360, 43 L. Ed. 1005. See the title **EQUITY**, vol. 5, p. 815.

90. *Ackley School Dist. v. Hall*, 113 U. S. 135, 140, 28 L. Ed. 954.

91. **Intervention.**—*New Orleans v. Warner*, 180 U. S. 199, 202, 45 L. Ed. 493.

92. *New Orleans v. Warner*, 180 U. S. 199, 45 L. Ed. 493, citing *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864. See the title **CREDITORS' SUITS**, vol. 5, p. 22.

93. **Demurrer.**—See the title **DEMURRERS**, vol. 5, p. 301.

94. **Evidence.**—*Apache County v. Barth*, 177 U. S. 538, 544, 44 L. Ed. 878.



those of the persons they purport to be.<sup>95</sup> There is nothing peculiar to a paper in the form of a county or municipal warrant which proves itself upon mere production. At common law, in an action upon such an instrument, and upon a pleading denying the execution thereof by the defendant, and setting up its forgery, the plaintiff in order to be entitled to put the instrument in evidence, and thereby to make a prima facie case, would be compelled to prove its execution.<sup>96</sup>

**Verification of Answer.**—The effect of the statute of Arizona is that when the defendant does not verify his answer in a case provided for therein, the warrant sued on is admitted as genuine, but when the answer denying that fact is verified, the plaintiff must prove it as he would have had to do at common law in a case where the genuineness of the paper was put at issue by the pleadings.<sup>97</sup>

**B. Remedies on Bonds**—1. **RIGHT OF ACTION AND JURISDICTION**—a. *Remedies of Obligor and Taxpayer.*—A municipal corporation cannot maintain a bill in equity to enjoin the holders of its bonds from proceeding at law to enforce such bonds where the municipality has a complete defense to the bonds at law.<sup>98</sup> Where property is put into the hands of a municipal corporation in exchange for its void securities, such corporation, represented by its taxpayers, may require a rescission of such a contract, on condition of a surrender of the void securities on the part of the vendor, and a reconveyance of the title in consideration of which they were issued; and by injunction restrain the vendor from prosecuting an action on such securities or one to recover the value of the property; and the officer of the corporation may be enjoined from paying the securities and directed to convey the lands to the vendor.<sup>99</sup> An in-

**95.** *Apache County v. Barth*, 177 U. S. 538, 544, 44 L. Ed. 878.

**96.** *Apache County v. Barth*, 177 U. S. 538, 546, 44 L. Ed. 878.

An action was brought upon certain county warrants fully described in the complaint, and it was therein alleged that they were issued under the direction and authority of the board of supervisors of the county, signed by the chairman, and countersigned by the clerk of the board. The answer denied the fact that the warrants were issued by the authority or direction of the board, and alleged that they were forged warrants, and that the county was not liable thereon. Irrespective of any statute in regard to pleading, an issue was thus joined which raised the question of the genuineness of the signatures subscribed to these warrants. It was held that the question of their execution being put in issue, it was necessary for the plaintiff to prove that fact before they could be admitted in evidence. *Apache County v. Barth*, 177 U. S. 538, 544, 44 L. Ed. 878.

The case of *Wall v. Monroe County*, 103 U. S. 74, 26 L. Ed. 430, does not show that the warrants were proved by their mere production; on the contrary, it appears that the warrants were drawn by the clerk of the county upon the treasurer in favor of a certain person and transferred by that person to the plaintiff. Their execution was alleged and proved, and the question decided had no relevancy to the matter here under discussion. *Apache County v. Barth*, 177 U. S. 538, 546, 44 L. Ed. 878.

**97.** **Verification of answer.**—*Apache County v. Barth*, 177 U. S. 538, 548, 44 L. Ed. 878.

**98.** A municipal corporation, obligors in a bond, cannot ask relief in equity that the obligee be enjoined from proceeding at law, and that the bond be surrendered, when his bill alleges that the bond was issued without authority, in violation of law and in fraud of the town; that the obligee knew this when he took it; that the obligee's possession is merely colorable, and that he gave no value for it, and never had any right or title to the bond. Such allegations show a complete defense to the bond at law; and a judgment against the obligee at law would give as full protection every way to the obligor as a decree in equity. *Grand Chute v. Winegar*, 15 Wall. 373, 21 L. Ed. 174.

**99.** *Crampton v. Zabriskie*, 101 U. S. 601, 25 L. Ed. 1070; *Chapman v. County of Douglas*, 107 U. S. 348, 360, 27 L. Ed. 378.

When the supreme court of New Jersey had decided that a resolution, adopted by the board of chosen freeholders of a county, to purchase lands whereon to erect a courthouse, and to issue in payment therefor bonds payable, etc., was illegal, and the vendor of the lands, had brought an action on said bonds against the board, resident taxpayers were entitled to a decree that the vendor be restrained from prosecuting that action or one to recover the value of the lands and that the board be enjoined from paying the bonds, and directed to convey the lands to the vendor, and that he be re-



junction suit is brought by an inhabitant of the district to restrain a board from issuing bonds, is an adversary proceeding.<sup>1</sup> If in such suit an injunction be granted, as is prayed for, the decision is not one of a moot question, but is an adjudication which protects the property of the taxpayer.<sup>2</sup>

**Amount in Controversy.**—As to the amount in controversy in a suit by taxpayer to enjoin bond issued, see the title *COURTS*, vol. 4, p. 979.

b. *Suits by Obligee or Holder*—(1) *In General*.—**There can be no jurisdiction in equity** to enforce the payment of corporation bonds until the remedy at law has been exhausted.<sup>3</sup> An action at law is maintainable by the holders of the bonds and coupons to recover the amount payable.<sup>4</sup>

**An action of assumpsit** cannot be brought to recover the sums due on the coupons.<sup>5</sup>

**State Bonds and Obligations.**—Those who deal in the bonds and obligations of a sovereign state are aware that they must rely altogether on the sense of justice and good faith of the state; and that the judiciary of the state cannot interfere to enforce these contracts without the consent of the state, and the courts of the United States are expressly prohibited from exercising such a jurisdiction.<sup>6</sup>

**Suit by One State against Another to Enforce State Bonds.**—See the title *COURTS*, vol. 4, p. 1010.

(2) *Extraordinary Remedies Provided for by Contract*.—Without attempting to state any general rule, if indeed one such exists, for distinguishing between a directory and a mandatory provision, it is sufficient to say that when a statute provides an extraordinary remedy to the holder of bonds containing an express stipulation that he "shall be entitled" to that remedy, it should not be adjudged that he is also entitled to it in the absence of such stipulation, for it is a reasonable presumption that if the county in issuing the bonds intended to contract for such extraordinary remedy, it would have complied with the express provisions of the statute and incorporated the stipulation into the bonds.<sup>7</sup>

(3) *Action on Detached Coupons*.—Where a town, issuing bonds to which coupons or interest warrants are attached, acknowledges, in the body of the bond, that the town is indebted to the bearer or his assigns in such a sum of money, payable at a future day named, "with interest thereon at the rate of 7 per cent, on presentation and delivery of the coupons for the same thereto attached," it may be sued on the coupons alone, although they may have been issued by commissioners specially made agents of the town by the legislature, and by it charged with the matter of issuing the securities, and not made by the or-

quired to accept a deed therefor. *Crampton v. Zabriskie*, 101 U. S. 601, 25 L. Ed. 1070.

1. *Tregea v. Modesto Irrig. Dist.*, 164 U. S. 179, 186, 41 L. Ed. 395. Underlying it is the claim that the agent is proposing to do for his principal that which he has no right to do, and to bind him by a contract which he has no right to make; and to protect his property from burden or cloud, the taxpayer is permitted to invoke judicial determination.

2. *Tregea v. Modesto Irrig. Dist.*, 164 U. S. 179, 186, 41 L. Ed. 395.

3. **Suits by obligee or holder.**—*Heine v. The Levee Comm'rs*, 19 Wall. 655, 22 L. Ed. 223; *Bernards Tp. v. Stebbins*, 109 U. S. 341, 351, 27 L. Ed. 956.

4. *Queensbury v. Culver*, 19 Wall. 83, 92, 22 L. Ed. 100.

5. *Queensbury v. Culver*, 19 Wall. 83, 92, 22 L. Ed. 100.

6. **State bonds and obligations.**—*Bank v.*

*Arkansas*, 20 How. 530, 532, 15 L. Ed. 993.

7. **Extraordinary remedies provided for by contract.**—*Hubbert v. Campbellsville Lumber Co.*, 191 U. S. 70, 76, 48 L. Ed. 101.

On March 18, 1878, the general assembly of Kentucky passed an act authorizing a county to issue bonds in a given amount. On February 27, 1882, an amendatory act was passed increasing the issuable amount and providing certain extraordinary remedies for collection not provided for by the original act. The county issued bonds purporting to be issued under the authority of the act of March 18, 1878, and which made no reference to the amendatory act but omitted the stipulation respecting the extraordinary remedies for collection provided by the latter act and required to appear on the face of the bonds. It was held that such omission deprives the holder of the extraordinary

dinary town authorities.<sup>8</sup> This liability of the town is not taken away by the fact that the legislature has directed a special mode in which the money to pay the principal and interest of the bonds is to be raised; the directions being given to the town and county agents, and not to the holders of the bonds or coupons.<sup>9</sup>

(4) *Reformation—Omission of Seal.*—The mere fact that the purchasers, at the time of their purchase, did not observe the omission of seals upon securities having in all other respects the appearance of municipal bonds, is not such negligence as should prevent them from applying to a court of equity to correct a mistake of this character.<sup>10</sup>

(5) *Enforcement of Levy of Tax.—Mandamus.*—See the title MANDAMUS, ante, p. 1.

**Equity Jurisdiction.**—Where the law has provided that a tax shall be levied to pay such bonds, a mandamus after judgment to compel the levy of the tax, in the nature of an execution or process to enforce the judgment, is the only remedy. The fact that this remedy has been shown to be unavailing does not confer upon a court of equity the power to levy and collect taxes to pay the debt.<sup>11</sup>

(6) *Foreclosure of Mortgage Given to Secure Bonds.*—A bona fide holder for value of bonds issued by a county in payment of subscription for stock in a railroad company may maintain a bill to foreclose a mortgage on swamp and overflowed lands of the county, executed under lawful authority, to secure such bonds, although the mortgage was informally executed or was obtained by fraud on the part of the agents of the railroad company.<sup>12</sup>

c. *Scaling Overissue—Cancellation.*—See ante, "Limitation of Amount," IV, E.

2. LIMITATIONS AND LACHES.—**Limitation of Actions on Coupons.**—See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 928.

**Bill in Nature of Creditor's Bill.**—Where a creditor files a bill in the nature of a creditor's bill, in a court of equity, and the right upon which the bill is predicated is barred at law,<sup>13</sup> the bill should be dismissed because by reason of laches in pursuing the remedy, the bar at law could be set up and maintained in equity.<sup>14</sup>

remedy granted in the amendatory act. Hubbert v. Campbellsville Lumber Co., 191 U. S. 70, 48 L. Ed. 101.

8. **Action on detached coupons.**—Queensbury v. Culver, 19 Wall. 83, 22 L. Ed. 100. See the title COUPONS, vol. 4, p. 855.

9. Queensbury v. Culver, 19 Wall. 83, 22 L. Ed. 100.

10. **Reformation—Omission of seal.**—Bernards Tp. v. Stebbins, 109 U. S. 341, 351, 27 L. Ed. 956, citing Elliott v. Sackett, 108 U. S. 132, 27 L. Ed. 678.

If commissioners, authorized by statute to subscribe in the corporate name of a town for stock in a railroad company, and, upon obtaining the consent of a certain majority of taxpayers, to issue bonds of the town under the hands and seals of the commissioners, and to sell the bonds and invest the proceeds of the sale in stock of the railroad company, which shall be held by the town with all the rights of other stockholders, issue, without obtaining the requisite consent of taxpayers, to the railroad company, in exchange for stock, such bonds signed by the commissioners, but on which the seals are omitted by oversight and mistake; and the town sets up the want of seals in defense

of an action at law afterwards brought against it by one who has purchased such bonds for value, in good faith, and without observing the omission, to recover interest on the bonds; a court of equity, at his suit, will decree that the bonds be held as valid as if actually sealed before being issued, and will restrain the setting up of the want of seals in the action at law. Bernards Tp. v. Stebbins, 109 U. S. 341, 27 L. Ed. 956.

11. **Equity jurisdiction.**—Heine v. The Levee Comm'rs, 19 Wall. 655, 22 L. Ed. 223.

12. **Foreclosure of mortgage given to secure bonds.**—Kenicott v. Supervisors, 16 Wall. 452, 21 L. Ed. 319.

13. In Young v. Clarendon Tp., 132 U. S. 340, 342, 33 L. Ed. 356, it was held that if the railroad company had any cause of action against the township by reason of the issue and cancellation of certain bonds in aid of the company, such cause of action was barred at law by the statute of limitations of the state of Michigan.

14. Young v. Clarendon Tp., 132 U. S. 340, 342, 33 L. Ed. 356. See the titles LACHES, vol. 7, p. 790; LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, pp. 979, 980.



**Rights to Plead Statute of Limitation.**—When a municipal corporation has failed to pay the interest on its bonds, and a special fund, to be created by its debtor, has been provided by law to which the coupon holder might look for payment, it cannot plead the statute of limitations until he shows that that fund has been provided.<sup>15</sup>

3. **PARTIES**—a. *Plaintiff*.—The holder of municipal bonds payable to a named payee or bearer can sue thereon in his own name.<sup>16</sup>

b. *Defendants*—(1) *In General*.—An action on municipal bonds should be brought against the corporate entity issuing them.<sup>17</sup>

(2) *Bonds Issued in Name of Precinct*.—Where bonds are issued by the county commissioners of a county in Nebraska, on behalf of a precinct in that county, to aid in constructing a "work of internal improvement," although, in such a bond and its coupons, the precinct is the promisor, a suit to recover on such coupons is properly brought against the county.<sup>18</sup>

(3) *Division of County—Suit against Original County*.—Where parts of two counties which are interested in a suit upon bonds have no separate organization of their own, and remain for all the purposes of the debt a part of another county, to which such parts originally belonged and which originally issued the bonds in suit, a suit against the original county is a suit against them, and a judgment against the original county will be payable out of taxes collected within the boundaries of the original county under the provisions of the act authorizing a settlement of the bond issue.<sup>19</sup> The fact that those parts of other counties taken from the original county were not joined as parties defendant in the suit does not amount to a defect of parties.<sup>20</sup>

(4) *Foreclosure of Mortgage Given to Secure Bonds*.—Where the statute of North Carolina with each of its bonds, gave a deed of mortgage upon a like amount of stock of a railroad company, a holder of such bonds may foreclose and sell the number of shares upon which he has a mortgage and the other bondholders need not be made parties defendant to the suit for foreclosure.<sup>21</sup>

(5) *Parties by Representation*.—There may be a class of persons who have an interest in the object of litigation but who need not be made parties where they are properly represented.<sup>22</sup> After decree such parties may come in and

**15. Rights to plead statute of limitation.**—*Lincoln County v. Luning*, 133 U. S. 529, 533, 33 L. Ed. 766.

**16. Plaintiff.**—*Roberts v. Bolles*, 101 U. S. 119, 25 L. Ed. 890; *Ottawa v. National Bank*, 105 U. S. 342, 344, 26 L. Ed. 1127.

**17. Defendants.**—*Atchison Board of Education v. DeKay*, 148 U. S. 591, 603, 37 L. Ed. 573.

Where the board of education of the city that issued bonds was at the time of issue a distinct corporation, an action on such bonds is properly brought against the board of education although since the issue the class of the city has been changed by reason of its increase in population to a city of a class in which the school board is not a distinct corporate body. *Atchison Board of Education v. DeKay*, 148 U. S. 591, 603, 37 L. Ed. 573.

**Suit against county to enforce township bond.**—*County of Cass v. Johnston*, 95 U. S. 360, 24 L. Ed. 416. See *Meath v. Phillips County*, 108 U. S. 553, 555, 27 L. Ed. 819.

**18. Bonds issued in name of precinct.**—*Nemaha County v. Frank*, 120 U. S. 41, 46, 30 L. Ed. 584; *Blair v. Cuming County*, 111 U. S. 363, 28 L. Ed. 457; *Davenport v. County of Dodge*, 105 U. S. 237, 26 L.

Ed. 1018. See *Meath v. Phillips County*, 108 U. S. 553, 555, 27 L. Ed. 819.

Where a precinct in an organized county in Nebraska voted, pursuant to the statute of that state approved Feb. 15, 1869, to aid a work of internal improvement, and bonds were, as in this case, issued therefor by the county commissioners, held, that, to enforce payment, the holder of them must sue the county, and judgment, if rendered in his favor, will be in form against it, and be collected by a tax upon the taxable property of the precinct. *Davenport v. County of Dodge*, 105 U. S. 237, 26 L. Ed. 1018.

**19. Division of county—Suit against original county.**—*Carter County v. Sinton*, 120 U. S. 517, 526, 30 L. Ed. 701.

**20.** *Carter County v. Sinton*, 120 U. S. 517, 523, 30 L. Ed. 701.

**21. Foreclosure of mortgage given to secure bonds.**—*South Dakota v. North Carolina*, 192 U. S. 286, 48 L. Ed. 448. See the titles **CHATTEL MORTGAGES**, vol. 3, p. 765; **PARTIES**.

**22. Parties by representation.**—*Wabash, etc., Canal Co. v. Beers*, 2 Black 448, 17 L. Ed. 327. See the titles **CREDITORS' SUITS**, vol. 5, p. 41; **PARTIES**.



prove their claims without formal interventions or special leave.<sup>23</sup>

4. **PROCESS.**—See the title **SUMMONS AND PROCESS.**

5. **PLEADING**—a. *Declaration or Complaint*—(1) *In General.*—**Authority to Issue.**—The holder must allege the authority of the town to issue the bonds.<sup>24</sup>

**Performance of Precedent Conditions.**—In an action on municipal bonds and coupons the holder need not allege performance of the prerequisites upon which the issuance of the bonds was authorized. He need only declare on the bonds.<sup>25</sup>

**Failure to Show Presentation for Allowance and Approval.**—The complaint is not defective in not showing that the bonds and coupons sued upon had been presented to the county commissioners and county auditor for allowance and approved, as provided by the state statutes, where the statute has application only to unliquidate claims and accounts, and does not apply to bonds and coupons.<sup>26</sup>

(2) *Filing Copy of Instrument Declared upon.*—In Illinois, a copy of the written instrument on which the action is founded must be filed with the declaration, and it constitutes part of the pleadings in the case.<sup>27</sup>

(3) *Prayer for Relief.*—No relief can be granted under the general prayer except such as is agreeable to the case made by the bill.<sup>28</sup> But in the case set out in the footnote, the bill was held sufficient to support a claim for relief as to proceeds where payment of the bonds and coupons had been actually received before service of process.<sup>29</sup>

b. *Demurrer*—(1) *To Declaration.*—A demurrer admits all facts well pleaded,<sup>30</sup> and the sufficiency of declaration when demurred to, depends upon whether or not such facts constitute a good cause of action.<sup>31</sup> An averment in

23. *New Orleans v. Warner*, 180 U. S. 199, 45 L. Ed. 493. See the titles **CREDITORS' SUITS**, vol. 5, pp. 39, 41; **PARTIES**. See ante, "Intervention," VI, A, 2.

24. *Hopper v. Covington*, 118 U. S. 148, 150, 30 L. Ed. 190.

25. *Lincoln v. Iron Co.*, 103 U. S. 412, 416, 26 L. Ed. 518; *County of Clay v. Society for Savings*, 104 U. S. 579, 586, 26 L. Ed. 856. See ante, "Performance of Condition Precedent and Requisites to Validity," IV, Q, 2, b, (26), (a), bb.

26. *Lincoln County v. Luning*, 133 U. S. 529, 532, 33 L. Ed. 766.

"This question was presented in the case of *County of Greene v. Daniel*, 102 U. S. 187, 194, 26 L. Ed. 99, in which the court observed, speaking of bonds and coupons, that 'the claim was, to all intents and purposes, audited by the court when the bonds were issued. The validity and amount of the liability were then definitely fixed, and warrants on the treasury given, payable at a future day.'" *Lincoln County v. Luning*, 133 U. S. 529, 532, 33 L. Ed. 766.

27. *Filing copy of instrument declared upon.*—*Nauvoo v. Ritter*, 97 U. S. 389, 24 L. Ed. 1050.

28. *Prayer for relief.*—*Texas v. Hardenberg*, 10 Wall. 68, 86, 19 L. Ed. 839.

29. Under a bill by a state praying that a defendant may be enjoined from asking payment of certain United States bonds belonging to it, unlawfully taken some time before from its treasury, and now redeemable, and for such other and further relief as the court may deem proper, equity will follow a substituted security

(new bonds bearing interest) given by the United States; the substitution having been made after the issue of process under the bill, though before service, by agreement between the holder of the bonds and the United States, in order that the party properly entitled, whoever he might finally under the bill decided to be, should not lose interest; and the new bonds being held by a trustee for this purpose. *Texas v. Hardenberg*, 10 Wall. 68, 19 L. Ed. 839.

30. See the title **DEMURRERS**, vol. 5, p. 293.

31. *Hopper v. Covington*, 118 U. S. 148, 30 L. Ed. 190; *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 175, 20 L. Ed. 557.

The town having but a limited authority to issue bonds for certain purposes, it is not enough for the plaintiff to aver in general terms that the town was authorized to issue the bonds in suit; but he must state the facts which bring the case within the special authority. The averment that the defendant is a municipal corporation under the laws of Indiana, "with full power and authority, pursuant to the laws of said state, to execute negotiable commercial paper," is inconsistent with the public laws of the state of which the courts of the United States take judicial notice. *Hopper v. Covington*, 118 U. S. 148, 151, 30 L. Ed. 190; *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 175, 20 L. Ed. 557.

As the declaration sets out a copy of the bonds with all the recitals, and the recitals show that the bonds were irregularly issued and not binding upon the township, it follows that the declaration

a declaration of a conclusion of law is not admitted by demurrer, and the declaration is fatally defective unless it states facts necessary to enable the court to judge for itself whether that conclusion of law has any foundation in fact.<sup>32</sup>

(2) *To Plea or Answer*.<sup>33</sup>—An answer in a suit on municipal bonds which is of such character as to present no issuable question of fact going to the merits of the suit is properly demurred to and in such case the demurrer should be sustained.<sup>34</sup> Whether bonds were issued under the general statute of the state and in pursuance of the vote of the people or by virtue of a special act is a matter properly demurrable in a suit on the bonds, and one to be finally settled by the judgment therein.<sup>35</sup> Under the code of practice of Missouri, if any one of the defenses set up in the answer is a bar to the plaintiff's right to recover, a demurrer to the whole answer must be overruled.<sup>36</sup>

(3) *To Replication*.—See the title DEMURRERS, vol. 5, p. 309.

c. *Plea and Answer*.—See post, "Issues," VI, B, 6; "Proof of Execution of Bonds," VI, B, 7, d.

6. ISSUES.—Where a declaration in assumpsit upon bonds of a county issued to a railroad company, alleges that the bonds were issued by the county in pursuance of an act of legislature named, and that they were purchased by the plaintiffs for value and before any of them fell due, a plea of the general issue puts in issue the question of authority to issue, bona fides and notice.<sup>37</sup> Where a suit is brought solely for recovery upon railroad aid bonds and coupons issued by a town, no question growing out of the liability of the town for the subscription to the stock can be inquired into.<sup>38</sup> Nor can a question as to whether the railroad corporation had a legal existence or not, be raised in such an action.<sup>39</sup>

does not set forth a good cause of action against the defendant, and that the demurrer was properly sustained. *McClure v. Oxford Tp.*, 94 U. S. 429, 433, 24 L. Ed. 129.

32. *Hopper v. Covington*, 118 U. S. 148, 151, 30 L. Ed. 190; *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 175, 20 L. Ed. 557.

33. See the title DEMURRERS, vol. 5, p. 302.

34. *Chicot County v. Sherwood*, 148 U. S. 529, 536, 37 L. Ed. 546.

An answer to a declaration in an action on municipal bonds and coupons set forth the suit under which the election was held and alleged that a condition of affairs existed in the county that precluded a free and fair election and that the veriest sham of an election was held "as shown by papers filed with the county clerk;" together with various other recited irregularities, alleged to be shown by papers filed, but by whom filed was not averred; nor was it stated how or in what way such irregularities affected the vote actually cast and counted. After a recital of these matters which, it is said, appear "by reference to certified copies of the papers sent into the clerk's office from some of the various precincts in the county," the conclusion set up in the answer is as follows: "And so the county says that there was in fact no election held in said county \* \* \* to determine whether or not the county would \* \* \* issue bonds to pay the same." It was held that the answer was of such a character as to present no issuable questions of fact going to the merits of the suit, and was properly demurred to and there was no error in sustaining the demurrer. *Chicot County v. Sherwood*, 148 U. S. 529, 536, 37 L. Ed. 546.

*cot County v. Sherwood*, 148 U. S. 529, 536, 37 L. Ed. 546.

35. *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 94, 37 L. Ed. 93; *Harshman v. Knox County*, 122 U. S. 306, 30 L. Ed. 1152.

36. *County of Dallas v. MacKenzie*, 94 U. S. 660, 24 L. Ed. 182. See the title DEMURRERS, vol. 5, p. 293.

A county in Missouri, sued on certain coupons attached to bonds alleged to have been issued by it, denied in its answer the plaintiff's ownership for value; and, for a further defense, averred that no orders authorizing the issue of such bonds were ever made by the proper court, but that two of the justices thereof fraudulently and corruptly, but not as a court, made certain other orders, upon condition which were not complied with. It further averred that such bonds were fraudulently and corruptly issued and without authority. No copy of the bonds was filed with the plaintiff's complaint. The plaintiff demurred to the answer. It was held that the demurrer must be overruled, for by his demurrer the plaintiff admits that he is not a holder for value of the coupons. *Dallas County v. MacKenzie*, 94 U. S. 660, 24 L. Ed. 182.

37. *Issues*.—*Chambers County v. Clews*, 21 Wall. 317, 22 L. Ed. 517.

38. *Norton v. Dyersburg*, 127 U. S. 160, 176, 32 L. Ed. 85.

39. *Dallas County v. Huidekoper*, 154 U. S., appx., 654, 25 L. Ed. 974; *Dallas County v. Huidekoper*, 154 U. S., appx., 655, 25 L. Ed. 974; *Macon County v. Shores*, 97 U. S. 272, 24 L. Ed. 889. See ante, "Payee Corporation Defectively Organized," IV, Q, 2, b, (15).



The plea of *non est factum* does not put in issue the fact that the plaintiff was the holder.<sup>40</sup>

7. EVIDENCE—*a. Presumptions and Burden of Proof.*—**Upon Plea of Non Est Factum.**—Upon a plea of *non est factum* legislative authority for an issue of bonds being established by reference to the statute, and the bonds reciting that they were issued in pursuance of the statute, the utmost which plaintiff is bound to show to entitle him, *prima facie*, to judgment, is the due appointment of the commissioners and the execution by them, in fact, of the bonds.<sup>41</sup>

*b. Admissibility in General.*—Where a matter to be determined is whether an issue of municipal bonds was made under the general statute of the state, or under a special act, the whole conduct of the municipality both before, at the time, and after the issue of the bonds may be shown to aid in determining under what statute the municipality proceeded.<sup>42</sup>

*c. Admissibility of Bonds and Coupons.*—See the title DOCUMENTARY EVIDENCE, vol. 5, p. 454.

*d. Proof of Execution of Bonds.*—Where the validity of the bonds is admitted by the answer, it is unnecessary to prove every separate step which otherwise might be required in order to show the legality of this issue.<sup>43</sup> It is not necessary in a suit against the county to prove the order of the county court authorizing the president of the court to sign and the agent to countersign the bonds, there being no plea or answer sworn to denying the execution of the

40. *Montclair v. Ramsdell*, 107 U. S. 147, 158, 27 L. Ed. 431.

41. *Bernards Tp. v. Morrison*, 133 U. S. 523, 527, 33 L. Ed. 726. See, also, *Bernards Tp. v. Stebbins*, 109 U. S. 341, 27 L. Ed. 956; *New Providence v. Halsey*, 117 U. S. 336, 29 L. Ed. 904. See ante, "In General," IV, Q, 2, a, (3), (c), aa, (aa).

**Plea of non est factum.**—It is not necessary that he should, in the first instance, prove either that he paid value, or that the conditions preliminary to the exercise by the commissioners of the authority conferred by statute were, in fact, performed before the bonds were issued. The one is presumed from the possession of the bonds; and the other is established by the statute authorizing an issue of bonds, and by proof of the due appointment of the commissioners, and their execution of the bonds, with recitals of compliance with the statute. *Montclair v. Ramsdell*, 107 U. S. 147, 158, 27 L. Ed. 431; *Bernards Tp. v. Morrison*, 133 U. S. 523, 527, 33 L. Ed. 726.

42. **Admissibility in general.**—*Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 97, 37 L. Ed. 93, citing *Chicago v. Sheldon*, 9 Wall. 50, 54, 19 L. Ed. 594; *Steinbach v. Stewart*, 11 Wall. 566, 20 L. Ed. 56; *Canal Co. v. Hill*, 15 Wall. 94, 21 L. Ed. 64; *Merriam v. United States*, 107 U. S. 437, 27 L. Ed. 531; *United States v. Gibbons*, 109 U. S. 200, 27 L. Ed. 906.

In determining that question, any statement on the records of the county may be competent evidence. Suppose the bonds contained no recitals, but simply an acknowledgment of indebtedness, and in a suit on them their validity was admitted, and there were two statutes, under either of which the bonds might have been issued, a single entry on the records of the county might be sufficient, in the absence

of all other testimony, to support a finding that the bonds were issued under one rather than the other statute. All that can be said from the omission to introduce in evidence a full recital of all the steps necessary to make a perfect proceeding under the general statute is, that such omission detracts from the force of the testimony from the records and proceedings actually produced. In this respect it will be noticed that there is a marked difference between an omission to prove one step in a prescribed course of proceeding, and evidence that such step was not taken, for if it were established that one essential step in a course of proceeding required by one statute was not taken, it might well be held that the bonds admitted to be valid were in fact issued under the other statute. *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 98, 37 L. Ed. 93.

The court permitted the plaintiff to offer in evidence the tax levies for several years after the issue of the bonds; a copy of the entries made on the bond register of the county in 1874, showing the bonded indebtedness of the county; and a financial statement of the county, published by direction of the county court. It also instructed the jury that they might consider these matters in determining what was the intent of the county court in issuing the bonds, "that is to say, whether they intended to act exclusively under the railroad charter, or under authority conferred by a popular vote, or under both powers." It was not said by the court that these matters created an estoppel upon the county, or concluded it as to the question, but simply that they were matters to be considered. *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 99, 37 L. Ed. 93.

43. **Proof of execution of bonds.**—*Knox*



bonds or coupons sued on.<sup>44</sup> Where, as in Alabama, a statute enacts that the execution of a written instrument cannot be questioned unless the defendant by a sworn plea deny it, a county sued in assumpsit with a plea of general issue, on instruments alleged to be its bonds issued to a railroad, cannot object that there was no evidence that the seal on the bonds was the proper seal.<sup>45</sup>

e. *Proof of Bona Fide Ownership*.—Testimony is admissible to prove that the plaintiff was a bona fide holder and owner of the coupons sued on, there being no averment in the petition to that effect.<sup>46</sup> Where bona fide ownership is alleged in the petition, and this ownership at the maturity of the coupons and for value is denied in the answer, evidence in this point is not only proper but necessary.<sup>47</sup> Where, in an action against a county, to recover the amount due on coupons detached from bonds issued by it in payment of its subscription to the capital stock of a railroad company, the declaration avers that the plaintiff is a bona fide holder of them for value before maturity, and such averment is traversed, it is competent for him, notwithstanding the presumption of law in his favor, to maintain the issue by direct affirmative proof.<sup>48</sup>

f. *Judicial Notice*.—The courts will take judicial notice of the public laws of a state. They are not foreign laws.<sup>49</sup>

8. *QUESTIONS OF LAW AND FACT*.—Whether an alleged defense, when set up, is or is not good against the particular holder, is to be determined by the court in each case.<sup>50</sup>

9. *DIRECTING VERDICT*.—See the title *VERDICT*.

10. *WRIT OR ORDER OF INJUNCTION*.—An injunction from a state court to a municipal officer enjoining him from enforcing a tax to pay a municipal bond cannot stand in the way of the enforcement of the tax by a circuit court of the United States, to carry its judgment into execution, where subsequent to the injunction a judgment for payment of the interest which it was agreed should be made by the assessment and collection of the tax recovered in the circuit court of the United States.<sup>51</sup>

11. *JUDGMENT AND ENFORCEMENT*.—*In General*.—Judgment may be rendered on bonds given by a county in behalf of the township, under the township aid act of Missouri, against the county.<sup>52</sup>

*Enforcement*.—See the title *MANDAMUS*, vol. 8, p. 66.

*County v. Ninth Nat. Bank*, 147 U. S. 91, 98, 37 L. Ed. 93.

44. *County of Ralls v. Douglass*, 105 U. S. 728, 729, 26 L. Ed. 957.

"Under the practice in Missouri, unless the execution of the bonds was denied under oath, their execution was admitted. There was no such denial here. Hence it was only necessary to prove such facts connected with the execution as were directly put in issue by the pleadings. The only defense relied on under this branch of the case was the authority of the court to make the order it did. All else was, therefore, admitted. As the presiding judge was necessarily the president of the court, the bonds are not invalid because signed by the president as presiding judge." *County of Ralls v. Douglass*, 105 U. S. 728, 732, 26 L. Ed. 957.

45. *Chambers County v. Clews*, 21 Wall. 317, 22 L. Ed. 517. See the titles *BILLS, NOTES AND CHECKS*, vol. 3, p. 257; *PLEADING*.

46. *Proof of bona fide ownership*.—*County of Ralls v. Douglass*, 105 U. S. 728, 730, 26 L. Ed. 957.

47. *County of Ralls v. Douglass*, 105

U. S. 728, 732, 26 L. Ed. 957.

48. *County of Macon v. Shores*, 97 U. S. 272, 24 L. Ed. 889.

49. An averment, that a municipal corporation under the laws of Indiana, "with full power and authority, pursuant to the laws of said state, to execute negotiable commercial paper," if understood as alleging a general power to execute negotiable commercial paper, is inconsistent with the public laws of the state, of which the courts of the United States take judicial notice. *Hopper v. Covington*, 118 U. S. 148, 30 L. Ed. 190; *Merrill v. Monticello*, 138 U. S. 673, 684, 34 L. Ed. 1069. See the title *JUDICIAL NOTICE*, vol. 7, p. 692.

50. *Question of law and fact*.—*Lincoln v. Iron Co.*, 103 U. S. 412, 416, 26 L. Ed. 518.

51. *Writ or order of injunction*.—*Hawley v. Fairbanks*, 108 U. S. 543, 27 L. Ed. 820. See the title *INJUNCTIONS*, vol. 6, p. 1058.

52. *Judgment and enforcement*.—*County of Cass v. Johnston*, 95 U. S. 30, 24 L. Ed. 416; *Cass County v. Jordan*, 95 U. S. 373, 375, 24 L. Ed. 419.

**MUNICIPAL COURTS.**—See the title **MUNICIPAL CORPORATIONS**, ante, p. 546.

**MUNICIPAL LAW.**—As to point that “law” in contract clause of constitution refers to municipal law, see the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 770. International law as part of municipal law, see the title **INTERNATIONAL LAW**, vol. 7, p. 241.

**MUNICIPAL OFFICERS.**—See the title **MUNICIPAL CORPORATIONS**, ante, p. 546.

**MUNICIPAL ORDINANCES.**—See the title **ORDINANCES**.

**MUNICIPAL RECORDS.**—See the title **MUNICIPAL CORPORATIONS**, ante, p. 546.

**MUNICIPAL TAXATION.**—See the title **TAXATION**.

**MUNICIPAL WARRANTS.**—See the title **MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES**, ante, p. 650.

**MUNITIONS OF WAR.**—See note 1.

**MURDER.**—See the title **HOMICIDE**, vol. 6, p. 695.

**MURIATE COCAINE.**—Muriate of cocaine is defined in the tariff act of October 1, 1890, as an alkaloidal salt, and is a chemical salt produced by combinations of the alkaloid cocaine and muriatic acid.<sup>2</sup>

**MUTILATION.**—See note 3.

**MUTUAL ACCOUNTS.**—See the title **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, p. 932.

**MUTUAL ASSENT.**—Mutual assent is the meeting of the minds of both parties.<sup>4</sup>

**MUTUAL BENEFIT SOCIETIES.**—See the titles **BENEFICIAL AND BENEVOLENT ASSOCIATIONS**, vol. 3, p. 211; **MUTUAL INSURANCE**.

**MUTUAL CREDITS AND DEBTS.**—See note 5.

1. **Munitions of war.**—Under the act of July 6th, 1812, “to prohibit American vessels from proceeding to or trading with the enemies of the United States, and for other purposes,” it was held, that living fat oxen, etc., were articles of provision and munitions of war, within the true intent and meaning of the act. *United States v. Sheldon*, 2 Wheat. 119, 4 L. Ed. 199. See, also, *United States v. Barber*, 9 Cranch 243, 3 L. Ed. 719.

2. **Muriate of cocaine.**—*Fink v. United States*, 170 U. S. 584, 585, 42 L. Ed. 1153.

3. **Mutilation.**—In an action against a railway company for ejection from its cars, the defense was that the coin tendered the conductor as fare was not a current coin, one that was not mutilated, a perfect coin, one that was worth its face value. The trial judge remarked: “It is not mutilated in the ordinary sense. Mutilation implies the taking away of some part. It is not mutilated in the ordinary sense of the term; a portion of it is gone only by use, by currency, and that happens to any coin after it has passed through numerous hands.” The case was affirmed on appeal. *Jersey City, etc., R. Co. v. Morgan*, 160 U. S. 288, 292, 40 L. Ed. 430.

4. *Insurance Co. v. Young*, 23 Wall. 85, 107, 23 L. Ed. 152. See the title **CONTRACTS**, vol. 4, p. 561.

5. **Mutual credits.**—In *Scott v. Armstrong*, 146 U. S. 499, 507, 36 L. Ed. 1059, the court said: “In equity, relief was usually

accorded, says Mr. Justice Story (Eq. Jur., § 1435), ‘where, although there are mutual and independent debts, yet there is a mutual credit between the parties, founded, at the time, upon the existence of some debts due by the crediting party to the other. By mutual credit, in the sense in which the terms are here used, we are to understand, a knowledge on both sides of an existing debt due to one party, and a credit by the other party, founded on, and trusting to such debt, as a means of discharging it.’ This definition is hardly broad enough to cover all the cases where, as the learned commentator concedes, there being a ‘connection between the demands, equity acts upon it, and allows a set-off under particular circumstances.’ Section 1434. Courts of equity frequently deviate from the strict rule of mutuality when the justice of the particular case requires it, and the ordinary rule is that where the mutual obligations have grown out of the same transaction, insolvency on the one hand justifies the set-off of the debt due upon the other.” See, also, *Blount v. Windley*, 95 U. S. 173, 177, 24 L. Ed. 424; *Carr v. Hamilton*, 129 U. S. 252, 262, 32 L. Ed. 669; *Scammon v. Kimball*, 92 U. S. 362, 23 L. Ed. 483. And see the title **SET-OFF, RECOUPMENT AND COUNTERCLAIM**.

**Bankruptcy.**—As to mutual credits as used in the bankrupt act of 1867, see the title **BANKRUPTCY**, vol. 2, p. 923.

**Mutual credit and debt compared.**—In

# MUTUAL INSURANCE.

BY A. P. WALKER.

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## CROSS REFERENCES.

See the title **INSURANCE**, vol. 7, pp. 66, 76, and cross references there given.

### I. Associations and Corporations.

The words "doing business," in a state statute regulating corporations and associations doing a life or casualty insurance business on the assessment plan and providing that corporations "doing business under this act" shall not be subject to the general insurance laws of the state, refer to issuing policies and not to paying those which have been antecedently issued.<sup>1</sup>

**Membership.**—The insured in a mutual insurance company must be a member of the company.<sup>2</sup>

The insurance feature or endowment rank of the supreme lodge of **Knights of Pythias** has no connection with that order other than that no one can become a member of the endowment rank who is not a member of the order.<sup>3</sup>

**Majority.**—All the members of the company are bound by the act of the majority.<sup>4</sup>

*Libby v. Hopkins*, 104 U. S. 303, 306, 26 L. Ed. 769, the court said: "The plaintiffs insist that the term **mutual credits** is more comprehensive than the term **mutual debts** in the statutes relating to set-off; that credit is synonymous with trust, and the trust or credit need not be money on both sides; that where there is a deposit of property on one side without authority to turn it into money, no debt can arise out of it; but where there are directions to turn it into money it may become a debt, the reason being that when turned into

money it becomes like any other **mutual debt**. \* \* \* We cannot assent to these views, and they receive but little support from the adjudged cases."

1. **Associations and corporations.**—*Knights Templars', etc., Co. v. Jarman*, 187 U. S. 197, 204, 47 L. Ed. 139.

2. **Membership.**—*Union Ins. Co. v. Hoge*, 21 How. 35, 64, 16 L. Ed. 61.

3. *Knights of Pythias v. Kalinski*, 163 U. S. 289, 41 L. Ed. 163.

4. **Majority.**—*Korn v. Mutual Assur. Soc.*, 6 Cranch 192, 3 L. Ed. 195.



## II. Change of Constitution and By-Laws.

As a general rule, the assured is bound by subsequently adopted by-laws of the society,<sup>5</sup> and by changes of its regulations and constitution;<sup>6</sup> but he is not bound by changes which on their face indicate that they apply only to policies thereafter to be issued.<sup>7</sup>

**Change from Assessment to Legal Reserve Plan.**—See post, "Change from Assessment to Legal Reserve Plans," III, B, 5, b.

## III. The Contract of Insurance.

**A. Nature.**—The contract of insurance when made with a mutual insurance company, although in terms a contract with a corporation, is in substance a contract between the insured and all other members of that company.<sup>8</sup>

**B. Premiums and Assessments**—1. **DEFINITIONS.**—**Premium and Quota.**—Under the law relating to the Mutual Assurance Society of Virginia, a premium is the sum paid down before the contract is entered into; while a quota is the occasional contribution, exacted of individuals to make up the losses from time to time sustained.<sup>9</sup>

2. **DUTY TO MAKE ASSESSMENT.**—As a general rule an assessment assurance association is not required to make assessments except when made necessary in order to meet existing claims.<sup>10</sup>

3. **NOTICE.**—Where the insured is not bound to pay an assessment of which notice is not given, at least in the mode designated, and where the duty to give such notice is necessarily upon the association, it cannot claim a forfeiture except upon showing that such duty was performed.<sup>11</sup> The duty imposed upon the insured of an assessment insurance association to inform the association of his failure to receive notice of an assessment being neither expressly, nor by necessary implication, made a condition of the contract, the nonperformance of which would cause a forfeiture of membership and previous payments, his

**5. Change of constitution and by-laws.**—*Mutual Assur. Soc. v. Korn*, 7 Cranch 396, 3 L. Ed. 383.

In the capacity of an individual of the body corporate, the members of a mutual insurance society are bound by the by-laws of the society, so far as is consistent with the nature of its institution. *Mutual Assur. Soc. v. Korn*, 7 Cranch 396, 399, 3 L. Ed. 383; *Korn v. Mutual Assur. Soc.*, 6 Cranch 192, 3 L. Ed. 195.

The proprietors of buildings in Alexandria, insured by the society, were bound, by the act of assembly of Virginia, passed in 1805, and the subsequent regulations of the society, to pay an additional premium upon the increased rate of hazard, according to the new regulations of 1805. *Mutual Assur. Soc. v. Korn*, 7 Cranch 396, 3 L. Ed. 383.

6. *Knights Templars', etc., Co. v. Jarman*, 187 U. S. 197, 47 L. Ed. 139.

7. *Knights Templars', etc., Co. v. Jarman*, 187 U. S. 197, 47 L. Ed. 139.

An agreement contained in a clause in an application for a policy of life insurance on the assessment plan, which is as follows: "to abide by the constitution, rules and regulations of the company, as they now are, or may be constitutionally changed hereafter," does not amount to a consent to changes which on their face indicate that they apply only to policies thereafter to be issued. *Knights Tem-*

*plars', etc., Co. v. Jarman*, 187 U. S. 197, 199, 47 L. Ed. 139.

8. **Nature.**—*Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327, 344, 44 L. Ed. 1088, citing *New York Life Ins. Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789.

9. **Premium and quota.**—*Mutual Assur. Soc. v. Faxon*, 6 Wheat. 606, 607, 5 L. Ed. 342; *Mutual Assur. Soc. v. Watts*, 1 Wheat. 279, 4 L. Ed. 91.

10. **Duty to make assessments.**—*Mutual, etc., Life Ass'n v. Hamlin*, 139 U. S. 297, 298, 35 L. Ed. 167.

11. **Notice.**—*Mutual, etc., Life Ass'n v. Hamlin*, 139 U. S. 297, 304, 35 L. Ed. 167.

Where the insured was entitled, of right, to notice—at least in the form prescribed by the contract, namely, by mail, according to the association's usual course of business—and such notice was not, in fact, given, the assessment, as to him, did not become due and payable, and he did not cease to be a member of the association by reason of his failure to pay it. *Mutual, etc., Life Ass'n v. Hamlin*, 139 U. S. 297, 302, 35 L. Ed. 167.

**Estoppel of insured by seeking reinstatement.**—A member of an assessment insurance society failed to pay an assessment of which notice was not given to him, although he was entitled to the same. The association thereupon claimed that he had forfeited his rights as a member. An attempt was made to have him reinstated

failure to inform the association that he had not received notice of such assessment is immaterial and cannot excuse its failure to give the required notice.<sup>12</sup>

**Question for Jury.**—Whether notice of an assessment was in fact mailed to the assured is a question for the jury.<sup>13</sup>

**The burden of proof** to show that the notice of an assessment, properly directed, was mailed according to its usual course of business, is upon the association.<sup>14</sup>

4. **AMOUNT.**—The additional premium upon a revaluation under § 7 of the act of 1805, Virginia Laws, vol. 2, App. 81, under the rules of the society, is only upon the excess between the old and new valuation and not on the whole sum at which the buildings were insured.<sup>15</sup>

5. **MANNER OF PAYMENT**—a. *In General.*—In the absence of any prescribed mode of payment of premiums, due a mutual insurance company, the power to prescribe it by the company is necessarily implied; otherwise, the object for which it was created would be defeated.<sup>16</sup>

b. *Change from Assessment to Legal Reserve Plan.*—Where the right of amendment exists, an assessment insurance company may change its business from the legal reserve plan of "old line" insurance.<sup>17</sup>

by the act of the association. It was held that that attempt—evidently made to avoid litigation—cannot be regarded as a waiver of the rights the insured had as a member. *Mutual, etc., Life Ass'n v. Hamlin*, 139 U. S. 297, 306, 35 L. Ed. 167.

12. *Mutual, etc., Life Ass'n v. Hamlin*, 139 U. S. 297, 303, 35 L. Ed. 167.

If the association did not make an assessment, information in writing from the insured that he had not received notice of one would have been an idle ceremony. If it made one, and did not give the insured notice of it—at least in the mode prescribed—his failure to inform the association that he had not received notice of such assessment was immaterial and could not excuse its failure to give the required notice. *Mutual, etc., Life Ass'n v. Hamlin*, 139 U. S. 297, 303, 35 L. Ed. 167.

13. **Question for jury.**—*Mutual, etc., Life Ass'n v. Hamlin*, 139 U. S. 297, 304, 35 L. Ed. 167.

Where there is conflicting evidence as to whether notice of an assessment to which a member was entitled was mailed by the association to a member, the question was peculiarly one for the determination of the jury. *Mutual, etc., Life Ass'n v. Hamlin*, 139 U. S. 297, 298, 35 L. Ed. 167.

14. *Mutual, etc., Life Ass'n v. Hamlin*, 139 U. S. 297, 304, 35 L. Ed. 167.

15. **Amount.**—*Atkinson v. Mutual Assur. Soc.*, 6 Cranch 202, 3 L. Ed. 199.

16. **Manner of payment.**—*Union Ins. Co. v. Hoge*, 21 How. 35, 66, 16 L. Ed. 61.

Under a general act of the legislature of New York, passed on the 10th of April, 1849, which authorized the incorporation of insurance companies in the state under it, held that the eighth section in the charter of a mutual insurance company formed under the general act, which provided for the payment of cash premiums, at the election of the insured, as well as pre-

miums secured by notes, was authorized by the general act, and that a policy issued upon a payment of the premium in cash was legal and valid. *Union Ins. Co. v. Hoge*, 21 How. 35, 16 L. Ed. 61.

Admitting that the insured in a mutual insurance company must be a member of the company, he is made so by the payment of the cash premium. *Union Ins. Co. v. Hoge*, 21 How. 35, 64, 16 L. Ed. 61.

"The theory of a mutual insurance company is, that the premiums paid by each member for the insurance of his property constitute a common fund, devoted to the payment of any losses that may occur. Now, the cash premium may as well represent the insured in the common fund as the premium note; and this class of companies has been so long engaged in the business of insurance, it may well be that they can determine, with sufficiency certainty for all practical purposes, the just difference in the rates of premium between cash and notes." *Union Ins. Co. v. Hoge*, 21 How. 35, 64, 16 L. Ed. 61.

17. **Change from assessment to legal reserve plan.**—*Wright v. Minnesota, etc., Ins. Co.*, 193 U. S. 657, 48 L. Ed. 832.

The articles of association of a life insurance company contained a reservation of the right of amendment of such articles of association except that the amounts pledged to secure payments of assessments occasioned by the death of members should be used only for that purpose, and it was expressly provided that this article should never be amended without the written consent of every member. With the consent of a majority of the policy holders and the approval of the state superintendent of insurance, the company changed its business from the assessment to the legal reserve, flat premium plan of "old line" insurance. A bill was filed on the part of two dissatisfied holders of certificates issued while the company was



6. **LIABILITY FOR PAYMENT OF CONTRIBUTION.**—The obligation of the insured to contribute, in case of a loss, does not cease, in consequence of his forfeiture of his policy by his own neglect to conform to the rules of the association.<sup>18</sup>

**Liability of Vendee.**—Under the 6th and 8th sections of the act of assembly of Virginia, of the 22d of December, 1794, property pledged to the Mutual Assurance Society, etc., continues liable for assessments, on account of the losses insured against, in the hands of a bona fide purchaser, without notice.<sup>19</sup> Under the laws in relation to the Mutual Assurance Society of Virginia, property offered for insurance, on which the premium has not been paid, and which is sold, without notice, is not liable for the premium, in the hands of the vendee.<sup>20</sup>

7. **FORFEITURE FOR NONPAYMENT.**—See post, "Forfeiture," III, E, 1.

**C. Risks and Causes of Loss.**—**Suicide.**—See the title *INSURANCE*, vol. 7, p. 138. In Missouri the liability of an assessment insurance company where the assured commits suicide is statutory.<sup>21</sup>

doing business on the assessment plan to wind up the affairs and distribute the assets of the company alleging that their original contract was impaired by reason of the change permitted by the state law. It was held that the reservation of the right of amendment authorizes the company to bind its members by a change in the plan of the insurance business done by the defendant company from the assessment to the legal reserve, flat premium plan of "old line" insurance; and that there was no vested right in a holder of certificates issued on the assessment plan, to a continuation of that plan, that constituted a contract, nor did the statute of the state authorizing a change of this character work the impairment by the state of the obligation of the contract. *Wright v. Minnesota, etc., Ins. Co.*, 193 U. S. 657, 48 L. Ed. 832.

**18. Liability for payment or contribution.**—*Korn v. Mutual Assur. Soc.*, 6 Cranch 192, 3 L. Ed. 195, so held where the assured neglected to conform to a rule or revaluation.

**19. Liability of vendee.**—*Mutual Assur. Soc. v. Watts*, 1 Wheat. 279, 4 L. Ed. 91.

In *Mutual Assur. Soc. v. Watts*, 1 Wheat. 279, 4 L. Ed. 91, it was decided that the express lien for the quota given by the act of December 22, 1794, had its origin in contract, although enforced by statute, and continued a mortgage on the premises, until vacated according to the provision of the several laws which regulate the company. *Mutual Assur. Soc. v. Faxon*, 6 Wheat. 606, 607, 5 L. Ed. 342.

**20. Mutual Assur. Soc. v. Faxon**, 6 Wheat. 606, 5 L. Ed. 342, explaining *Mutual Assur. Soc. v. Watts*, 1 Wheat. 279, 4 L. Ed. 91.

"There is no express lien (for the premium) created in any of the laws of the company, and there are no provisions in any of those laws, from which it could be inferred (if it were possible ever to infer a lien), but those which authorize a sale of land to satisfy a premium. But a right to sell the land is completely satisfied, by subjecting it to such sale, while in the hands of the first holder, and there are two of the by-laws of the company which

expressly negative every pretense for carrying it any further. The first is the 8th section, 4th article, of the act of January 29th, 1805, which requires immediate payment of the premium, upon the acceptance of the declaration, and the second is, the 6th section of the 5th article, which declares, that insurance shall not commence until the premium be paid." *Mutual Assur. Soc. v. Faxon*, 6 Wheat. 606, 607, 5 L. Ed. 342.

**21. Suicide.**—*Knights Templars', etc., Co. v. Jarman*, 187 U. S. 197, 47 L. Ed. 139.

As to policies issued upon the assessment plan subsequent to the law of 1887, and prior to the law of 1897, the Missouri suicide statute does not apply. *Knights Templars', etc., Co. v. Jarman*, 187 U. S. 197, 200, 47 L. Ed. 139.

Under § 10, Missouri laws of 1887, page 199, policies of insurance issued on the assessment plan after the insurance company obtained its certificate to do business as an assessment insurance company, are freed from the provisions of § 5982, Revised Statutes of Missouri, declaring that suicide shall be no defense to a suit on a policy of life insurance. By the proviso of § 10 of the above-named act corporations and associations doing business thereunder are not subject to any provision of the general insurance law of the state, except as therein distinctly set forth. *Knights Templars', etc., Co. v. Jarman*, 187 U. S. 197, 47 L. Ed. 139.

The provision of Missouri Laws, 1887, p. 199, § 5869, Revised Statutes, 1889, which authorizes the incorporation of assessment insurance companies, repeals § 5982, Mo. Rev. Stat. 1879, and is prospective in its operation and not applicable to policies antecedently issued, but the rights of the parties under such policies are to be determined by the suicide statute. *Knights Templars', etc., Co. v. Jarman*, 187 U. S. 197, 202, 47 L. Ed. 139.

In 1897 a law was passed by the legislature of Missouri specially applying the suicide statute to insurance companies doing business upon the assessment plan. This was done by an amendment to § 5869, Revised Statutes of Missouri. The



**Death from Violation or Attempt to Violate Criminal Law.**—See the title *INSURANCE*, vol. 7, p. 145.

**D. Extent of Liability.**—Where a policy does not contract to make an assessment nor does it make the payment of any sum contingent on an assessment, or on the collection of an assessment, but agrees to pay a principal sum represented by the payment of two dollars for each member in division AA, within sixty days after proof of death; it takes the risk as to those of its members who do not pay in time or at all. It always knows the number of its members which is to be multiplied by two. It has sixty days in which to make the assessment and collect what it can before making payment. The liability to assessment is all that concerns the beneficiary, not the making or collection of an assessment; and the liability to assessment only measures the amount to be paid under the policy.<sup>22</sup>

**E. Forfeiture, Avoidance and Discharge**—1. **FORFEITURE.**—The certificate holders in a benefit association are entitled to rely upon the construction given to the rules and regulations by the highest tribunal of the order, and to presume that the supreme lodge will not enforce a forfeiture of a benefit certificate under circumstances which the board of control has held did not create one.<sup>23</sup>

**The mere nonpayment of lodge dues** is not sufficient to work a forfeiture of an endowment certificate in view of the fact that the insured kept up his assessment, which the supreme lodge received without inquiring whether the insured was indebted for his lodge dues or not.<sup>24</sup>

**Negligence of Agent in Remitting Collections.**—Even though the by-laws of a mutual insurance company provide that secretary of a section shall be the agent of the members and not of the company in matters of collections and remittances, yet if the company controls the agent and the agent makes the remittances to the company he is nevertheless the agent of the company, and his negligence in not remitting collections in the time specified in the by-laws will not work a forfeiture of a member's policy because in making the remittances he is the company's agent.<sup>25</sup>

**Waiver and Estoppel.**—The continued receipt of assessments upon the assured's certificate up to the day of his death is a waiver of any technical forfeiture of the certificate by reason of the nonpayment of the lodge dues. Granting that the continued receipt of premiums or assessments after a forfeiture has occurred

law of 1897 is constitutional. *Knights Templars', etc., Co. v. Jarman*, 187 U. S. 197, 205, 47 L. Ed. 139.

**22. Extent of liability.**—*United States, etc., Ass'n v. Barry*, 131 U. S. 100, 122, 33 L. Ed. 60.

**23. Forfeiture.**—*Knights of Pythias v. Kalinski*, 163 U. S. 289, 298, 41 L. Ed. 163.

Although the court are not bound by the construction put upon the rules and regulations of a private order by the board of control or supreme council of such order, the association has no right to complain if its certificate holders act upon such interpretation, and it is not in a position to claim that this ruling in their favor was more liberal than the facts of the case or a proper construction of these rules would warrant. Whether the decision were right or wrong, it established a course of business on the part of the defendant, upon which its certificate holders had a right to rely. *Knights of Pythias v. Kalinski*, 163 U. S. 289, 298, 41 L. Ed. 163; *Insurance Co. v. Eggleston*, 96 U. S. 572, 24 L. Ed. 841.

**24.** *Knights of Pythias v. Kalinski*, 163 U. S. 289, 294, 41 L. Ed. 163.

In the ordinary course of business between the lodges and the sections of the endowment rank, and under the instructions contained in the circular of the supreme chancellor, it became the duty of the keeper of the records and seal of the lodge to which the assured belonged to notify the secretary of the proper section of the endowment rank of the fact that he was in arrears for dues. It was held that a failure to do this should be imputed to the lodge, as representing the order, rather than to the assured. It is more than possible that, as the endowment rank was a separate and distinct feature from the lodges, the assured was wholly ignorant of the fact that a failure to pay his lodge dues promptly forfeited his certificate; and while, as matter of law, he might be chargeable with notice of this fact, his beneficiary has a perfect right to insist that the lodge was guilty of a technical dereliction of its own duty in the premises. *Knights of Pythias v. Kalinski*, 163 U. S. 289, 298, 41 L. Ed. 163.

**25. Negligence of agent in remitting collections.**—*Knights of Pythias v. Withers*, 177 U. S. 206, 44 L. Ed. 762.

will not only be construed as a waiver when the facts constituting a forfeiture are known to the company,<sup>26</sup> this is true only of such facts as are peculiarly within the knowledge of the assured. If the company ought to have known of the facts, or with proper attention to its own business, would have been apprised of them, it has no right to set up its ignorance as an excuse.<sup>27</sup>

**Effect of Failure to Give Notice of Assessment.**—See ante, "Notice," III, B, 3.

2. **DISCHARGE.**—An insurance upon buildings in Alexandria did not cease by separation, although the company could only insure houses in Virginia.<sup>28</sup>

**F. Actions.—Remedy at Law.**—A recovery at law can be had on a policy of insurance, although the contract of the insurer is only to levy an assessment to pay over the proceeds and not to pay any sum absolutely; the remedy is not solely in equity for a specific performance of the contract.<sup>29</sup>

**Parties.**—An action upon an assessment certificate of a member of the endowment rank of the order of Knights of Pythias may be maintained directly against the corporation corresponding to the lodge.<sup>30</sup>

**MUTUALITY.**—As to mutuality of estoppels, see the title **ESTOPPEL**, vol. 5, p. 918. As to necessity for mutuality of award, see the title **ARBITRATION AND AWARD**, vol. 2, p. 483. As to necessity for mutuality in contracts, see the titles **CONTRACTS**, vol. 4, p. 562; **SPECIFIC PERFORMANCE**. As to point that right of appeal must be mutual, see the title **APPEAL AND ERROR**, vol. 2, p. 53.

26. **Waiver and estoppel.**—Knights of Pythias *v.* Kalinski, 163 U. S. 289, 298, 41 L. Ed. 163, citing *Insurance Co. v. Wolff*, 95 U. S. 326, 24 L. Ed. 387, and *Bennecke v. Insurance Co.*, 105 U. S. 355, 26 L. Ed. 990.

27. *Knights of Pythias v. Kalinski*, 163 U. S. 289, 298, 41 L. Ed. 163.

28. **Discharge.**—*Korn v. Mutual Assur. Soc.*, 6 Cranch 192, 3 L. Ed. 195.

29. **Remedy at law.**—*United States, etc., Ass'n v. Barry*, 131 U. S. 100, 33 L. Ed. 60.

A policy says: "The principal sum represented by the payment of two dollars by each member in division AA of the association as provided in the by-laws," not to exceed \$5,000, "to be paid" to the wife. The policy did not contract to make an assessment, nor does it make the payment of any sum contingent on an assessment, or on the collection of an assessment. It was held that a recovery at law might be had. *United States, etc., Ass'n v. Barry*, 131 U. S. 100, 122, 33 L. Ed. 60.

30. **Parties.**—*Knights of Pythias v. Kalinski*, 163 U. S. 289, 41 L. Ed. 163.

## NAMES.

### CROSS REFERENCES.

See the titles **INDICTMENTS, INFORMATIONS, PRESENTMENTS AND COMPLAINTS**, vol. 6, p. 961; **PATENTS; TRADEMARKS, TRADENAMES AND UNFAIR COMPETITION; WITNESSES**.

As to alteration of name in deed, see the title **ALTERATION OF INSTRUMENTS**, vol. 1, p. 262. As to misspelling and amendment of Christian name, see the title **APPEAL AND ERROR**, vol. 2, p. 152. As to name of person to whom citation is addressed, see the title **APPEAL AND ERROR**, vol. 2, p. 164. As to wrong name in warrant, see the title **ARREST**, vol. 2, p. 541. As to misnomer of obligor and obligee in bonds, see the title **BONDS**, vol. 3, pp. 387, 388. As to averment of corporation sued under corporate name, see the title **CORPORATIONS**, vol. 4, p. 766. As to initial and surname as notice of copyright, see the title **COPYRIGHT**, vol. 4, p. 612. As to variance in name of person by whom copyright was entered, see the title **COPYRIGHT**, vol. 4, p. 612. As to name by which county should be sued, see the title **COUNTIES**, vol. 4, p. 844. As to mistake in name in taking deposition, see the title **DEPOSITIONS**, vol. 5, p. 324. As to initials only as signature by judge, see the title **EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL**, vol. 6, p. 38. As to signing another's name which is idem sonans as forgery, see the title **FORGERY AND COUNTERFEITING**, vol. 6, p. 381. As to defect in name cured by statute of jeofails, see the title **JUDGMENTS AND DECREES**, vol. 7, p. 544. As to erroneous spelling of name in indictment, see the title **INDICTMENTS, INFORMATION, PRESENTMENTS AND COMPLAINTS**, vol. 6, p. 995. As to misspelling name of mortgagee in notices of foreclosure, see the title **MORTGAGES AND DEEDS OF TRUST**, ante, p. 452. As to name of grantee in patents, see the title **PUBLIC LANDS**.

**Initials.**—Initials are no legal part of a name, the full Christian name being essential.<sup>1</sup>

**Middle Letter of Name.**—It may well be questioned, whether the middle letter of a name forms any part of the Christian name of a party; it is said, the law knows only one Christian name, and there are adjudged cases, strongly countenancing, if not fully establishing, that the entire omission of a middle letter is not a misnomer or variance.<sup>2</sup>

**Idem Sonans.**—Names to be idem sonans must sound alike.<sup>3</sup> A name need not be correctly spelled in an indictment if substantially the same sound is preserved.<sup>4</sup>

1. **Initials no part of name.**—*Monroe v. Cattle Co.*, 71 Becker, 147 U. S. 47, 58, 37 L. Ed. 72; *Walton v. Marietta Chair Co.*, 157 U. S. 342, 39 L. Ed. 725. See the titles **APPEAL AND ERROR**, vol. 2, p. 152; **PLEADING**.

2. **Omission of middle letter no variance.**—*Keene v. Meade*, 3 Pet. 1, 7 L. Ed. 581.

The law knows of but one Christian name, and the omission or insertion of the middle name, or of the initial letter of that name, is immaterial; it is competent for the party to show that he is known as

well without as with the middle name. *Games v. Dunn*, 14 Pet. 322, 10 L. Ed. 476.

3. **Example not idem sonans.**—The federal supreme court concurs with the court below in thinking that, by no reasonable application of the rule of idem sonans, can the name of *Ida J. Hawthorn* be deemed equivalent to that of *Ida J. Hanthorn*. *Marx v. Hanthorn*, 148 U. S. 172, 184, 37 L. Ed. 410.

4. **Name in indictment.**—*Faust v. United States*, 163 U. S. 452, 454, 41 L. Ed. 224.



**NARCOTICS.**—See the title *INSURANCE*, vol. 7, p. 163.

**NATION.**—"The word 'nation' as ordinarily used presupposes or implies an independence of any other sovereign power more or less absolute, an organized government, recognized officials, a system of laws, definite boundaries and the power to enter into negotiations with other nations."<sup>1</sup>

**NATIONAL BANKS.**—See the title *BANKS AND BANKING*, vol. 3, p. 1, and references given.

**NATIONAL CORPORATIONS.**—As to appellate jurisdiction of circuit court of appeals, see the title *APPEAL AND ERROR*, vol. 1, p. 820. As to bridge companies, see the title *BRIDGES*, vol. 3, p. 517. As to state regulation and control, see the titles *CARRIERS*, vol. 3, pp. 624, 629; *CORPORATIONS*, vol. 4, p. 638; see, also, the title *POLICE POWER*. As to power of congress to create, see the title *CORPORATIONS*, vol. 4, p. 664; see, also, the title *CONSTITUTIONAL LAW*, vol. 4, p. 314. As to character and measure of powers, see the title *CORPORATIONS*, vol. 4, p. 716. As to grants of federal franchises to state corporations, see the title *CORPORATIONS*, vol. 4, p. 666. As to construction of grant by state in aid of national corporation, see the title *COURTS*, vol. 4, p. 1078. As to jurisdiction of suits by or against federal corporations, see the title *COURTS*, vol. 4, p. 929; jurisdiction of suits by or against national banks, see the title *COURTS*, vol. 4, p. 924; jurisdiction of suits by or against bank of United States, see the title *COURTS*, vol. 4, p. 926; jurisdiction of suits by national corporation against state, see the title *STATES*. As to national corporations as instrumentalities in regulation of commerce, see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 310. As to removal of causes by or against, see the title *REMOVAL OF CAUSES*. As to taxation, see the title *TAXATION*; see, also, the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, pp. 456, 457.

**NATIONALITY.**—A man's nationality is his natural allegiance.<sup>2</sup>

**NATIVE-BORN CITIZENS.**—See the title *CITIZENSHIP*, vol. 3, p. 797.

**NATURAL GAS.**—See the title *GAS*, vol. 6, p. 545.

1. **Nation.**—*Montoya v. United States*, 180 U. S. 261, 265, 45 L. Ed. 521.

"'Nations or states,' says Vattel, 'are bodies politic, societies of men united together for the promotion of their mutual safety and advantage by the joint efforts of their combined strength. Such a society has her affairs and her interests. She deliberates and takes resolutions in common, thus becoming a moral person who possesses an understanding and a will peculiar to herself, and is susceptible of obligations and rights.'" *Keith v. Clark*, 97 U. S. 454, 459, 24 L. Ed. 1071.

**Indians.**—"The North American Indians do not and never have constituted nations as that word is used by writers upon international law, although in a great number of treaties they are designated as nations as well as tribes." *Montoya v. United States*, 180 U. S. 261, 265, 45 L. Ed. 521. See the title *INDIANS*, vol. 6, p. 911.

But it has been said that, the very term

**nation**, so generally applied to Indians means "a people distinct from others." *Worcester v. Georgia*, 6 Pet. 515, 559, 8 L. Ed. 483.

"The words 'treaty' and **nation** are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning. We have applied them to Indians, as we have applied them to the other **nations** of the earth; they are applied to all in the same sense." *Worcester v. Georgia*, 6 Pet. 515, 559, 8 L. Ed. 483; *United States v. Forty-Three Gallons of Whiskey*, 93 U. S. 188, 196, 23 L. Ed. 846.

As to suits by Indian tribes or **nations**, see the title *COURTS*, vol. 4, p. 1017.

2. **Nationality.**—*United States v. Wong Kim Ark*, 169 U. S. 649, 657, 42 L. Ed. 890. See the title *CITIZENSHIP*, vol. 3, p. 788.

# NATURALIZATION.

BY BEIRNE STEDMAN.

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## CROSS REFERENCES.

See the titles **ALIENS**, vol. 1, p. 210; **CHINESE EXCLUSION ACTS**, vol. 3, p. 769; **CITIZENSHIP**, vol. 3, p. 788. See, also, **DENIZEN**, vol. 5, p. 320.

As to exclusion of alien, diseased child of naturalized parent, see the title **ALIENS**, vol. 1, p. 249. As to distinction between citizenship by birth and citizenship by naturalization, see the title **CITIZENSHIP**, vol. 3, p. 796. As to acquisition of citizenship by naturalization, see the title **CITIZENSHIP**, vol. 3, pp. 796, 799. As to whether a child born in this country of domiciled aliens, who had not been naturalized, is a "native born citizen," see the title **CITIZENSHIP**, vol. 3, p. 799. As to necessity for naturalization of persons born within the United States, see the title **CITIZENSHIP**, vol. 3, p. 799. As to naturalization of woman by marriage to citizen, see the title **CITIZENSHIP**, vol. 3, p. 800. As to rights, privileges and immunities of naturalized citizens, see the title **CITIZENSHIP**, vol. 3, pp. 804, 805. As to failure of government to protect naturalized citizens as ground for renunciation of allegiance, see the title **CITIZENSHIP**, vol. 3, p. 808. As to neces-

sity for naturalization of one expatriated in order to become a citizen of another country, see the title *CITIZENSHIP*, vol. 3, p. 809. As to duty of clerk to account for naturalization fees, and as to whether such fees are for services in his official capacity, see the title *CLERKS OF COURT*, vol. 3, p. 863.

### I. Definition.

Naturalization is the act of adopting a foreigner and clothing him with the privileges of a native citizen.<sup>1</sup>

### II. Power of Naturalization.

The constitution invested congress with the exclusive power to establish a uniform rule of naturalization,<sup>2</sup> thereby taking from the several states such power. The right of naturalization was therefore, with one accord, surrendered by the states, and confided to the federal government.<sup>3</sup> The fourteenth amendment to the constitution does not affect the power of congress to regulate naturalization.<sup>4</sup>

### III. Who May Be Naturalized.

**A. In General.**—Congress in the exercise of the power to establish an uni-

**1. Naturalization defined.**—*Boyd v. Thayer*, 143 U. S. 135, 162, 36 L. Ed. 103.

**2. Exclusive power of congress.**—*Dred Scott v. Sandford*, 19 How. 393, 405, 15 L. Ed. 691; *Chirac v. Chirac*, 2 Wheat. 259, 4 L. Ed. 234; *United States v. Wong Kim Ark*, 169 U. S. 649, 701, 42 L. Ed. 890; *Ex parte Clarke*, 100 U. S. 399, 412, 25 L. Ed. 715 (dissenting opinion.) *Clafin v. Houseman*, 93 U. S. 130, 140, 23 L. Ed. 833; *United States v. Villato*, 2 Dall. 370, 373, 1 L. Ed. 419; *Houston v. Moore*, 5 Wheat. 1, 49, 5 L. Ed. 19 (dissenting opinion.); *Holmes v. Jennison*, 14 Pet. 538, 540, 593, 10 L. Ed. 579.

The reason for investing congress with the power of naturalization was to guard against too narrow, instead of too liberal, a mode of conferring the rights of citizenship. *Collet v. Collet*, 2 Dall. 294, 296, 1 L. Ed. 387.

**3. By the states.**—*Chirac v. Chirac*, 2 Wheat. 259, 269, 4 L. Ed. 234; *Dred Scott v. Sandford*, 19 How. 393, 417, 15 L. Ed. 691. See, also, *United States v. Villato*, 2 Dall. 370, 372, 1 L. Ed. 419; *License Cases*, 5 How. 504, 585, 12 L. Ed. 256. See the title *CITIZENSHIP*, vol. 3, p. 791.

In *Chirac v. Chirac*, 2 Wheat. 259, 269, 4 L. Ed. 234, it was decided that the grant of the power of naturalization to congress is incompatible with its exercise by the state governments, thereby overruling *Collet v. Collet*, 2 Dall. 294, 296, 1 L. Ed. 387, which held that the states enjoyed a concurrent authority upon this subject; but that their individual authority could not be exercised, so as to contravene the rule established by the authority of the Union. See, also, *Ex parte Clarke*, 100 U. S. 399, 412, 25 L. Ed. 715 (dissenting opinion).

The naturalization law of the state of Maryland was virtually repealed by the constitution of the United States, and the act of naturalization enacted by congress. *Chirac v. Chirac*, 2 Wheat. 259, 268, 4 L. Ed. 234.

No state, since the adoption of the constitution, can by naturalizing an alien invest him with the rights and privileges secured to a citizen of a state under the federal government, although, so far as the state alone is concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the constitution and laws of the state attached to that character. *Dred Scott v. Sandford*, 19 How. 393, 406, 15 L. Ed. 691.

"Our foreign intercourse being exclusively committed to the general government, it is peculiarly their province, to determine who are entitled to the privileges of American citizens, and the protection of the American government. And the citizens of any one state being entitled by the constitution to enjoy the rights of citizenship in every other state, that fact creates an interest in this particular in each other's acts, which does not exist with regard to their bankrupt laws; since state acts of naturalization would thus be extraterritorial in their operation, and have an influence on the most vital interests of other states. On these grounds, state laws of naturalization may be brought under one of the four heads or classes of powers precluded to the states, to wit, that of incompatibility; and on this ground alone, if any, could the states be debarred from exercising this power, had congress not proceeded to assume it." *Ogden v. Saunders*, 12 Wheat. 212, 213, 275, 6 L. Ed. 606.

**Under the articles of confederation.**—Naturalization in one of the states was, under the articles of confederation, equivalent to naturalization in any other. *Gouverneur v. Robertson*, 11 Wheat. 332, 350, 6 L. Ed. 488.

**4. Not affected by fourteenth amendment.**—*United States v. Wong Kim Ark*, 169 U. S. 649, 703, 42 L. Ed. 890.



form rule of naturalization has enacted general laws under which individuals may be naturalized.<sup>5</sup> And provision has been made for the admission to citizenship of three principal classes of persons: First. Aliens, having resided for a certain time "within the limits and under the jurisdiction of the United States," and naturalized individually by proceedings in a court of record. Second. Children of persons so naturalized, "dwelling within the United States, and being under the age of twenty-one years at the time of such naturalization." Third. Foreign-born children of American citizens, coming within the definitions prescribed by congress.<sup>6</sup>

**The naturalization law of March 26, 1790**, confined the right of becoming citizens "to aliens being free white persons;"<sup>7</sup> but the constitution does not limit the power of congress in this respect to white persons, and they may authorize the naturalization of any one, of any color, who was born under allegiance to another government.<sup>8</sup>

**B. Aliens.**—The constitution gave to congress the power to naturalize only those persons who were born in a foreign country, under a foreign government.<sup>9</sup>

**C. Chinese.**—The Chinese are incapable of becoming citizens under the naturalization laws.<sup>10</sup>

**D. Indians.**—See the title **INDIANS**, vol. 6, pp. 916, 917.

#### IV. How Naturalization Accomplished.

**A. By Treaty.**—Naturalization may be by treaty, as in the case of the annexation of foreign territory.<sup>11</sup>

**B. By Act of Congress.**—Naturalization may be by authority of congress, exercised by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign born children or citizens.<sup>12</sup>

**C. Judicial Proceedings**—1. **IN GENERAL.**—The power of naturalization may be by authority of congress, exercised by proceedings in judicial tribunals, as in the ordinary provisions of the naturalization acts.<sup>13</sup> The proceeding for

**5. General laws enacted.**—*Boyd v. Thayer*, 143 U. S. 135, 162, 36 L. Ed. 103.

**6. Classes admitted.**—Acts of March 26, 1790, ch. 3; January 29, 1795, ch. 20; June 18, 1798, ch. 54; Stat. 103, 414, 566; April 14, 1802, ch. 28; March 26, 1804, ch. 47; 2 Stat. 153, 292; February 10, 1855, ch. 71; 10 Stat. 604; Rev. Stat., §§ 2165, 2172, 1993; *United States v. Wong Kim Ark*, 169 U. S. 649, 672, 42 L. Ed. 890.

The naturalization acts of the United States have been careful to limit admission to citizenship to those "within the limits and under the jurisdiction of the United States." *United States v. Wong Kim Ark*, 169 U. S. 649, 686, 42 L. Ed. 890; *Zartarian v. Billings*, 204 U. S. 170, 175, 51 L. Ed. 428.

The act of the 4th of April, 1802, provides that any alien, who was residing within the limits and under the jurisdiction of the United States before the 29th of January, 1795, may be admitted to become a citizen on due proof made to the proper court, that he has resided two years at least within and under federal jurisdiction, and one year at least immediately preceding his application within the state or territory where such court is at the time held. *Hogan v. Kurtz*, 94 U. S. 773, 777, 24 L. Ed. 317.

**7. Free white persons.**—For many years after the establishment of the original constitution, and until two years after the adoption of the fourteenth amendment,

congress never authorized the naturalization of any but "free white persons." *United States v. Wong Kim Ark*, 169 U. S. 649, 701, 42 L. Ed. 890; *Dred Scott v. Sandford*, 19 How. 393, 417, 15 L. Ed. 691.

**8. Naturalization not limited to white persons.**—*Dred Scott v. Sandford*, 19 How. 393, 417, 420, 15 L. Ed. 691.

**9. Aliens.**—*Dred Scott v. Sandford*, 19 How. 393, 417, 418, 15 L. Ed. 691. See the title **ALIENS**, vol. 1, p. 210.

**10. Chinese.**—*Fong Yue Ting v. United States*, 149 U. S. 698, 724, 37 L. Ed. 905.

In *Fong Yue Ting v. United States*, 149 U. S. 698, 716, 37 L. Ed. 905, the court said: "Chinese persons not born in this country have never been recognized as citizens of the United States, nor authorized to become such under the naturalization laws." *United States v. Wong Kim Ark*, 169 U. S. 649, 702, 42 L. Ed. 890. See the title **CHINESE EXCLUSION ACTS**, vol. 3, p. 760.

**11. Naturalization by treaty.**—See post, "Collective Naturalization," VIII.

**12. By act of congress.**—*United States v. Wong Kim Ark*, 169 U. S. 649, 702, 42 L. Ed. 890.

**13. By judicial proceedings.**—*United States v. Wong Kim Ark*, 169 U. S. 649, 42 L. Ed. 890.

**Courts of record.**—The various acts on the subject of naturalization, submit the decision upon the right of aliens to courts of record; they are to receive testimony,

naturalization is a judicial proceeding,<sup>14</sup> and can only be completed before a court.<sup>15</sup> Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law,<sup>16</sup> And an act of naturalization, such as taking the oath, performed under a law which had then ceased to be operative, is of no effect.<sup>17</sup>

2. **REPORT ON ARRIVAL.**—See post, "Evidence of Time of Arrival," IV, C, 6.

3. **DECLARATION OF INTENTION.**—**Necessity for.**—Any alien, being a minor, who shall have resided in the United States three years next preceding his arrival at majority and continued to reside therein, may, upon reaching the age of twenty-one years, and after a residence of five years, including the three years of minority, be admitted a citizen of the United States without having made during minority the declaration of intention required in the case of aliens.<sup>18</sup>

4. **RENUNCIATION OF FOREIGN ALLEGIANCE.**—An emigrant from any foreign state cannot become a citizen of the United States without a formal renunciation of his old allegiance, and an acceptance by the United States of that renunciation through such form of naturalization as may be required by law.<sup>19</sup>

5. **CERTIFICATE OF NATURALIZATION.**—a. *When Issued.*—A certificate of naturalization issues from a court of record when there has been the proper proof made of a residence of five years, and that the applicant is of the age of twenty-one years, and is of good moral character.<sup>20</sup>

b. *Nature.*—A certificate of naturalization is, against all the world, a judgment of citizenship, from which may follow the right to vote and hold property.<sup>21</sup>

c. *Conclusiveness.*—A certificate of naturalization is conclusive as such; but it cannot, in a distinct proceeding, be introduced as evidence of the residence or age at any particular time or place, or of the good character of the applicant.<sup>22</sup>

6. **EVIDENCE OF TIME OF ARRIVAL.**—Section two of the act of 1802, required that every person desirous of being naturalized should make report of himself to the clerk of the district court of the district where he should arrive, or some other court of record in the United States. The report was to be recorded, and a certificate of the same given to such alien, which certificate should be exhibited to the court by every alien "who may arrive in the United States, after the passing of the act, on his application to be naturalized, as evidence of the time of his arrival within the United States."<sup>23</sup> The inference is very strong, from the

to compare it with the law, and to judge on both law and fact. *Spratt v. Spratt*, 4 Pet. 392, 393, 7 L. Ed. 897.

14. **A judicial proceeding.**—In re Loney, 134 U. S. 372, 376, 33 L. Ed. 949; *Spratt v. Spratt*, 4 Pet. 392, 393, 408, 7 L. Ed. 897.

15. **Must be completed before a court.**—*Boyd v. Thayer*, 143 U. S. 135, 180, 36 L. Ed. 103.

16. **Must be under the authority and in the forms of law.**—*United States v. Wong Kim Ark*, 169 U. S. 649, 702, 42 L. Ed. 890.

17. **Must be under existing law.**—*United States v. Villato*, 2 Dall. 370, 1 L. Ed. 419.

18. **When declaration of intention not necessary.**—Section 1, act of May 26, 1824, 4 Stat. 69, ch. 186, carried forward into § 2176 of the Revised Statutes. *Boyd v. Thayer*, 143 U. S. 135, 177, 36 L. Ed. 103.

19. **Renunciation of foreign allegiance necessary.**—*Elk v. Wilkins*, 112 U. S. 94, 101, 28 L. Ed. 643.

20. **When certificate of naturalization issues.**—*Mutual Bene. Life Ins. Co. v. Tisdale*, 91 U. S. 238, 245, 23 L. Ed. 314.

21. **Nature of certificate.**—*Mutual Bene. Life Ins. Co. v. Tisdale*, 91 U. S. 238, 245, 23 L. Ed. 314.

22. **Conclusiveness of certificate.**—*Campbell v. Gordon*, 6 Cranch 175, 176, 3 L. Ed. 190; *Stark v. Chesapeake Ins. Co.*, 7 Cranch 420, 3 L. Ed. 391; *Mutual Bene. Life Ins. Co. v. Tisdale*, 91 U. S. 238, 245, 23 L. Ed. 314. See post, "Proof of Naturalization," V.

S. was admitted a citizen of the United States, by the circuit court for the county of Washington, in the district of Columbia, and obtained a certificate of the same, in the usual form. The act of the court admitting him as a citizen, was a judgment of the circuit court; and the federal supreme court cannot look behind it, and inquire on what testimony it was pronounced. *Spratt v. Spratt*, 4 Pet. 392, 393, 7 L. Ed. 897.

23. **Evidence of time of arrival.**—*Spratt v. Spratt*, 4 Pet. 392, 393, 7 L. Ed. 897.

It has been held that a person who arrived in the United States, after the passing of the above act, was under obligation



language of the act, that the time of arrival must have been proven by this report; and that a court, about to admit an alien to the rights of citizenship, ought to have required its production.<sup>24</sup>

**7. JUDGMENT AND OATH OF NATURALIZATION.—Conclusiveness of Judgment.**—It seems that the judgment of a court, admitting an alien to become a citizen, is conclusive that all the prerequisites have been complied with.<sup>25</sup> If the judgment of a court of record concerning the right of aliens be entered on record in legal form, it closes all inquiry and like any other judgment, is complete evidence of its own validity.<sup>26</sup>

**Entry Nunc Pro Tunc.**—Thirty-three years after a judgment naturalizing an alien is alleged to have been rendered but not recorded, or if recorded, the record lost, a common law court has no jurisdiction to enter such judgment of naturalization nunc pro tunc, when no entry or memorandum appeared upon the record or files at the time the original judgment is supposed to have been rendered. And if there be no jurisdiction to enter such judgment, it may be attacked collaterally.<sup>27</sup>

**Effect of Oath of Naturalization.**—The oath of naturalization when taken, confers the rights of a citizen; and it has been held not necessary that there should be an order of court, admitting him to become a citizen.<sup>28</sup>

**8. THE RECORD.—Need Not Show Compliance with Requisites.**—It need not appear by the record of naturalization, that all the requisites prescribed by law for the admission of aliens to the rights of citizenship, have been complied with.<sup>29</sup>

**And parol proof** may be received in aid of the record.<sup>30</sup>

**The exemplification of the record** of a naturalization when offered in evidence, does not require, to complete its authentication, the certificate of the clerk under the seal of his office that the judge of the court was duly commissioned and qualified.<sup>31</sup>

## V. Proof of Naturalization.

The usual proof of naturalization is a copy of the record of the court admitting the applicant,<sup>32</sup> though, in some instances, there may be facts from which, in the absence of the record, a jury may be allowed to infer that a per-

to report himself according to its provisions. The law does not require that the report shall have been made five years before the application for naturalization; the third condition of the first section of the law, which declares that the court admitting an alien to become a citizen "shall be satisfied that he has resided five years in the United States," etc., does not prescribe the evidence which shall be satisfactory; the report is required by the law to be exhibited on the application for naturalization, as evidence of the time of the arrival in the United States; the law does not say the report shall be the sole evidence; nor does it require that the alien shall report himself within any limited time after arrival; five years may intervene between the time of arrival and the report, and yet the report be valid; the report is undoubtedly conclusive evidence of the arrival; but it is not made by the law the only evidence of that fact. *Spratt v. Spratt*, 4 Pet. 392, 393, 406, 7 L. Ed. 897.

**24. Time of arrival must be proved.**—*Spratt v. Spratt*, 4 Pet. 392, 393, 406, 7 L. Ed. 897.

**25. Conclusiveness of judgment.**—*Stark v. Chesapeake Ins. Co.*, 7 Cranch 420, 3 L. Ed. 391.

**26.** *Spratt v. Spratt*, 4 Pet. 392, 393, 7 L. Ed. 897.

**27. Entry nunc pro tunc.**—*Gagnon v. United States*, 193 U. S. 451, 456, 48 L. Ed. 745. See the title JUDGMENTS AND DECREES, vol. 7, p. 577.

**28. Effect of oath of naturalization.**—*Campbell v. Gordon*, 6 Cranch 175, 3 L. Ed. 190.

**29. Record need not show compliance with requisites.**—*Stark v. Chesapeake Ins. Co.*, 7 Cranch 420, 3 L. Ed. 391; *Campbell v. Gordon*, 6 Cranch 175, 176, 3 L. Ed. 190.

**30. Parol proof.**—*Stark v. Chesapeake Ins. Co.*, 7 Cranch 420, 3 L. Ed. 391.

**31. Exemplification of record.**—*St. Paul, etc., R. Co. v. Burton*, 111 U. S. 788, 789, 29 L. Ed. 604.

**32. Proof of naturalization.**—*Contzen v. United States*, 179 U. S. 191, 196, 45 L. Ed. 148; *Boyd v. Thayer*, 143 U. S. 135, 180, 36 L. Ed. 103. See ante, "Conclusiveness," IV, C, 5, c.



son, having the requisite qualifications to become a citizen, had been duly naturalized.<sup>33</sup>

**A certificate by a competent court**, that an alien has taken the oath prescribed by the act respecting naturalization, raises a presumption that the court was satisfied as to the moral character of the alien, and of his attachment to the principles of the constitution of the United States, etc.<sup>34</sup>

## VI. Operation and Effect of Declaration of Intention.

**As to Widow and Children.**—As early as 1804 it was enacted by congress that when any alien who had declared his intention to become a citizen in the manner provided by law died before he was actually naturalized, his widow and children should be considered as citizens of the United States, and entitled to all rights and privileges as such upon taking the necessary oath.<sup>35</sup>

**Declaration of Intention Gives Minors Inchoate Status.**—Minors acquire an inchoate status by the declaration of intention on the part of their parents. If they attain their majority before the parent completes his naturalization, then they have an election to repudiate the status which they find impressed upon them, and determine that they will accept allegiance to some foreign potentate or power rather than hold fast to the citizenship which the act of the parent has initiated for them. Ordinarily this election is determined by application on their own behalf, but it does not follow that an actual equivalent may not be accepted in lieu of a technical compliance.<sup>36</sup>

**33. Naturalization may be inferred.**—*Contzen v. United States*, 179 U. S. 191, 196, 45 L. Ed. 148.

Where no record of naturalization can be produced, evidence that a person, having the requisite qualifications to become a citizen, did in fact and for a long time vote and hold office and exercise rights belonging to citizens, is sufficient to warrant a jury in inferring that he had been duly naturalized as a citizen. *Blight v. Rochester*, 7 Wheat. 534, 535, 546, 5 L. Ed. 516; *Hogan v. Kurtz*, 94 U. S. 773, 778, 24 L. Ed. 317; *Boyd v. Thayer*, 143 U. S. 135, 180, 36 L. Ed. 103.

Where the laws of Virginia require that an alien in order to attain citizenship should take the oath of fidelity to the commonwealth, in a court of record, of which the clerk is directed to grant a certificate, this fact, which, had it taken place, must appear on record, will not be presumed, unless there were some other fact, such as holding an office of which citizens alone were capable, or which required an oath of fidelity, from which it might be inferred. *Blight v. Rochester*, 7 Wheat. 534, 535, 546, 5 L. Ed. 516.

A party immigrated here from Ireland; the record shows that he filed his declaration of intention to become a citizen July 11, 1801, six years or more after he arrived here and settled in this district. Documentary proof that he took out his second papers is wanting. Proceedings of the kind are required to be recorded; but it was proved or conceded that the records of such proceedings in this district were destroyed many years ago; and in view of that fact, and of the long period between the purchase of the property and the other evidence exhibited in the record, the court left the question whether the party was or was not naturalized to the

jury, and they found the issue in favor of the defendant. Seasonable objection was made by the plaintiffs to the admissibility of the parol evidence, and they now contend that the court erred in admitting secondary evidence to prove that that party became a citizen. Enough appears to show that he possessed every requisite qualification to enable him to become a citizen at any time, and that he constantly exercised rights belonging to citizens; and, in view of the great lapse of time since he acquired the property, the court here is clearly of opinion that the assignment of error must be overruled. *Hogan v. Kurtz*, 94 U. S. 773, 777, 24 L. Ed. 317. See the title BEST AND SECONDARY EVIDENCE, vol. 3, p. 219.

**34. Certificate of court.**—*Campbell v. Gordon*, 6 Cranch 175, 3 L. Ed. 190.

**35. As to widow and children.**—*Minor v. Happersett*, 21 Wall. 162, 168, 22 L. Ed. 627.

**36. Declaration of intention gives minors inchoate status.**—*Boyd v. Thayer*, 143 U. S. 135, 178, 36 L. Ed. 103.

B, whose father had declared his intention to become a citizen of the United States while B was still a minor, grew up in the belief of his father's citizenship, and when he became of age removed to the territory of Nebraska, where he held office and served in the army. It was held that B was entitled to claim that if his father did not complete his naturalization before his son had attained his majority, the son cannot be held to have lost the inchoate status he had acquired by the declaration of intention, and to have elected to become the subject of a foreign power. *Boyd v. Thayer*, 143 U. S. 135, 179, 36 L. Ed. 103.

## VII. Operation and Effect of Naturalization.

**A. In General.**—A naturalized citizen possesses all the rights of a native citizen and stands, in the view of the constitution, on the footing of a native.<sup>37</sup>

**B. Retroactive Effect.**—Naturalization has a retroactive effect, so as to be deemed a waiver of all liability to forfeiture, and a confirmation of the former title of the person naturalized to property.<sup>38</sup> And subsequent naturalization relates back to remove or cure a disability to hold property acquired prior thereto.<sup>39</sup>

**C. As to Minors.**—The naturalization of the father operates to confer the municipal right of citizenship upon the minor child if, at the time of the father's naturalization, dwelling within the jurisdiction of the United States, or if he come within that jurisdiction subsequent to the father's naturalization and during his own minority,<sup>40</sup> but not if the child is born abroad, before the father comes to this country, and remains abroad until long after his naturalization.<sup>41</sup>

## VIII. Collective Naturalization.

Citizenship may spring from collective naturalization by treaty or statute.<sup>42</sup> And by the annexation of a sovereignty and its admission into the Union, all its citizens become, without any express declaration, citizens of the United

**37. Rights of a native citizen.**—*Osborn v. United States Bank*, 9 Wheat. 738, 827, 6 L. Ed. 204; *United States v. Wong Kim Ark*, 169 U. S. 649, 703, 42 L. Ed. 890. See the title CITIZENSHIP, vol. 3, p. 804.

**The oath of naturalization**, when taken, confers the rights of a citizen, and amounts to a judgment of the court for admission to those rights. *Campbell v. Gordon*, 6 Cranch 175, 176, 3 L. Ed. 190.

**38. Waiver of liability to forfeiture.**—*Osterman v. Baldwin*, 6 Wall. 116, 122, 18 L. Ed. 730, cited in *Manuel v. Wulff*, 152 U. S. 505, 511, 38 L. Ed. 532.

**39. Removal of disability.**—*Gouverneur v. Robertson*, 11 Wheat. 332, 350, 6 L. Ed. 488; *Manuel v. Wulff*, 152 U. S. 505, 511, 38 L. Ed. 532.

**40. As to minors.**—*Zartarian v. Billings*, 204 U. S. 170, 174, 51 L. Ed. 428. See the title CITIZENSHIP, vol. 3, p. 798.

In *Campbell v. Gordon*, 6 Cranch 175, 176, 3 L. Ed. 190, it was held that the naturalization act of April 14, 1802, now § 2172, Rev. Stat., conferred citizenship upon the minor child of an alien naturalized under the act of January 29, 1795, she being in this country at the time of the passage of the act of April 14, 1802, and then "dwelling in the United States." *Zartarian v. Billings*, 204 U. S. 170, 174, 51 L. Ed. 428; *Boyd v. Thayer*, 143 U. S. 135, 176, 36 L. Ed. 103.

"The act (of 1802) has also been held to be prospective in its operation and to include children of aliens naturalized after its passage, when 'dwelling in the United States.'" *Boyd v. Thayer*, 143 U. S. 135, 177, 36 L. Ed. 103." *Zartarian v. Billings*, 204 U. S. 170, 174, 51 L. Ed. 428.

"If the terms of the statutes are to be extended to include children of a naturalized who have never dwelt in the United States, such action must come from the legislation of congress and not judicial

decision." *Zartarian v. Billings*, 204 U. S. 170, 175, 51 L. Ed. 428.

"The limitation to children 'dwelling in the United States' was doubtless inserted in recognition of the principle that citizenship cannot be conferred by the United States on the citizens of another country when under such foreign jurisdiction; and is also in deference to the right of independent sovereignties to fix the allegiance of those born within their dominions, having regard to the principle of the common law which permits a sovereignty to claim, with certain exceptions, the citizenship of those born within its territory." *Zartarian v. Billings*, 204 U. S. 170, 174, 51 L. Ed. 428.

"The construction of this law and the meaning of the phrase 'dwelling in the United States' has been the subject of much consideration in the executive department of the government having to do with the admission of foreigners and the rights of alleged naturalized citizens of the United States. The rulings of the state department are collected in Prof. Moore's Digest of International Law, vol. 3, p. 467, et seq." *Zartarian v. Billings*, 204 U. S. 170, 174, 51 L. Ed. 428.

**41.** A child of a naturalized citizen, born abroad before the coming of her father to this country and remaining abroad until long after her father's naturalization, does not become a citizen of the United States, except upon compliance with the terms of the act of congress, for, wanting native birth, she cannot otherwise become a citizen of the United States. *Zartarian v. Billings*, 204 U. S. 170, 173, 51 L. Ed. 428; *United States v. Wong Kim Ark*, 169 U. S. 649, 702, 42 L. Ed. 890.

**42. By treaty or statute.**—*Contzen v. United States*, 179 U. S. 191, 193, 45 L. Ed. 148; *United States v. Wong Kim Ark*, 169 U. S. 649, 702, 42 L. Ed. 890.



States.<sup>43</sup> In the admission of a territory as a state, a collective naturalization may be effected in accordance with the intention of congress and the people applying for admission.<sup>44</sup>

### IX. Offenses against the Naturalization Laws.

Section 13 of the act of congress of 1813 providing for the punishment of certain offenses against the naturalization laws, was held to be repealed by the act of congress of 1870, "to amend the naturalization laws, and to punish crimes against the same, and for other purposes."<sup>45</sup>

**NAVAL CADET.**—See note 1.

**NAVAL OFFICER.**—See the title *ARMY AND NAVY*, vol. 2, p. 505.

**NAVAL SERVICE.**—See the title *ARMY AND NAVY*, vol. 2, pp. 499, 505.

The instances of collective naturalization by treaty or by statute are numerous. *Boyd v. Thayer*, 143 U. S. 135, 162, 36 L. Ed. 103.

**43. By annexation of a sovereignty.**—*Contzen v. United States*, 179 U. S. 191, 193, 45 L. Ed. 148.

By the annexation of Texas and its admission into the Union all the citizens of the former republic became, without any express declaration, citizens of the United States. *Contzen v. United States*, 179 U. S. 191, 193, 45 L. Ed. 148. See the title *CITIZENSHIP*, vol. 3, p. 801.

**44. Admission of territory as state.**—*Boyd v. Thayer*, 143 U. S. 135, 170, 36 L. Ed. 103. See the title *CITIZENSHIP*, vol. 3, p. 801.

B. was born in Ireland of Irish parents in 1834, and brought to this country in 1844 by his father, who in 1849 declared his intention to become a citizen of the United States. In 1856 B. removed to the territory of Nebraska where he filled office and served in the army. He had taken, prior to the admission of the state, the oath required by law in entering upon the duties of the offices he had filled, and sworn to support the constitution of the United States and the provisions of the organic act under which the territory of Nebraska was created. For many years he had enjoyed all the rights, privileges and immunities of a citizen of the United States and of the territory and state. It was held that B. was within the intent and meaning, effect and operation of the acts of congress in relation to the citizens of the territory, and was made a citizen of the United States and of the state of Nebraska under the organic and enabling acts and the act of admission. *Boyd v. Thayer*, 143 U. S. 135, 179, 36 L. Ed. 103.

The subject of collective naturalization is discussed at length in *Boyd v. Thayer*, 143 U. S. 135, 36 L. Ed. 103. See, also, *Contzen v. United States*, 179 U. S. 191, 195, 45 L. Ed. 148.

**45. Offenses against the naturalization laws.**—*United States v. Tynen*, 11 Wall. 88, 20 L. Ed. 153.

The act of 1870 declared not only that

the commission of the several acts mentioned in the thirteenth section of the law of 1813 should constitute a felony; but that also a great number of other acts of a fraudulent character, in connection with the naturalization of aliens, should constitute a similar offense, and made the infliction of a larger punishment for each offense discretionary with the court. *United States v. Tynen*, 11 Wall. 88, 20 L. Ed. 153.

**1. Naval cadets.**—One of the objects of the act of August 5, 1882, providing for the appointment of naval cadets in lieu of cadet engineers and cadet midshipmen, was to abolish the distinctions previously made by law between cadet engineers and cadet midshipmen, and for the future to merge both classes in the new designation of naval cadets. The previous differences between them grew out of separate provisions as to their number, their manner of appointment, their course and term of study, and their pay after their four years' course at the academy. Another principal purpose of the act was to prevent the increase of the number of officers in the navy, by providing for the annual discharge from the service of all graduates of the year not needed to fill vacancies, in the grade to which they were eligible for promotion, actually existing at the time of their graduation. The act provided that all the undergraduates at the Naval Academy should thereafter be designated and called naval cadets; and that from those, that is those thereafter called naval cadets, who successfully completed their six years' course, appointments should thereafter be made as should be necessary to fill vacancies in the lower grades of the line, and engineer corps of the navy and of the marine corps. But this act did not touch the case of a cadet engineer who has already graduated, at the date of the act, that is, who had at that time successfully completed his four years' course of study at the academy and was serving on board a naval steamer. He did not become a naval cadet by the act. *United States v. Redgrave*, 116 U. S. 474, 481, 29 L. Ed. 697. See, generally, the title *ARMY AND NAVY*, vol. 2, p. 494.



# NAVIGABLE WATERS.

BY HOMER RICHEY.

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### CROSS REFERENCES.

See the titles ACCESSION, ACCRETION AND RELICTION, vol. 1, p. 51; ADMIRALTY, vol. 1, p. 119; BOUNDARIES, vol. 3, pp. 476, 494; BRIDGES, vol. 3, p. 516, et seq.; CANALS, vol. 3, p. 546; COLLISION, vol. 3, p. 870; CONSTITUTIONAL LAW, vol. 4, pp. 158, 337; DUE PROCESS OF LAW, vol. 5, pp. 564, 596; FERRIES, vol. 6, p. 274; FISH AND FISHERIES, vol. 6, p. 291; INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 269, 337, 386; LOGS AND LOGGING, vol. 7, p. 1059; NUISANCES; PILOTS; POLICE POWER; PUBLIC LANDS; SHIPS AND SHIPPING; STATES; UNITED STATES; WATERS AND WATERCOURSES; WHARVES AND WHARFINGERS. And see ISLANDS, vol. 7, p. 525; LAKES AND PONDS, vol. 7, p. 825.

### I. Definitions and General Considerations.

**A. Navigable Waters**—1. IN ENGLAND.—At common law no waters are deemed navigable except such as are subject to the ebb and flow of the tide. This test grew out of the fact that in England no rivers are navigable in fact, at least none of any considerable extent, which are not also affected by the tide. Under the English system, therefore, the ebb and flow of the tide, with few if any exceptions, establishes the fact of navigability, and there tidewater and navigable waters are synonymous terms.<sup>1</sup>

**1. Navigable waters, in England.**—The Propeller *Genesee Chief*, 12 How. 443, 444, 455, 13 L. Ed. 1058; *Fretz v. Bull*, 12 How. 466, 13 L. Ed. 1068; *Jackson v. The Steamboat Magnolia*, 20 How. 296, 15 L. Ed. 909; *Springfield Tp. v. Quick*, 22 How. 56, 16 L. Ed. 256; *The Hine v. Trevor*, 4 Wall. 555, 18 L. Ed. 451; *Railroad Co. v. Schurmeir*, 7 Wall. 272, 19 L. Ed. 74; *The Daniel Ball*, 10 Wall. 557, 563, 19 L. Ed. 999; *Insurance Co. v. Dunham*, 11 Wall. 1, 26, 20 L. Ed. 90; *The Mon-*

*tello*, 20 Wall. 430, 441, 22 L. Ed. 391; *Barney v. Keokuk*, 94 U. S. 324, 336, 24 L. Ed. 224; *Escanaba Co. v. Chicago*, 107 U. S. 678, 27 L. Ed. 442; *Leovy v. United States*, 177 U. S. 621, 44 L. Ed. 914; *Packer v. Bird*, 137 U. S. 661, 667, 34 L. Ed. 819; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 435, 36 L. Ed. 1018; *Grand Rapids, etc., R. Co. v. Butler*, 159 U. S. 87, 92, 40 L. Ed. 85; *The Robert W. Parsons*, 191 U. S. 17, 26, 48 L. Ed. 73. See, also, the title ADMIRALTY, vol. 1, p. 132.



2. IN THE UNITED STATES—*a. Generally.*—At the time the constitution of the United States was adopted and our courts of admiralty went into operation the definition which had been adopted in England was in a large measure applicable here, since in the original thirteen states the far greater part of the navigable waters are tidewaters. Accordingly the confusion of navigable with tidewaters, found in the monuments of the common law, long prevailed in this country, and for two generations it had the influence of excluding the admiralty jurisdiction from our great rivers and inland seas unaffected by the ebb and flow of the tide;<sup>2</sup> but with the growth of the country, embracing thousands of miles of navigable waters, including lakes and rivers in which there is no tide, it was seen that a definition which would limit public navigable waters to tidewaters was wholly inadmissible, and the definition was broadened so as to include all public navigable waters, lakes and rivers.<sup>3</sup> It is well settled, therefore, that in this country the test is not the ebb and flow of the tide, but the navigable capacity of the water, and that those waters must be regarded as public navigable waters in law which are navigable in fact.<sup>4</sup>

*b. Rivers Navigable in Fact, When.*—Rivers are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.<sup>5</sup>

**Capability of Use Rather than Actual Use.**—The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway.<sup>6</sup> Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the

2. In the United States.—The Steamboat Thomas Jefferson, 10 Wheat. 428, 6 L. Ed. 359; The Steamboat Orleans v. Phœbus, 11 Pet. 175, 9 L. Ed. 677; The Propeller Genesee Chief, 12 How. 443, 444, 455, 13 L. Ed. 1058; Fretz v. Bull, 12 How. 466, 13 L. Ed. 1068; Springfield Tp. v. Quick, 22 How. 56, 16 L. Ed. 256; Railroad Co. v. Schurmeir, 7 Wall. 272, 19 L. Ed. 74; The Daniel Ball, 10 Wall. 557, 19 L. Ed. 999; Insurance Co. v. Dunham, 11 Wall. 1, 26, 20 L. Ed. 90; The Montello, 20 Wall. 430, 22 L. Ed. 391; Barney v. Keokuk, 94 U. S. 324, 338, 24 L. Ed. 224; Leovy v. United States, 177 U. S. 621, 630, 44 L. Ed. 914; Packer v. Bird, 137 U. S. 661, 667, 34 L. Ed. 819. See, also, the title ADMIRALTY, vol. 1, p. 132.

3. Same.—The Propeller Genesee Chief, 12 How. 443, 444, 13 L. Ed. 1058. See, generally, the titles ADMIRALTY, vol. 1, p. 133; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 339.

4. Same; includes all waters navigable in fact.—The Propeller Genesee Chief, 12 How. 443, 444, 457, 13 L. Ed. 1058; Fretz v. Bull, 12 How. 466, 13 L. Ed. 1068; Jackson v. The Steamboat Magnolia, 20 How. 296, 15 L. Ed. 909; Springfield Tp. v. Quick, 22 How. 56, 16 L. Ed. 256; Jones v. Souldard, 24 How. 41, 60, 16 L. Ed. 604; The Hine v. Trevor, 4 Wall. 555, 18 L. Ed. 451; Railroad Co. v. Schurmeir, 7 Wall. 272, 19 L. Ed. 74; The Daniel Ball, 10 Wall. 557, 19 L. Ed. 999; Insurance Co. v. Dunham, 11 Wall. 1, 26, 20 L. Ed.

90; The Montello, 20 Wall. 430, 439, 22 L. Ed. 391; Barney v. Keokuk, 94 U. S. 324, 338, 24 L. Ed. 224; Escanaba Co. v. Chicago, 107 U. S. 678, 682, 27 L. Ed. 442; Miller v. Mayor, 109 U. S. 385, 27 L. Ed. 971; Leovy v. United States, 177 U. S. 621, 630, 44 L. Ed. 914; Packer v. Bird, 137 U. S. 661, 667, 34 L. Ed. 819; Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 435, 36 L. Ed. 1018; United States v. Rio Grande Dam, etc., Co., 174 U. S. 690, 698, 43 L. Ed. 1136; The Robert W. Parsons, 191 U. S. 17, 26, 48 L. Ed. 73.

“**Navigable,**” as employed by congress.—“Congress did not employ the words ‘navigable’ and ‘not navigable,’ in that sense, as usually understood in legal decisions. On the contrary, it is obvious that the words were employed without respect to the ebb and flow of the tide, as they were applied to territory situated far above tidewaters, and in which there were no salt water streams.” Railroad Co. v. Schurmeir, 7 Wall. 272, 19 L. Ed. 74.

5. Rivers navigable in fact, when.—The Daniel Ball, 10 Wall. 557, 19 L. Ed. 999; The Montello, 20 Wall. 430, 439, 22 L. Ed. 391; Packer v. Bird, 137 U. S. 661, 667, 34 L. Ed. 819; United States v. Rio Grande Dam, etc., Co., 174 U. S. 690, 692, 43 L. Ed. 1136; Leovy v. United States, 177 U. S. 621, 630, 44 L. Ed. 914.

6. Capability of use rather than actual use.—The Montello, 20 Wall. 430, 441, 22 L. Ed. 391; Leovy v. United States, 177 U. S. 621, 631, 44 L. Ed. 914.

agency of steam, are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river.<sup>7</sup>

**But Not Every Small Creek.**—It is not, however, every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture.<sup>8</sup>

**Streams Not Navigable in Every Part; Artificial Aids, Locks, Dams, etc.**—In order to be navigable, it is not necessary that it should be deep enough to admit the passage of boats at all portions of the stream.<sup>9</sup> A rule, as a test of navigability, cannot be adopted if it would exclude any of the great rivers of the country which so interrupted by rapids as to require artificial means to enable them to be navigated without break. Indeed, there are but few of our fresh-water rivers which did not originally present serious obstructions to an uninterrupted navigation.<sup>10</sup> In some cases, they may be so great while they last as to prevent the use of the best instrumentalities for carrying on commerce, but the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce. If this be so the river is navigable in fact, although its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sand bars.<sup>11</sup>

**Rivers Not Always Navigable.**—Many of our leading rivers are sometimes unnavigable; but this cannot affect their navigability at other times.<sup>12</sup>

c. *Lakes, Ponds, etc.*—Our great inland lakes, together with the waters connecting them, are public navigable waters, and within the grant of the admiralty and maritime jurisdiction of the United States.<sup>13</sup>

d. *Canals.*—Canals or other artificial channels, which are navigable in fact, and which, in connection with other waters, form a highway for commerce between ports and places in different states, are public navigable waters of the United States, and within the legitimate scope of the admiralty and maritime jurisdiction of the United States.<sup>14</sup>

e. *Navigable Waters of the United States.*—Navigable waters of the United States, within the meaning of the acts of congress, in contradistinction to the navigable waters of the states, are waters which, in their ordinary condition by themselves, or by uniting other waters, form a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water.<sup>15</sup> The mere

7. *Same.*—The *Montello*, 20 Wall. 430, 442, 22 L. Ed. 391; *Leovy v. United States*, 177 U. S. 621, 631, 44 L. Ed. 914.

8. *But not every small creek, etc.*—*United States v. Rio Grande Dam, etc., Co.*, 174 U. S. 690, 698, 43 L. Ed. 1136; *The Montello*, 20 Wall. 430, 442, 22 L. Ed. 391; *Leovy v. United States*, 177 U. S. 621, 632, 44 L. Ed. 914.

9. *Streams not navigable in every part; improvements and artificial aids.*—*St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs*, 168 U. S. 349, 359, 42 L. Ed. 497.

10. *Same.*—*The Montello*, 20 Wall. 430, 442, 22 L. Ed. 391.

11. *Same.*—*The Montello*, 20 Wall. 430, 443, 22 L. Ed. 391.

12. *Rivers not always navigable.*—*Springfield Tp. v. Quick*, 22 How. 56, 16 L. Ed. 256.

13. *Lakes, ponds, etc.*—*The Propeller Genesee Chief*, 12 How. 443, 444, 457, 13 L. Ed. 1058; *Insurance Co. v. Dunham*, 11

Wall. 1, 26, 20 L. Ed. 90; *Barney v. Keokuk*, 94 U. S. 324, 338, 24 L. Ed. 224; *Escanaba Co. v. Chicago*, 107 U. S. 678, 682, 27 L. Ed. 442; *Hardin v. Jordan*, 140 U. S. 371, 391, 35 L. Ed. 428; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 36 L. Ed. 1018; *Illinois Cent. R. Co. v. Chicago*, 176 U. S. 646, 44 L. Ed. 622. See, also, the title ADMIRALTY, vol. 1, p. 133.

14. *Canals.*—*Ex parte Boyer*, 109 U. S. 629, 632, 27 L. Ed. 1056. *The Robert W. Parsons*, 191 U. S. 17, 26, 48 L. Ed. 73. See the titles ADMIRALTY, vol. 1, p. 134; LAKE AND PONDS, vol. 7, p. 825.

15. *Navigable waters of the United States.*—*South Carolina v. Georgia*, 93 U. S. 4, 10, 23 L. Ed. 782; *The Robert W. Parsons*, 191 U. S. 17, 28, 48 L. Ed. 73. See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 339.

*Lakes and ponds.*—See ante, "Lakes, Ponds, etc.," I, A, 2, c; *Lakes and Ponds*, vol. 7, p. 825.

*Canals.*—See ante, "Canals," I, A, 2, d.



capacity to pass in a boat of any size, however small, from one stream or rivulet to another, is not sufficient, however to constitute a navigable water of the United States. It is not every small creek in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable, but in order to give it the character of a navigable stream it must be generally and commonly useful to some purpose of trade or agriculture.<sup>16</sup> But the navigability of a stream, for the purpose of bringing it within the terms "navigable waters of the United States," does not depend upon the mode by which commerce is conducted upon it, as whether by steamers, or sailing vessels, nor upon the difficulties attending navigation, such as those made by falls, rapids, and sandbars, even though these be so great that while they last they prevent the use of the best means, such as steamboats, for carrying on commerce. It depends upon the fact whether the river in its natural state is such that it affords a channel for useful commerce.<sup>17</sup>

f. *Judicial Notice of Navigability*.—See the title JUDICIAL NOTICE, vol. 7, p. 682.

g. *Waters Held to Be or Not to Be Navigable*.—See the footnotes.<sup>18</sup>

**B. High Seas.**—If the words "high seas" be taken according to the common

If the waters, though navigable, are wholly territorial and used only for local traffic, such, for instance, as the interior lakes of the state of New York, they are not to be considered as navigable waters of the United States. The Robert W. Parsons, 191 U. S. 17, 28, 48 L. Ed. 73; The Montello, 20 Wall. 430, 22 L. Ed. 391. See, also, the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 339.

16. **Same; small and uncertain traffic.**—The Montello, 20 Wall. 430, 442, 22 L. Ed. 391; Leovy v. United States, 177 U. S. 621, 633, 44 L. Ed. 914; United States v. Rio Grande Dam, etc., Co., 174 U. S. 690, 698, 43 L. Ed. 1136. See, also, the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 340.

"The mere fact that logs, poles and rafts are floated down a stream occasionally, and in times of high water, does not make it a navigable river." United States v. Rio Grande Dam, etc., Co., 174 U. S. 690, 698, 43 L. Ed. 1136.

17. **Same; as affected by mode of commerce or difficulties of navigation.**—The Montello, 20 Wall. 430, 22 L. Ed. 391; Leovy v. United States, 177 U. S. 621, 631, 44 L. Ed. 914.

18. **Waters held to be or not to be navigable.**—"The Alabama river flows through the state of Alabama. It is a great public river, navigable from the sea for many miles above the ebb and flow of the tide." Jackson v. The Steamboat Magnolia, 20 How. 296, 298, 15 L. Ed. 909.

**Buzzard's Bay.**—Buzzard's Bay lies wholly within the territory of Massachusetts, having Barnstable County on the one side of it, and the counties of Bristol and Plymouth on the other. Manchester v. Massachusetts, 139 U. S. 240, 256, 35 L. Ed. 159.

But the waters of Buzzard's Bay are, of course, navigable waters of the United States, and the jurisdiction of Massachusetts over them is necessarily limited.

Manchester v. Massachusetts, 139 U. S. 240, 264, 35 L. Ed. 159.

"The Chicago River is a navigable stream." Harman v. Chicago, 147 U. S. 396, 404, 37 L. Ed. 216.

The Chicago River and its branches, although entirely within the state of Illinois, are navigable waters of the United States, over which congress under its commercial power may exercise control to the extent necessary to protect, preserve, and improve their free navigation. Escanaba Co. v. Chicago, 107 U. S. 678, 683, 27 L. Ed. 442.

**The Chippewa River** is a small stream lying wholly within the state of Wisconsin, but emptying its waters into the Mississippi. The stream, though small, is a navigable river of the United States, and protected by all the acts of congress and provisions of the constitution applicable to such waters. Pound v. Turk, 95 U. S. 459, 462, 24 L. Ed. 525.

**The Delaware.**—By the law of Pennsylvania the river Delaware is a public navigable river, held by its joint sovereigns in trust for the public. Rundle v. Delaware, etc., Canal Co., 14 How. 80, 14 L. Ed. 335.

The river Delaware is within the admiralty jurisdiction. Montgomery v. Henry, 1 Dall. 49, 1 L. Ed. 32.

**Fox River** is, within the rule prescribed by the United States supreme court, a navigable water of the United States. It has always been navigable in fact, and not only capable of use, but actually used as a highway for commerce in the only mode in which commerce could be conducted, before the navigation of the river was improved. The Montello, 20 Wall. 430, 443, 22 L. Ed. 391; Green Bay, etc., Canal Co. v. Patten Paper Co., 172 U. S. 58, 69, 43 L. Ed. 364. See, also, The Montello, 11 Wall. 411, 416, 20 L. Ed. 191.

**Grand River**, in Michigan, is a navigable water of the United States, from its mouth in Lake Michigan to Grand Rapids, a distance of forty miles, being a stream capable of bearing for that distance a steamer



understanding of mankind, if they be taken in their popular and received sense, the "high seas," if not in all instances confined to the ocean which washes a coast, can never extend to a river, about half a mile wide, and in the interior of a country.<sup>19</sup> But a road, haven, or even a river, not within the body of the country, is high sea in the idea of the civilians."<sup>20</sup>

**C. Haven, Harbor, etc.**—See, generally, the titles *COLLISION*, vol. 3, p. 884; *CRIMINAL LAW*, vol. 5, pp. 78, 80; *SHIPS AND SHIPPING*; *WATERS AND WATERCOURSES*; *WHARVES AND WHARFINGERS*. See, also, *HAVEN*, vol. 6, p. 680.

**D. River, Bed, Shore, Tide Land, etc.**—**River.**—Woolrych defines a river to be a body of flowing water of no specific dimensions—larger than a

of one hundred and twenty-three tons burden, laden with merchandise and passengers, and forming by its junction with the lake a continued highway for commerce, both with other states and with foreign countries. *The Daniel Ball*, 10 Wall. 557, 19 L. Ed. 999.

**Healey Slough**, a tributary of the Chicago River, is not navigable in such sense as to constitute it a public highway and a public navigable water of the United States at the point where it is spanned by the bridge built by the Joliet and Chicago Railroad Company in 1856 and now kept up and maintained by the Chicago and Alton Railway Company. *Healy v. Joliet, etc.*, R. Co., 116 U. S. 191, 29 L. Ed. 607.

**The Mississippi.**—The Mississippi River and its principal branches are public navigable waters of the United States. *Barney v. Keokuk*, 94 U. S. 324, 336, 24 L. Ed. 224.

The Mississippi River in the vicinity of St. Anthony's Falls is a navigable stream. *St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs*, 168 U. S. 349, 42 L. Ed. 497.

"The Mississippi is a navigable river above the Falls of St. Anthony, and the state could not confer an exclusive use of its waters, or exclusive control and management of logs floating on it, against the consent of their owners." *Boom Co. v. Patterson*, 98 U. S. 403, 409, 25 L. Ed. 206.

**The Ohio.**—"That the Ohio is one of the navigable rivers of the United States must be conceded. It forms a boundary of six states, and the commerce upon its waters is very large." *Bridge Co. v. United States*, 105 U. S. 470, 475, 26 L. Ed. 1143. This is a historical fact which all courts may recognize. *Pennsylvania v. Wheeling, etc.*, *Bridge Co.*, 13 How. 518, 561, 14 L. Ed. 249.

**The River Penobscot** is entirely within the state of Maine, from its source to its mouth. For the last eight miles of its course it is not navigable, but crossed by four dams erected for manufacturing purposes. Higher up the stream there is an imperfect navigation. *Veazie v. Moor*, 14 How. 568, 14 L. Ed. 545.

**The Potomac River** is a navigable stream, or part of the *jus publicum*; and any obstruction to its navigation would, upon the

most established principles, be a public nuisance. *Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 9 L. Ed. 1012.

**The Rio Grande**, speaking generally, is a navigable river, but it is not navigable within the limits of the territory of New Mexico. Within the limits of New Mexico it is not a stream over which in its ordinary condition trade and travel can be conducted in the customary modes of trade and travel on water. Its use for any purposes of transportation has been and is exceptional, and only in times of temporary high water. The ordinary flow of water is insufficient. *United States v. Rio Grande Dam, etc., Co.*, 174 U. S. 690, 698, 43 L. Ed. 1136.

**Red Pass** in the state of Louisiana, in the condition it was at the time when the dam in controversy was built, was not shown by adequate evidence to have been a navigable water of the United States, actually used in interstate commerce. *Leovy v. United States*, 177 U. S. 621, 637, 44 L. Ed. 914.

**19. High seas defined.**—*United States v. Wiltberger*, 5 Wheat. 76, 94, 5 L. Ed. 37.

**20. Same; as including road, haven or harbor.**—*Montgomery v. Henry*, 1 Dall. 49, 1 L. Ed. 32. See the title *CRIMINAL LAW*, vol. 5, p. 78.

"The use of the word sea to fix admiralty jurisdiction, and what part of it might be within the body of a county, have not been settled points among the common-law judges in England. Lord Hale differed from Lord Coke. The former, in defining what the sea is, says, 'that it is either that which lies within the body of the county or without; that arm or branch of the sea which lies within the fauces terræ is, or at least may be, within the body of a county; that part which lies not within the body of a county is called the main sea.' It is difficult to reconcile the differences of opinion and of definition given by the common-law courts in Lord Coke's day and for fifty years afterwards, as to the meaning and legal application of the word sea, so as to make a practical rule to govern the decisions of cases, or to determine what were cases of admiralty jurisdiction. But there is no difficulty in making such a rule, if the construction of it, by the admiralty courts, is adopted. In that construction, it meant not only

brook or rivulet, less than a sea—a running stream, pent on each side by walls or banks.<sup>21</sup>

**Shores.**—The shore is that ground that is between the ordinary high-water and low-water marks.<sup>22</sup>

**Seashore.**—By the common law, the shore of the sea, and, of course, of arms of the sea, is the land between ordinary high-water and low-water marks, the land over which the daily tides ebb and flow.<sup>23</sup>

**Shores, as Used in Revenue Laws.**—The word “shores” as used in Rev. Stat., §§ 2550, 2551, relating to collection districts, is broad enough to include the whole of a city on those shores and within the other limits named.<sup>24</sup>

**Tide Lands.**—Land alternately covered and uncovered, and between the dry uplands and the navigable water, is land which may be used in facilitating approach to the navigable waters from the upland, and is strictly within the description of “tide lands,” and covered by the rule in respect to the right of the holders of land scrip to locate upon such lands.<sup>25</sup>

## II. Dominion, Sovereignty and Ownership of Navigable Waters, Beds, Shores, etc.

**A. As between Independent States and Nations.**—As between nations, the minimum limit of the territorial jurisdiction of a nation over tidewaters is a marine league from its coast; and bays wholly within its territory not exceeding two marine leagues in width at the mouth are within this limit.<sup>26</sup> The open sea within this limit is, of course, subject to the common right of navigation; and all governments, for the purpose of self-protection in time of war or for

high sea, but arms of the sea, waters flowing from it into ports and havens, and as high upon rivers as the tide ebbs and flows.” *Waring v. Clarke*, 5 How. 441, 462, 12 L. Ed. 226. See, generally, the titles ADMIRALTY, vol. 1, p. 132; CRIMINAL LAW, vol. 5, pp. 78, 79; INTERNATIONAL LAW, vol. 7, pp. 242, 243. See, also, HIGH SEAS, vol. 6, p. 692.

**21. River defined.**—*Alabama v. Georgia*, 23 How. 505, 513, 16 L. Ed. 556.

**Same; channel.**—See CHANNEL, vol. 3, p. 673.

**22. Shores.**—*Shively v. Bowlby*, 152 U. S. 1, 12, 38 L. Ed. 331.

The shores of a river border on the water's edge. *Handly v. Anthony*, 5 Wheat. 374, 385, 5 L. Ed. 113; *Alabama v. Georgia*, 23 How. 505, 513, 16 L. Ed. 556.

“Mr. Justice Story, in *Thomas and Hatch*, 3 Sumner 178, defines shores or flats to be the space between the margin of the water at a low stage, and the banks to be what contains it in its greatest flow; Lord Hale defines the term shore to be synonymous with flat, and substitutes the latter for that expression. Mr. Justice Parker does the same, in 6 Mass. Reports, 436, 439.” *Alabama v. Georgia*, 23 How. 505, 513, 16 L. Ed. 556.

**23. Seashore.**—*United States v. Pacheco*, 2 Wall. 587, 590, 17 L. Ed. 865.

**24. Shores as used in revenue laws.**—*Bartlett v. United States*, 197 U. S. 230, 233, 49 L. Ed. 735. See the title REVENUE LAWS.

**25. Tide lands.**—*Mann v. Tacoma Land Co.*, 153 U. S. 273, 38 L. Ed. 714; *Baer v.*

*Moran Bros. Co.*, 153 U. S. 287, 288, 38 L. Ed. 718; *Walker v. Harbor Comm'rs*, 17 Wall. 648, 21 L. Ed. 744. See, also, the titles BOUNDARIES, vol. 3, p. 461; PUBLIC LANDS.

“The lands which passed to the state (of California) upon her admission to the Union were not those which were affected occasionally by the tide, but only those over which tidewater flowed so continuously as to prevent their use and occupation. To render lands tide lands, which the state by virtue of her sovereignty could claim, there must have been such continuity of the flow of tidewater over them, or such regularity of the flow within every twenty-four hours, as to render them unfit for cultivation, the growth of grasses, or other uses to which upland is applied. But even if there were such lands, their existence could in no way affect the rights of the pueblo.” *San Francisco v. Le Roy*, 138 U. S. 656, 671, 34 L. Ed. 1096.

**Follows state court.**—The supreme court of the United States follows the decision of the supreme court of California that in that state the term “tide lands” is applied only to lands covered and uncovered by the water, and that it does not include lands permanently submerged. *Walker v. Harbor Comm'rs*, 17 Wall. 648, 21 L. Ed. 744.

**26. Dominion, sovereignty and ownership as between independent states and nations.**—*Manchester v. Massachusetts*, 139 U. S. 240, 258, 35 L. Ed. 159. See, generally, the title INTERNATIONAL LAW, vol. 7, pp. 242, 243.



the prevention of frauds on its revenue, exercise an authority beyond this limit.<sup>27</sup>

**Jurisdiction of States of the United States.**—The extent of the territorial jurisdiction of a state of the Union over the sea adjacent to its coast is that of an independent nation; and, except so far as any right of control over this territory has been granted to the United States, this control remains with the state.<sup>28</sup> Within what are generally recognized as the territorial limits of states by the law of nations, a state can define its boundaries on the sea and the boundaries of its counties.<sup>29</sup>

**As to Boundary Waters.**—See the title BOUNDARIES, vol. 3, pp. 494, 505, 507.

## B. As between the States and Territories and the United States—

1. GENERALLY AS TO MUNICIPAL JURISDICTION, SOVEREIGNTY AND EMINENT DOMAIN—a. *Generally.*—When the Revolution took place, the people of each state became themselves sovereign, and in that character they hold the absolute right to all their navigable waters and the soils under them for their own common use, with the consequent right to use or dispose of any portion thereof, where that can be done without substantial impairment of the interest of the public in such waters, subject only to the rights since surrendered by the constitution to the general government. It is the well-established doctrine that the absolute property in and dominion and sovereignty over navigable streams, tidewaters, and the underlying soils were not granted to the United States, but were reserved to and remain in the several states.<sup>30</sup>

**27. Same.**—*Manchester v. Massachusetts*, 139 U. S. 240, 258, 35 L. Ed. 159. See, generally, the title INTERNATIONAL LAW, vol. 7, pp. 242, 243.

**28. Same; jurisdiction of states of the United States.**—*Manchester v. Massachusetts*, 139 U. S. 240, 264, 35 L. Ed. 159.

Whatever soil below low-water mark is the subject of exclusive property and ownership, belongs to the state on whose maritime border and within whose territory it lies, subject to any lawful grants of that soil by the state, or the sovereign power which governed its territory before the declaration of independence. *Martin v. Waddell*, 16 Pet. 367, 10 L. Ed. 997; *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565; *Den v. The Jersey Co.*, 15 How. 426, 14 L. Ed. 757; *Smith v. Maryland*, 18 How. 71, 15 L. Ed. 269; *Manchester v. Massachusetts*, 139 U. S. 240, 261, 35 L. Ed. 159.

**29. Same.**—*Manchester v. Massachusetts*, 139 U. S. 240, 264, 35 L. Ed. 159.

"If Massachusetts had continued to be an independent nation, her boundaries on the sea, as defined by her statute, would unquestionably be acknowledged by all foreign nations, and her right to control the fisheries within those boundaries would be conceded." *Manchester v. Massachusetts*, 139 U. S. 240, 257, 35 L. Ed. 159.

"By this test the commonwealth of Massachusetts can include Buzzard's Bay within the limits of its counties." *Manchester v. Massachusetts*, 139 U. S. 240, 264, 35 L. Ed. 159.

**30. Municipal jurisdiction, sovereignty and eminent domain as between states and United States.**—*Johnson v. McIntosh*, 8 Wheat. 543, 595, 5 L. Ed. 681; *The Steam-*

*boat Thomas Jefferson*, 10 Wheat. 428, 6 L. Ed. 359; *Mobile v. Esclava*, 16 Pet. 234, 10 L. Ed. 948; *Martin v. Waddell*, 16 Pet. 367, 10 L. Ed. 997; *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565; *Goodtitle v. Kibbe*, 9 How. 471, 13 L. Ed. 220; *Doe v. Beebe*, 13 How. 25, 14 L. Ed. 35; *Den v. The Jersey Co.*, 15 How. 426, 14 L. Ed. 757; *Smith v. Maryland*, 18 How. 71, 74, 15 L. Ed. 269; *Withers v. Buckley*, 20 How. 84, 92, 15 L. Ed. 816; *United States v. Pacheco*, 2 Wall. 587, 17 L. Ed. 865; *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. Ed. 96; *The Passaic Bridges*, 3 Wall., appx., 782, 793; *Mumford v. Wardwell*, 6 Wall. 423, 436, 18 L. Ed. 756; *Railroad Co. v. Schurmeir*, 7 Wall. 272, 19 L. Ed. 74; *Walker v. Harbor Commrs.*, 17 Wall. 648, 21 L. Ed. 744; *Weber v. Harbor Commrs.*, 18 Wall. 57, 21 L. Ed. 798; *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224; *McCready v. Virginia*, 94 U. S. 391, 24 L. Ed. 248; *Pound v. Turck*, 95 U. S. 459, 464, 24 L. Ed. 525; *Transportation Co. v. Chicago*, 99 U. S. 635, 643, 25 L. Ed. 336; *Bridge Co. v. United States*, 105 U. S. 470, 491, 26 L. Ed. 1143; *Escanaba Co. v. Chicago*, 107 U. S. 678, 682, 27 L. Ed. 442; *Cardwell v. American Bridge Co.*, 113 U. S. 205, 28 L. Ed. 959; *St. Louis v. Myers*, 113 U. S. 566, 567, 28 L. Ed. 1131; *Hamilton v. Vicksburg, etc., Railroad*, 119 U. S. 280, 30 L. Ed. 393; *Huse v. Glover*, 119 U. S. 543, 548, 30 L. Ed. 487; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 9, 31 L. Ed. 629; *Packer v. Bird*, 137 U. S. 661, 34 L. Ed. 819; *St. Louis v. Rutz*, 138 U. S. 226, 34 L. Ed. 941; *San Francisco v. LeRoy*, 138 U. S. 656, 670, 34 L. Ed. 1096; *Manchester v. Massachusetts*, 139 U. S. 240, 35 L. Ed. 159; *Hardin v. Jordan*, 140



b. *Doctrine Extends to Lands Bordering upon Seashore and to Inland Lakes.*—This doctrine applies to the rights of the states in regard to all navigable waters within their jurisdiction, including lands bordering upon the seashore and lands covered by the waters of inland lakes which, by reason of their affording a connecting route for commerce with other states or foreign countries, are to be considered navigable waters of the United States.<sup>31</sup>

c. *Abrogation of Doctrine by Compact between State and United States.*—The constitution of the United States being the supreme law binding upon both the states and the United States, it follows that their relative rights as to navigable waters and the soils under them cannot be diminished or enlarged by compact or agreement.<sup>32</sup>

d. *But Congress May Purchase Lands within the States.*—But congress may, of course, exercise exclusive jurisdiction over places within the states purchased under the authority of the 16th clause of § 8 of article 1 of the constitution of the United States, and in such cases the consent of the state operates as a practical cession of the territory to the United States.<sup>33</sup>

U. S. 371, 35 L. Ed. 428; *Knight v. United States Land Ass'n*, 142 U. S. 161, 35 L. Ed. 974; *Kaukauna Water Power Co. v. Green Bay, etc.*, Canal Co., 142 U. S. 254, 35 L. Ed. 1004; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 36 L. Ed. 1018; *Shively v. Bowlby*, 152 U. S. 1, 38 L. Ed. 331; *Prosser v. Northern Pac. Railroad*, 152 U. S. 59, 64, 38 L. Ed. 352; *Wharton v. Wise*, 153 U. S. 155, 173, 38 L. Ed. 669; *Mann v. Tacoma Land Co.*, 153 U. S. 273, 38 L. Ed. 714; *Baer v. Moran Bros. Co.*, 153 U. S. 287, 38 L. Ed. 718; *Eldridge v. Trezevant*, 160 U. S. 452, 468, 40 L. Ed. 490; *Ward v. Race Horse*, 163 U. S. 504, 41 L. Ed. 244; *Gibson v. United States*, 166 U. S. 269, 271, 41 L. Ed. 996; *St. Anthony Falls Water Power Co. v. St. Paul Water Comm'r's*, 168 U. S. 349, 359, 42 L. Ed. 497; *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 43 L. Ed. 823; *Morris v. United States*, 174 U. S. 196, 43 L. Ed. 946; *Leovy v. United States*, 177 U. S. 621, 630, 44 L. Ed. 914; *Scranton v. Wheeler*, 179 U. S. 141, 162, 45 L. Ed. 126; *Mobile Transp. Co. v. Mobile*, 187 U. S. 479, 47 L. Ed. 266; *United States v. Missouri Rock Co.*, 189 U. S. 391, 404, 47 L. Ed. 865; *Kean v. Calumet Canal, etc., Co.*, 190 U. S. 452, 47 L. Ed. 1134; *Hardin v. Shedd*, 190 U. S. 508, 519, 47 L. Ed. 1156; *Hamburg, etc., Steamship Co. v. Grube*, 196 U. S. 407, 49 L. Ed. 529; *Kansas v. Colorado*, 206 U. S. 46, 51 L. Ed. 956.

31. *Same; lands bordering on sea; navigable lakes.*—*Martin v. Waddell*, 16 Pet. 367, 10 L. Ed. 997; *Barney v. Keokuk*, 94 U. S. 324, 338, 24 L. Ed. 224; *Hardin v. Jordan*, 140 U. S. 371, 382, 35 L. Ed. 428; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 36 L. Ed. 1018; *Shively v. Bowlby*, 152 U. S. 1, 46, 38 L. Ed. 331; *St. Anthony Falls Water Power Co. v. St. Paul Water Comm'r's*, 168 U. S. 348, 360, 42 L. Ed. 497; *Morris v. United States*, 174 U. S. 196, 236, 43 L. Ed. 946; *Illinois Cent. R. Co. v. Chicago*, 176 U. S. 646, 44 L. Ed. 622; *Kansas v. Colorado*, 206 U. S. 46, 93, 51 L. Ed. 956.

Especially is this doctrine applicable to

the Great Lakes, which, except in the freshness of their waters and in the absence of the ebb and flow of the tide, are really inland seas. *Barney v. Keokuk*, 94 U. S. 324, 338, 24 L. Ed. 224; *Hardin v. Jordan*, 140 U. S. 371, 391, 35 L. Ed. 428; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 435, 36 L. Ed. 1018; *Shively v. Bowlby*, 152 U. S. 1, 46, 38 L. Ed. 331; *Illinois Cent. R. Co. v. Chicago*, 176 U. S. 646, 44 L. Ed. 622; *Kansas v. Colorado*, 206 U. S. 46, 93, 51 L. Ed. 956.

32. *Abrogation of doctrine by compact or agreement.*—*Pollard v. Hagan*, 3 How. 212, 229, 11 L. Ed. 565; *Withers v. Buckley*, 20 How. 84, 93, 15 L. Ed. 816. See, generally, on this point the title CONSTITUTIONAL LAW, vol. 4, pp. 158, 214.

As to the power of congress to exact of a new state the surrender of any of its constitutional rights and powers, as a condition of admission into the Union, see the title CONSTITUTIONAL LAW, vol. 4, pp. 334, 335.

"Then to Alabama belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the constitution of the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights." *Pollard v. Hagan*, 3 How. 212, 229, 11 L. Ed. 565.

33. *But congress may purchase lands within the states.*—See the title CONSTITUTIONAL LAW, vol. 4, pp. 151, 152.

*Jurisdiction over Sandy Hook and adjacent waters.*—The jurisdiction of the United States over Sandy Hook is derived from the act of the legislature of New Jersey of March 12, 1846, N. J. Laws 1846, p. 146. The New Jersey act of 1846 was merely one of cession, and the operation of the general laws of New Jersey was reserved as therein provided. The act did not purport to transfer jurisdiction over the littoral waters beyond low-water mark, and for the purpose of this case the public laws of New Jersey must be regarded as obtaining there, whether en-

e. *Limitations of Doctrine*.—It was stated in a preceding paragraph that the rights of property, jurisdiction and sovereignty remaining in the states with respect to navigable waters and the soils under them were subject to the rights surrendered to the general government by the constitution of the United States.<sup>34</sup>

**Subordinate to Paramount Control of Congress over Commerce and Navigation.**—In particular it may be stated that the state's right of ownership, sovereignty and dominion, and, as included within this, whatever rights it may claim to dispose of navigable waters within its limits, or to bridge, obstruct, divert, deepen, narrow, or otherwise improve or alter the course thereof, and whatever right it may claim to have the same continue to flow in their natural and accustomed course, are subordinate to the acknowledged jurisdiction of congress to regulate and control foreign and interstate commerce and navigation thereon, and as a necessary incident to such power, to preserve, protect and improve their navigability free and uninterrupted.<sup>35</sup>

acted prior or subsequent to the cession. *Hamburg, etc., Steamship Co. v. Grube*, 196 U. S. 407, 49 L. Ed. 529.

There is absolutely nothing in the agreement or compact between the states of New Jersey and New York in respect of their territorial limits and jurisdiction, dated September 16, 1833, and confirmatory statutes (N. Y. Laws 1834, p. 8, ch. 8; N. J. Laws 1834, p. 118) abdicating rights in favor of the United States; the transaction simply amounted to fixing the boundaries between the two states. *Hamburg, etc., Steamship Co. v. Grube*, 196 U. S. 407, 49 L. Ed. 529.

**34. Limitations of doctrine.**—See ante, "Generally," II, B, 1, a.

**35. Subordinate to paramount control of congress.**—*Gibbons v. Ogden*, 9 Wheat. 1, 194, 6 L. Ed. 23; *Willson v. Black-Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. Ed. 412; *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 14 L. Ed. 249; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. 421, 15 L. Ed. 435; *Withers v. Buckley*, 20 How. 84, 15 L. Ed. 816; *Gilman v. Philadelphia*, 3 Wall. 713, 724, 18 L. Ed. 96; *The Passaic Bridges*, 3 Wall., appx., 782, 793; *Mumford v. Wardwell*, 6 Wall. 423, 18 L. Ed. 756; *The Clinton Bridge*, 10 Wall. 454, 19 L. Ed. 969; *Weber v. Harbor Comm'rs*, 18 Wall. 57, 21 L. Ed. 798; *South Carolina v. Georgia*, 93 U. S. 4, 10, 23 L. Ed. 782; *McCready v. Virginia*, 94 U. S. 391, 394, 24 L. Ed. 248; *Pound v. Turck*, 95 U. S. 459, 24 L. Ed. 525; *Wisconsin v. Duluth*, 96 U. S. 379, 24 L. Ed. 668; *Boom Co. v. Patterson*, 98 U. S. 403, 409, 25 L. Ed. 206; *Transportation Co. v. Chicago*, 99 U. S. 635, 643, 25 L. Ed. 336; *Mobile County v. Kimball*, 102 U. S. 691, 697, 26 L. Ed. 238; *Bridge Co. v. United States*, 105 U. S. 470, 482, 26 L. Ed. 1143; *Escanaba Co. v. Chicago*, 107 U. S. 678, 683, 27 L. Ed. 442; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 701, 27 L. Ed. 584; *Miller v. Mayor*, 109 U. S. 385, 27 L. Ed. 971; *Cardwell v. American Bridge Co.*, 113 U. S. 205, 28 L. Ed. 959; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S.

196, 217, 29 L. Ed. 158; *Huse v. Glover*, 119 U. S. 543, 30 L. Ed. 487; *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 295, 31 L. Ed. 149; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8, 31 L. Ed. 629; *Manchester v. Massachusetts*, 139 U. S. 240, 259, 35 L. Ed. 159; *Hardin v. Jordan*, 140 U. S. 371, 381, 35 L. Ed. 428; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 435, 437, 36 L. Ed. 1018; *Harman v. Chicago*, 147 U. S. 396, 411, 37 L. Ed. 216; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 333, 37 L. Ed. 463; *Shively v. Bowlby*, 152 U. S. 1, 24, 38 L. Ed. 331; *Luxton v. North River Bridge Co.*, 153 U. S. 525, 38 L. Ed. 808; *Railroad Co. v. Fuller*, 17 Wall. 560, 569, 21 L. Ed. 710; *In re Debs*, 158 U. S. 564, 586, 39 L. Ed. 1092; *Eldridge v. Trezevant*, 160 U. S. 452, 40 L. Ed. 490; *Lake Shore, etc., R. Co. v. Ohio*, 165 U. S. 365, 366, 368, 41 L. Ed. 747; *Gibson v. United States*, 166 U. S. 269, 41 L. Ed. 996; *St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs*, 168 U. S. 349, 42 L. Ed. 497; *Green Bay, etc., Canal Co. v. Patten Paper Co.*, 173 U. S. 179, 43 L. Ed. 658; *United States v. Rio Grande Dam, etc., Co.*, 174 U. S. 690, 703, 43 L. Ed. 1136; *Morris v. United States*, 174 U. S. 196, 236, 43 L. Ed. 946; *United States v. Bellingham Bay Boom Co.*, 176 U. S. 211, 215, 44 L. Ed. 437; *Lindsay, etc., Co. v. Mullen*, 176 U. S. 126, 148, 44 L. Ed. 400; *Leovy v. United States*, 177 U. S. 621, 632, 44 L. Ed. 914; *Scranton v. Wheeler*, 179 U. S. 141, 156, 45 L. Ed. 126; *Cummings v. Chicago*, 188 U. S. 410, 47 L. Ed. 525; *Calumet Grain Co. v. Chicago*, 188 U. S. 431, 47 L. Ed. 532; *Gutierrez v. Albuquerque Land, etc., Co.*, 188 U. S. 545, 554, 47 L. Ed. 588; *United States v. Mission Rock Co.*, 189 U. S. 391, 404, 47 L. Ed. 865; *Union Bridge Co. v. United States*, 204 U. S. 364, 401, 51 L. Ed. 523; *Kansas v. Colorado*, 206 U. S. 46, 51 L. Ed. 956; *Stone v. Southern Illinois, etc., Bridge Co.*, 206 U. S. 267, 274, 51 L. Ed. 1057.

The right of a state to divert, or the right of one acting under state authority to divert the waters of a navigable stream is subject to the acknowledged ju-



**States Not to Divert Waters to Injury of Government's Proprietary Interests.**—Again, as respects streams within their borders, the states cannot, in the absence of specific authority from congress, destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters, so far at least as may be necessary to the beneficial use of government property.<sup>36</sup>

**Effect of the Grant of Admiralty and Maritime Jurisdiction.**—See, generally, the titles ADMIRALTY, vol. 1, pp. 125, 127, 132; CONSTITUTIONAL LAW, vol. 4, p. 161.

**Grant of Admiralty Jurisdiction Does Not Extend to a Cession of the Waters in Which Admiralty Cases May Arise.**—See the title ADMIRALTY, vol. 1, p. 127.

**As to Criminal Jurisdiction of the United States.**—See the title CRIMINAL LAW, vol. 5, pp. 77, 78, et seq.

**As to Federal Government's Superior Right of Eminent Domain.**—Finally, while the right of eminent domain over the shores and the soil under navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdictions, and they only have the constitutional power to exercise it, yet in the hands of the states this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the constitution; for although the territorial limits and sovereign power of a state may extend over all navigable waters within its limits and into the sea upon its borders, it is there, as on the shore, but municipal power, subject to the powers conferred upon the national government by the constitution of the United States, and if, in the exercise of those powers, it is necessary that the federal government should have an eminent domain still higher than that of the state, in order that it may fully carry out the objects and purposes of the constitution, then it has it, regardless of what may be the necessities or conclusions of theoretical law as to eminent domain or anything else.<sup>37</sup>

jurisdiction of the United States under the constitution in regard to commerce and the navigation of the waters of rivers. *St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs*, 168 U. S. 349, 365, 42 L. Ed. 497.

But it is held that "the national government has no separate dominion over a river within the limits of a state; its jurisdiction there is like that over land within the same state. Its control over the river is simply by virtue of the fact that it is one of the highways of interstate and international commerce. The great case of *Gibbons v. Ogden*, 9 Wheat. 1, 197, 6 L. Ed. 23, in which the control of congress over inland waters was asserted, rested that control on the grant of the power to regulate commerce." *In re Debs*, 158 U. S. 564, 590, 39 L. Ed. 1092.

**Acts of March 3, 1877, and March 3, 1891, construed.**—Congress did not by the acts of March 3, 1877, 19 Stat. 377, and March 3, 1891, 26 Stat. 1101, confer upon any state the right to appropriate all the waters of the tributary streams which united into a navigable watercourse, and so destroy the navigability of that watercourse in derogation of the interests of all the people of the United States. Such a construction cannot be tolerated. It ignores the spirit of the legislation and carries the statute to the verge of the

letter and far beyond what under the circumstances of the case must be held to have been the intent of congress. *United States v. Rio Grande Dam, etc., Co.*, 174 U. S. 690, 706, 43 L. Ed. 1136.

**Act of September 19, 1890.**—By the act of September 19, 1890, c. 907, 26 Stat. 454, § 10, congress meant that thereafter no state should interfere with the navigability of a stream without the condition of national assent. And it would be to improperly ignore the scope of this act to limit it to the acts done within the very limits of navigation of a navigable stream. *United States v. Rio Grande Dam, etc., Co.*, 174 U. S. 690, 707, 43 L. Ed. 1136.

**36. States not to divert waters to injury of government's proprietary interests.**—*Gutierrez v. Albuquerque Land, etc., Co.*, 188 U. S. 545, 554, 47 L. Ed. 588; *United States v. Rio Grande Dam, etc., Co.*, 174 U. S. 690, 43 L. Ed. 1136; *Kansas v. Colorado*, 206 U. S. 46, 86, 51 L. Ed. 956.

**37. As to federal government's superior right of eminent domain.**—*Pollard v. Hagan*, 3 How. 212, 230, 11 L. Ed. 565; *Gilman v. Philadelphia*, 3 Wall. 713, 726, 18 L. Ed. 96. See, also, the titles CONSTITUTIONAL LAW, vol. 4, pp. 161, 317; EMINENT DOMAIN, vol. 5, p. 752.

**Mission Rock reservation.**—The orders of the president of the United States of January 13, 1899, permanently reserving



**Limitations Applicable to Territorial Legislatures.**—Necessarily, these limitations are equally applicable in restraint of the legislative branch of a territorial government, controlled, as is such body, by congress.<sup>38</sup>

2. **WATERS AND SOILS IN TERRITORIES HELD IN TRUST**—a. *Generally.*—The territories acquired by congress, whether by deed of cession from the original states or by treaty with foreign countries, are held with the object, as soon as their population and condition justify it, of being admitted into the Union as states, upon an equal footing with the original states in all respects; and the title and dominion of the tidewaters and all other navigable waters and the lands under them are held by the United States for the benefit of the whole people, and in trust for the several states to be ultimately created out of the territory.<sup>39</sup>

b. *But United States or Former Proprietors May Make Grants That Will Be Binding upon Future States.*—But this doctrine does not apply to lands that have been previously granted to other parties by the former government, or subjected to trusts which require their disposition in some other way.<sup>40</sup> Like-

for naval purposes Mission Island in San Francisco Bay, together with the small island southeast thereof in the same bay, said islands being described in said order as containing fourteen one-hundredths of an acre and one one-hundredth of an acre, respectively, must be limited to the specific lands named, and cannot be extended to include the surrounding submerged and reclaimed lands included in a certain grant of about fourteen acres made by the state of California to Henry B. Tichenor in the year 1872. *United States v. Mission Rock Co.*, 189 U. S. 391, 408, 47 L. Ed. 865.

**38. Limitations applicable to territorial legislatures.**—*Gutierrez v. Albuquerque Land, etc., Co.*, 188 U. S. 545, 555, 47 L. Ed. 588; *United States v. Rio Grande Dam, etc., Co.*, 174 U. S. 690, 43 L. Ed. 1136.

**39. Waters and soils in territories held in trust.**—*Pollard v. Hagan*, 3 How. 212, 221, 222, 11 L. Ed. 565; *Weber v. Harbor Comm'rs*, 18 Wall. 57, 65, 21 L. Ed. 798; *San Francisco v. Le Roy*, 138 U. S. 656, 670, 34 L. Ed. 1096; *Knight v. United States Land Ass'n*, 142 U. S. 161, 163, 35 L. Ed. 974; *Shively v. Bowlby*, 152 U. S. 1, 49, 38 L. Ed. 331; *United States v. Mission Rock Co.*, 189 U. S. 391, 404, 47 L. Ed. 865.

"Upon the acquisition of the territory from Mexico, the United States acquired the title to tide lands, equally with the title to upland; but with respect to the former they held it only in trust for the future states that might be erected out of such territory." *Knight v. United States Land Ass'n*, 142 U. S. 161, 183, 35 L. Ed. 974; *Shively v. Bowlby*, 152 U. S. 1, 30, 38 L. Ed. 331.

**40. But grants may be made binding upon future states.**—*Martin v. Waddell*, 16 Pet. 367, 10 L. Ed. 997; *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565; *Den v. The Jersey Co.*, 15 How. 426, 14 L. Ed. 757; *Smith v. Maryland*, 18 How. 71, 15 L. Ed. 269; *San Francisco v. Le Roy*, 138 U. S. 656, 34 L. Ed. 1096; *Manchester v. Massachusetts*, 139 U. S. 240, 261, 35 L. Ed. 159;

*Knight v. United States Land Ass'n*, 142 U. S. 161, 183, 35 L. Ed. 974; *Shively v. Bowlby*, 152 U. S. 1, 38 L. Ed. 331.

"When the United States acquired California from Mexico by the treaty of Guadalupe Hidalgo, 9 Stat. 922, they were bound, under the 8th article of that treaty, to protect all rights of property in that territory emanating from the Mexican government previous to the treaty. *Teschmacher v. Thompson*, 18 California 11; *Beard v. Federy*, 3 Walk. 478, 18 L. Ed. 88. Irrespective of any such provision in the treaty, the obligations resting upon the United States in this respect, under the principles of international law, would have been the same. *Soulard v. United States*, 4 Pet. 511, 7 L. Ed. 938; *United States v. Percheman*, 7 Pet. 51, 87, 8 L. Ed. 604; *Strother v. Lucas*, 12 Pet. 410, 436, 9 L. Ed. 1137; *United States v. Repentigny*, 5 Wall. 211, 260, 18 L. Ed. 627." *Knight v. United States Land Ass'n*, 142 U. S. 161, 183, 35 L. Ed. 974.

"When the United States acquired California it was with the duty to protect all the rights and interests which were held by the pueblo of San Francisco under Mexico. The property rights of pueblos equally with those of individuals were entitled to protection, and provision was made by congress in its legislation for their investigation and confirmation. *Townsend v. Greeley*, 5 Wall. 326, 337, 18 L. Ed. 547. The duty of the government and its power in the execution of its treaty obligations to protect the claims of all persons, natural and artificial, and of course of the city of San Francisco as successor to the pueblo, were superior to any subsequently acquired rights or claims of the state of California, or of individuals." *San Francisco v. Le Roy*, 138 U. S. 656, 671, 34 L. Ed. 1096.

"In the cases from California, already referred to, the question whether a Mexican grant, confirmed by the United States, did or did not include any lands below high-water mark, was treated as depending on the terms of the decree of confirmation

wise the United States, while they hold the country as a territory, having all the powers of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high-water mark of navigable waters, whether tidal or otherwise, which will be binding upon the future states.<sup>41</sup>

c. *United States Has Not Undertaken to Grant Soils under Navigable Waters; Operation of Surveys and General Grants.*—But they have never done so by general laws; and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the states, respectively, when organized and admitted into the Union. General grants by congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high-water mark, and do not impair the title and dominion of the future state when created; but leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the constitution in the United States.<sup>42</sup>

by a court of the United States under authority of congress. By the application of that test, no such lands, were held to be included in *United States v. Pacheco*, 2 Wall. 587, 17 L. Ed. 865, and some such lands were held to be included in *Knight v. United States Land Ass'n*, 142 U. S. 161, 35 L. Ed. 974. And in *Packer v. Bird*, 137 U. S. 661, 672, 34 L. Ed. 819, Mr. Justice Field, speaking for the court, after referring to the rule, as stated in *Railroad Co. v. Schurmeir*, 7 Wall. 272, 288, 19 L. Ed. 74, above quoted, that congress, by the provisions of the land laws, intended that the title to lands bordering on navigable streams should stop at the stream, said: "The same rule applies when the survey is made and the patent is issued upon a confirmation of a previously existing right or equity of the patentee to the lands, which in the absence of such right or equity would belong absolutely to the United States, unless the claim confirmed in terms embraces the land under the waters of the stream." *Shively v. Bowlby*, 152 U. S. 1, 47, 38 L. Ed. 331.

In *Knight v. United States Land Ass'n*, 142 U. S. 161, 35 L. Ed. 974, it was adjudged that under a boundary "by the bay," in the Mexican grant of the pueblo of San Francisco, duly confirmed by a decree of a court of the United States, and defined by a survey under the authority of the secretary of the interior as following the general line of high-water mark of the bay, crossing the mouth of a tidewater creek, the title of lands inside of that line, although below high-water mark of the creek, was included, and therefore did not pass by a deed from the state. See, also, *Shively v. Bowlby*, 152 U. S. 1, 31, 38 L. Ed. 331.

41. *Same.*—*Goodtitle v. Kibbe*, 9 How. 471, 478, 13 L. Ed. 220; *Baer v. Moran Bros. Co.*, 153 U. S. 287, 289, 38 L. Ed. 718; *Barney v. Keokuk*, 94 U. S. 324, 338, 24 L. Ed. 224; *Shively v. Bowlby*, 152 U. S. 1, 58, 38 L. Ed. 331; *Mann v. Tacoma*

*Land Co.*, 153 U. S. 273, 283, 38 L. Ed. 714; *Morris v. United States*, 174 U. S. 196, 236, 43 L. Ed. 946; *United States v. Winans*, 198 U. S. 371, 383, 49 L. Ed. 1089. See, also, the title CONSTITUTIONAL LAW, vol. 4, p. 160.

Congress has full control over territorial waters. *Kansas v. Colorado*, 206 U. S. 46, 51 L. Ed. 956.

"Congress has the power to make grants of land below high-water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States holds the territory. But congress has never undertaken by general laws to dispose of such land." *Shively v. Bowlby*, 152 U. S. 1, 48, 38 L. Ed. 331; *Prosser v. Northern Pac. Railroad*, 152 U. S. 59, 64, 38 L. Ed. 352; *Morris v. United States*, 174 U. S. 196, 236, 43 L. Ed. 946.

"It may be admitted that the congress of the United States, while the present state of Washington was a territory, had the power, in chartering a corporation, to construct and maintain a railroad from Lake Superior to the Pacific Coast, to grant to the corporation such title or rights in lands below high-water mark of tidewaters of the territory, as might be necessary or convenient for the building, maintenance, use and enjoyment of such structures as might be required for commerce and transportation on the railroad and by sea, and for transferring goods and passengers between the railroad and sea-going vessels." *Prosser v. Northern Pac. Railroad*, 152 U. S. 59, 64, 38 L. Ed. 352.

42. *Policy of government; operation of surveys and general grants.*—*Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565; *Goodtitle v. Kibbe*, 9 How. 471, 13 L. Ed. 220;



3. IN THE DISTRICT OF COLUMBIA.—What has been said with reference to the operation of the general land acts in the territories applies equally to the District of Columbia. It is not to be presumed unless the acts manifest a clear

Smith *v.* Maryland, 18 How. 71, 74, 15 L. Ed. 269; United States *v.* Pacheco, 2 Wall. 587, 17 L. Ed. 865; Railroad Co. *v.* Schurmeir, 7 Wall. 272, 19 L. Ed. 74; Weber *v.* Harbor Comm'rs, 18 Wall. 57, 65, 21 L. Ed. 798; Barney *v.* Keokuk, 94 U. S. 324, 24 L. Ed. 224; Packer *v.* Bird, 137 U. S. 661, 34 L. Ed. 819; St. Louis *v.* Rutz, 138 U. S. 226, 242, 34 L. Ed. 941; Manchester *v.* Massachusetts, 139 U. S. 240, 261, 35 L. Ed. 159; Hardin *v.* Jordan, 140 U. S. 371, 381, 35 L. Ed. 428; Mitchell *v.* Smale, 140 U. S. 406, 412, 414, 35 L. Ed. 442; Illinois Cent. R. Co. *v.* Illinois, 146 U. S. 387, 36 L. Ed. 1018; Shively *v.* Bowlby, 152 U. S. 1, 58, 38 L. Ed. 331; Mann *v.* Tacoma Land Co., 153 U. S. 273, 283, 38 L. Ed. 714; Baer *v.* Moran Bros. Co., 153 U. S. 287, 38 L. Ed. 718; Eldridge *v.* Trezevant, 160 U. S. 452, 468, 40 L. Ed. 490; Grand Rapids, etc., R. Co. *v.* Butler, 159 U. S. 87, 92, 40 L. Ed. 85; St. Anthony Falls Water Power Co. *v.* St. Paul Water Comm'rs, 168 U. S. 349, 358, 42 L. Ed. 497; Morris *v.* United States, 174 U. S. 196, 236, 43 L. Ed. 946; Illinois Cent. R. Co. *v.* Chicago, 176 U. S. 646, 660, 44 L. Ed. 622; Mobile Transp. Co. *v.* Mobile, 187 U. S. 479, 491, 47 L. Ed. 266; United States *v.* Mission Rock Co., 189 U. S. 391, 404, 47 L. Ed. 865; Hardin *v.* Shedd, 190 U. S. 508, 519, 47 L. Ed. 1156; Whitaker *v.* McBride, 197 U. S. 510, 511, 49 L. Ed. 857; Joy *v.* St. Louis, 201 U. S. 332, 50 L. Ed. 776; Kansas *v.* Colorado, 206 U. S. 46, 93, 51 L. Ed. 956.

"The congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high-water mark, may be taken up by actual occupants in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future states, and shall vest in the several states, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older states in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the state, after it shall have become a completely organized community." Shively *v.* Bowlby, 152 U.

S. 1, 49, 38 L. Ed. 331; Morris *v.* United States, 174 U. S. 196, 237, 43 L. Ed. 946.

"Under that general system surveys are not extended to tide lands, nor those under navigable rivers above tidewater." Barney *v.* Keokuk, 94 U. S. 324, 338, 24 L. Ed. 224; Mann *v.* Tacoma Land Co., 153 U. S. 273, 284, 38 L. Ed. 714; Baer *v.* Moran Bros. Co., 153 U. S. 287, 38 L. Ed. 718.

#### Scrip not to be located upon tide lands.

—Scrip issued by the United States authorities to be located on the unoccupied and unappropriated public lands cannot be located on tide lands, and the words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws. Barney *v.* Keokuk, 94 U. S. 324, 338, 24 L. Ed. 224; Mann *v.* Tacoma Land Co., 153 U. S. 273, 284, 38 L. Ed. 714; Baer *v.* Moran Bros. Co., 153 U. S. 287, 38 L. Ed. 718; Morris *v.* United States, 174 U. S. 196, 237, 43 L. Ed. 946.

"There is nothing in the act authorizing the Valentine scrip, or in the circumstances which gave occasion for its passage, to make an exception to the general rule." Barney *v.* Keokuk, 94 U. S. 324, 24 L. Ed. 224; Mann *v.* Tacoma Land Co., 153 U. S. 273, 284, 38 L. Ed. 714; Baer *v.* Moran Bros. Co., 153 U. S. 287, 38 L. Ed. 718.

"That there was no intent in the Valentine scrip act to make any exception to the general rule is evident not merely from the use of a term having such an accepted meaning, but from the further provision that the land, 'if unsurveyed when taken, to conform, when surveyed, to the general system of United States land surveys,' for under that general system surveys are not extended to tide lands, nor those under navigable rivers above tidewater." Barney *v.* Keokuk, 94 U. S. 324, 338, 24 L. Ed. 224; Mann *v.* Tacoma Land Co., 153 U. S. 273, 284, 38 L. Ed. 714; Baer *v.* Moran Bros. Co., 153 U. S. 287, 38 L. Ed. 718.

**Oregon donation act.**—The first act of congress which granted to settlers titles in Oregon lands was the Oregon donation act of September 27, 1850, c. 76. That act required the lands in Oregon to be surveyed as in the Northwest Territory; and it made grants or donations of land, measured by sections, half sections and quarter sections, to actual settlers and occupants. It contains nothing indicating any intention on the part of congress to depart from its settled policy of not granting to individuals lands under tidewaters or navigable rivers. 9 Stat. 496; Rev. Stat., §§ 2395, 2396, 2409. It is evident, therefore, that a donation claim under this act, bounded by the Columbia River, where the tide ebbs and flows, did not, of its own force, have the effect of passing any title in lands below high-water mark. Nor



intention to the contrary, that congress intended to grant the soil beyond high-water mark.<sup>43</sup>

**Same; Effect of Maryland Decisions Subsequent to Cession.**—The decisions of the Maryland court of last resort, rendered subsequent to the cession of the District of Columbia to the United States, and tending to establish a different doctrine with respect to lands under tide and navigable waters in that state, are not controlling upon the courts of the United States upon this point.<sup>44</sup>

4. **GRANT OF NAVIGABLE WATERS AND UNDERLYING SOILS IN THE STATES.**—As the right of property in navigable waters and their underlying soils remains in the states, it follows that the United States' government can make no grant thereof after the state has been admitted into the Union; and, in general, it has not attempted to do so. A patent from the United States for land bordering upon navigable waters in a state does not, of itself, convey any title or ownership beyond ordinary high-water mark. The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the states for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states, subject to the condition that their rules do not impair the efficiency of the grants, or the use and enjoyment of the property by the grantee. Any effect, therefore, that such a grant may have as conveying to riparian and littoral proprietors a title to the soil beyond high-water mark is dependent wholly upon the local state law. Under the practical operation of this doctrine, therefore, a patentee from the United States may, in one state, take only to high-water mark, whereas in another state his title may extend to low-water mark or to the middle of the stream, or in case of lands bordering upon the seashore, to a given distance beyond low tide.<sup>45</sup>

is any such effect attributed to it by the law of the state of Oregon. *Shively v. Bowlby*, 152 U. S. 1, 51, 58, 38 L. Ed. 331.

43. **In the District of Columbia.**—*Morris v. United States*, 174 U. S. 196, 234, 43 L. Ed. 946.

"It was not the intention of congress, by the general resolution of 1839, to subject lands lying beneath the waters of the Potomac and within the limits of the District of Columbia to sale by the methods therein provided." *Morris v. United States*, 174 U. S. 196, 234, 43 L. Ed. 946.

"The lands whose disposition was contemplated by these acts were vacant lands which had been cultivated, or which were susceptible of cultivation. By such terms of description it would not appear that the disposition of lands covered by tide-water was contemplated, because such lands are incapable of ordinary and private occupation, cultivation and improvement, and their natural and primary uses are public in their nature, for highways of navigation and commerce." *Morris v. United States*, 174 U. S. 196, 235, 43 L. Ed. 946.

"The proceedings of Kidwell, under the resolution of 1839, to obtain a patent for the 'Kidwell Meadows,' and the issue of that patent, are inoperative to confer upon the patentee or his assigns any title or interest in the property within its limits, adverse to the complete and paramount right therein of the United States." *Morris v. United States*, 174 U. S. 196, 244, 43 L. Ed. 946.

44. **Same; effect of Maryland decisions**

**subsequent to cession.**—*Morris v. United States*, 174 U. S. 196, 240, 43 L. Ed. 946.

45. **Grant of navigable waters and underlying soils in states.**—*Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565 (overruling anything to the contrary in *Pollard v. Kibbe*, 14 Pet. 353, 10 L. Ed. 490; *Mobile v. Es-lava*, 16 Pet. 234, 10 L. Ed. 948; *Mobile v. Hallett*, 16 Pet. 261, 10 L. Ed. 958; *Mobile v. Emanuel*, 1 How. 94, 95, 11 L. Ed. 60; *Pollard v. Files*, 2 How. 591, 11 L. Ed. 391); *Goodtitle v. Kibbe*, 9 How. 471, 477, 13 L. Ed. 220; *Doe v. Beebe*, 13 How. 25, 14 L. Ed. 35; *Rundle v. Delaware, etc., Canal Co.*, 14 How. 80, 91, 14 L. Ed. 335; *Fisher v. Haldeman*, 20 How. 186, 194, 15 L. Ed. 879; *United States v. Pacheco*, 2 Wall. 587, 17 L. Ed. 865; *Railroad Co. v. Schurmeir*, 7 Wall. 272, 19 L. Ed. 74; *Weber v. Harbor Commrs*, 18 Wall. 57, 21 L. Ed. 798; *Barney v. Keokuk*, 94 U. S. 324, 338, 24 L. Ed. 224; *St. Louis v. Myers*, 113 U. S. 566, 567, 28 L. Ed. 1131; *Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656, 683, 31 L. Ed. 543; *Packer v. Bird*, 137 U. S. 661, 34 L. Ed. 819; *St. Louis v. Rutz*, 138 U. S. 226, 242, 34 L. Ed. 941; *Hardin v. Jordan*, 140 U. S. 371, 384, 35 L. Ed. 428; *Mitchell v. Smale*, 140 U. S. 406, 412, 35 L. Ed. 442; *Kaukauna Water Power Co. v. Green Bay, etc., Canal Co.*, 142 U. S. 254, 272, 35 L. Ed. 1004; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 36 L. Ed. 1018; *Shively v. Bowlby*, 152 U. S. 1, 28, 38 L. Ed. 331; *Lowndes v. Huntington*, 153 U. S. 1, 38 L. Ed. 615; *Mann v. Tacoma Land Co.*, 153 U. S. 273, 283, 38 L. Ed. 714; *Baer v. Moran Bros. Co.*, 153

**Doctrine Extends to Navigable Lakes.**—The doctrine that grants from the federal government operate to convey title only to ordinary high-water mark, leaving to the states to attach rights of ownership to the soil beyond that

U. S. 287, 38 L. Ed. 718; *Grand Rapids*, etc., R. Co. v. *Butler*, 159 U. S. 87, 92, 40 L. Ed. 85; *Eldridge v. Trezevant*, 160 U. S. 452, 568, 40 L. Ed. 490; *St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs*, 168 U. S. 349, 42 L. Ed. 497; *Morris v. United States*, 174 U. S. 196, 227, 43 L. Ed. 946; *Illinois Cent. R. Co. v. Chicago*, 176 U. S. 646, 44 L. Ed. 622; *Mobile Transp. Co. v. Mobile*, 187 U. S. 479, 47 L. Ed. 266; *United States v. Mission Rock Co.*, 189 U. S. 391, 404, 47 L. Ed. 865; *Kean v. Calumet Canal, etc., Co.*, 190 U. S. 452, 47 L. Ed. 1134; *Hardin v. Shedd*, 190 U. S. 508, 519, 47 L. Ed. 1156; *Whitaker v. McBride*, 197 U. S. 510, 515, 49 L. Ed. 857; *Joy v. St. Louis*, 201 U. S. 332, 342, 50 L. Ed. 776.

This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. The United States has not the right to transfer to a citizen the title to the shores and the soils under the navigable waters within the state. *Pollard v. Hagan*, 3 How. 212, 230, 11 L. Ed. 565.

The right of congress to make a grant, or to confirm Spanish grants of lots on the Mobile River between high-water and low-water marks, after the admission of Alabama into the Union, assumed in *Mobile v. Eslava*, 16 Pet. 234, 10 L. Ed. 948; *Mobile v. Hallett*, 16 Pet. 261, 10 L. Ed. 958; *Mobile v. Emanuel*, 1 How. 94, 95, 11 L. Ed. 60; *Pollard v. Files*, 2 How. 591, 11 L. Ed. 391. But see *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565, in which it is held that Alabama, upon her admission, became entitled to the navigable waters and soils under them, and that after her admission congress could make no grant of lands between high-water and low-water mark, or under the beds of the navigable streams—virtually overruling the assumption upon which the above cases proceed. See, also, *Shively v. Bowlby*, 152 U. S. 1, 27, 38 L. Ed. 331; *Mobile Transp. Co. v. Mobile*, 187 U. S. 479, 47 L. Ed. 266.

The existence of an imperfect and inoperative Spanish grant could not enlarge the power of the United States over the place in question after Alabama became a state, nor authorize the general government to grant or confirm a title to land when the sovereignty and dominion over it had become vested in the state. *Goodtitle v. Kibbe*, 9 How. 471, 478, 13 L. Ed. 220.

If the premises sued for were below usual high-water mark, at the time Alabama was admitted into the Union, then the act of congress, and the patent in pursuance thereof, could give the plaintiffs

no title, whether the waters had receded by the labor of man only, or by alluvion. *Pollard v. Hagan*, 3 How. 212, 220, 11 L. Ed. 565. See, also, *Den v. The Jersey Co.*, 15 How. 426, 14 L. Ed. 757, where it is said that the principle that the soil under the navigable waters belongs to the state applies also to land that has been reclaimed from the water under the act of the legislature.

The act passed June 2, 1866, ch. 116, § 9, 14 Stat. 63, by which congress relinquished to the city of St. Louis all the right, title and interest of the United States "in and to all wharves, streets, lanes, avenues, alleys and of the other public thoroughfares" within the corporate limits, did not, any more than the act providing for the admission of Missouri into the Union, purport to authorize the city to impair the rights of other riparian proprietors by extending streets into the river. *St. Louis v. Myers*, 113 U. S. 566, 567, 28 L. Ed. 1131.

"That the title to tide lands is in the state is a proposition which has been again and again affirmed by this court, some of the earlier opinions going so far as to declare that the United States had no power to grant to individuals such lands at any time, even prior to the admission of the state and during the territorial existence." *Mann v. Tacoma Land Co.*, 153 U. S. 273, 283, 38 L. Ed. 714; *Baer v. Moran Bros. Co.*, 153 U. S. 287, 38 L. Ed. 718; *Barney v. Keokuk*, 94 U. S. 324, 338, 24 L. Ed. 224.

"With regard to grants of the government for lands bordering on tide water, it has been distinctly settled that they only extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted enures to the state within which they are situated, if a state has been organized and established there." *Hardin v. Jordan*, 140 U. S. 371, 381, 35 L. Ed. 428.

"Such title to the shore and lands under water is regarded as incidental to the sovereignty of the state—a portion of the royalties belonging thereto and held in trust for the public purposes of navigation and fishery—and cannot be retained or granted out to individuals by the United States. *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565; *Goodtitle v. Kibbe*, 9 How. 471, 13 L. Ed. 220; *Weber v. Harbor Comm'rs*, 18 Wall. 57, 21 L. Ed. 798." *Hardin v. Jordan*, 140 U. S. 371, 381, 35 L. Ed. 428.

"But it is equally well settled that, in the absence of any local statute or usage, a grant of lands by the state does not pass title to submerged lands below high-water mark; *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565; *Goodtitle v. Kibbe*, 9 How. 471, 13 L. Ed. 220; *United States v.*



mark, or not, as they may see fit, extends to navigable lakes, and streams above the ebb and flow of the tide.<sup>46</sup>

Pacheco, 2 Wall. 587, 17 L. Ed. 865; Weber v. Harbor Comm'rs, 18 Wall. 57, 21 L. Ed. 798; Hardin v. Jordan, 140 U. S. 371, 381, 35 L. Ed. 428; Shively v. Bowlby, 152 U. S. 1, 13, 38 L. Ed. 331." Illinois Cent. R. Co. v. Chicago, 176 U. S. 646, 660, 44 L. Ed. 622.

"The legislation of congress for the survey of the public lands recognizes the general rule as to the public interest in waters of navigable streams without reference to the existence or absence of the tide in them." Packer v. Bird, 137 U. S. 661, 672, 34 L. Ed. 819.

"In Railroad Co. v. Schurmeir, 7 Wall. 272, 288, 19 L. Ed. 74, the court said that in view of this legislation and other similar acts it did not 'hesitate to decide, that congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common-law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be and remain public highways.'" Packer v. Bird, 137 U. S. 661, 672, 34 L. Ed. 819.

"In Barney v. Keokuk (1876), 94 U. S. 324, 24 L. Ed. 224, the owner, under a grant from the United States, of two lots of land in the city of Keokuk and state of Iowa, bounded by the Mississippi River, brought an action of ejectment against the city and several railroad companies and a steamboat company to recover possession of lands below high-water mark in front of his lots, which the city, pursuant to statutes of the state, had filled up as a wharf and levee, and had permitted to be occupied by the railroads and landing places of those companies. The plaintiff's counsel relied on Dutton v. Strong, 1 Black 23, 17 L. Ed. 29; Railroad Co. v. Schurmeir, 7 Wall. 272, 19 L. Ed. 74, and Yates v. Milwaukee, 10 Wall. 497, 19 L. Ed. 984, above cited. \* \* \* But this court, affirming the judgment of the circuit court of the United States, held that the action could not be maintained; and Mr. Justice Bradley, in delivering judgment, summed up the law upon the subject with characteristic power and precision, saying: 'It appears to be the settled law of that state that the title of the riparian proprietors on the banks of the Mississippi extends only to ordinary high-water mark, and that the shore between high and low-water mark, as well as the bed of the river, belongs to the state.'" Shively v. Bowlby, 152 U. S. 1, 41, 38 L. Ed. 331.

"It would seem that if a conveyance of land bounded by navigable water would not pass land below the water line, a conveyance purporting to bound the land by navigable water does not purport to pass

land below the water line. The common law as understood by this court and the local law of Illinois with regard to grants bounded by navigable water are the same." Hardin v. Shedd, 190 U. S. 508, 520, 47 L. Ed. 1156. See, also, Shively v. Bowlby, 152 U. S. 1, 43, 38 L. Ed. 331.

#### 46. Doctrine extends to navigable lakes.

—Barney v. Keokuk, 94 U. S. 324, 338, 24 L. Ed. 224; Hardin v. Jordan, 140 U. S. 371, 393, 35 L. Ed. 428; Mitchell v. Smale, 140 U. S. 406, 35 L. Ed. 442; Illinois Cent. R. v. Illinois, 146 U. S. 387, 36 L. Ed. 1018; Shively v. Bowlby, 152 U. S. 1, 46, 38 L. Ed. 331; St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs, 168 U. S. 349, 360, 42 L. Ed. 497; Morris v. United States, 174 U. S. 196, 236, 43 L. Ed. 946; Illinois Cent. R. Co. v. Chicago, 176 U. S. 646, 660, 44 L. Ed. 622; Kansas v. Colorado, 206 U. S. 46, 93, 51 L. Ed. 956.

#### As to lakes and ponds nonnavigable.—

—At common law a grantee upon a non-navigable pond or lake took to the centre thereof ratably with other proprietors. Hardin v. Jordan, 140 U. S. 371, 35 L. Ed. 428. Accord: Mitchell v. Smale, 140 U. S. 406, 35 L. Ed. 442.

"When land is bounded by a lake or pond, the water, equally as in the case of a river, is appurtenant to it; it constitutes one of the advantages of its situation, and a material part of its value, and enters largely into the consideration for acquiring it. Hence the presumption is that a grant of land thus bounded is intended to include the contiguous land covered by water. Besides, a lake or pond, like a river, is a concrete object, a unit, and when named as a boundary, the natural inference is that the middle line of it is intended, that is, the line equidistant from the land on either side. If the margin is named as the boundary the case is different; the land under the water being then expressly excluded." Hardin v. Jordan, 140 U. S. 371, 391, 35 L. Ed. 428.

In this country there has been a diversity of opinion on the subject. The colonial ordinance of Massachusetts, adopted in 1641, provided that great ponds containing more than ten acres of land, and lying in common, though within the bounds of a town, should be free for fishing and fowling. It is there held that the land under water in such lakes and ponds belongs to the state, and not to the riparian owners; and that when land is conveyed bounding upon a natural lake or pond, the grant extends only to the water's edge. In other states the rule of the common law has prevailed. Hardin v. Jordan, 140 U. S. 371, 393, 35 L. Ed. 428.

The Illinois cases reviewed and the doctrine of the foregoing case held to be the law of that state. Hardin v. Jordan,



5. NEW STATES ADMITTED UPON AN EQUALITY WITH THE OLD.—Subjects to the limitation previously mentioned, that congress or the former proprietors of the territories may make grants of navigable waters, soils and shores which will be binding upon the future states, the new states are admitted upon an equality with the old, and are possessed of the same rights of property, sovereignty, and jurisdiction over their navigable waters and underlying soils, shores, etc., as the original states.<sup>47</sup>

6. EFFECT OF ACTS PRESCRIBING FREE NAVIGATION, ETC.—The propositions that each state retains the absolute rights of property, dominion and sovereignty over navigable waters within its borders, and that the new states are admitted

140 U. S. 371, 35 L. Ed. 428. Accord: *Mitchell v. Smale*, 140 U. S. 406, 35 L. Ed. 442.

**As to lakes and ponds navigable.**—"Of course, these observations do not apply to our great navigable lakes, which are really inland seas, and to which all those reasons apply which apply to the sea itself." *Hardin v. Jordan*, 140 U. S. 371, 391, 35 L. Ed. 428.

The doctrine that the ownership of the beds of navigable waters remains in the state and that the state may grant the same provided it be done without substantial impairment of the interest of the public in such waters, and subject to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce, extends to navigable lakes. The same doctrine applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tidewaters on the borders of the sea, and the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations. *Barney v. Keokuk*, 94 U. S. 324, 338, 24 L. Ed. 224; *Hardin v. Jordan*, 140 U. S. 371, 382, 35 L. Ed. 428; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 436, 36 L. Ed. 1018; *Shively v. Bowlby*, 152 U. S. 1, 46, 38 L. Ed. 331; *Morris v. United States*, 174 U. S. 196, 236, 43 L. Ed. 946; *Illinois Cent. R. Co. v. Chicago*, 176 U. S. 646, 660, 44 L. Ed. 622; *Kansas v. Colorado*, 206 U. S. 46, 93, 51 L. Ed. 956.

**47. New states admitted upon an equality with the old.**—*Martin v. Waddell*, 16 Pet. 367, 410, 10 L. Ed. 997; *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565; *Permoli v. Municipality*, No. 1, 3 How. 589, 11 L. Ed. 739; *Goodtitle v. Kibbe*, 9 How. 471, 13 L. Ed. 220; *Strader v. Graham*, 10 How. 82, 13 L. Ed. 337; *Doe v. Beebe*, 13 How. 25, 14 L. Ed. 35; *Withers v. Buckley*, 20 How. 84, 15 L. Ed. 816; *United States v. Pacheco*, 2 Wall. 587, 17 L. Ed. 865; *Mumford v. Wardwell*, 6 Wall. 423, 18 L. Ed. 756; *Weber v. Harbor Comm'rs*, 18 Wall. 57, 21 L. Ed. 798; *Barney v. Keokuk*, 94 U. S. 324, 338, 24 L. Ed. 224; *McCready v. Virginia*, 94 U. S. 391, 394, 24 L. Ed. 248; *Pound v. Turck*, 95 U. S. 459, 24 L. Ed. 525; *Bridge Co. v. United States*, 105 U. S. 470, 491, 26 L. Ed. 1143; *Escanaba Co. v. Chicago*, 107 U. S. 678, 688, 27 L. Ed. 442; *Cardwell v. American Bridge Co.*,

113 U. S. 205, 28 L. Ed. 959; *St. Louis v. Myers*, 113 U. S. 566, 28 L. Ed. 1131; *Van Brocklin v. Tennessee*, 117 U. S. 151, 159, 29 L. Ed. 845; *Hamilton v. Vicksburg, etc., Railroad*, 119 U. S. 280, 30 L. Ed. 393; *Huse v. Glover*, 119 U. S. 543, 30 L. Ed. 487; *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 31 L. Ed. 149; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 9, 31 L. Ed. 629; *Packer v. Bird*, 137 U. S. 661, 666, 34 L. Ed. 819; *San Francisco v. Le Roy*, 138 U. S. 656, 671, 34 L. Ed. 1096; *Knight v. United States Land Ass'n*, 142 U. S. 161, 183, 35 L. Ed. 974; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 435, 36 L. Ed. 1018; *Shively v. Bowlby*, 152 U. S. 1, 30, 38 L. Ed. 331; *Baer v. Moran Bros. Co.*, 153 U. S. 287, 38 L. Ed. 718; *Mann v. Tacoma Land Co.*, 153 U. S. 273, 38 L. Ed. 714; *Ward v. Race Horse*, 163 U. S. 504, 41 L. Ed. 244; *St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs*, 168 U. S. 349, 360, 42 L. Ed. 497; *Mobile Transp. Co. v. Mobile*, 187 U. S. 479, 482, 47 L. Ed. 266; *United States v. Mission Rock Co.*, 189 U. S. 391, 408, 47 L. Ed. 865; *Hardin v. Shedd*, 190 U. S. 508, 519, 47 L. Ed. 1156.

That the state of Alabama, when admitted into the Union, became entitled to the soil under the navigable waters, below high-water mark within the limits of the state, not previously granted, was conclusively settled by the federal supreme court in *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565; *Mobile Transp. Co. v. Mobile*, 187 U. S. 479, 482, 47 L. Ed. 266.

The property rights of riparian owners are to be measured by the rules and decisions of the state courts. This principle has been announced and adhered to by this court from its very early days, and no distinction has been made between the rights of the original states and those which were subsequently admitted to the Union under the provisions of the federal constitution. *St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs*, 168 U. S. 349, 358, 42 L. Ed. 497.

"The new states admitted into the Union since the adoption of the constitution have the same rights as the original states in the tidewaters, and in the lands under them, within their respective jurisdictions. The title and rights of riparian or littoral proprietors in the soil below high-water mark, therefore, are governed by the laws of the several states, subject

upon an equality with and possessed of all the rights and powers of original states in this respect, are not affected by the provision found in the ordinance of 1787, and similar provisions in acts providing for the admission of new states into the Union, that the navigable waters within the borders of the new state shall be deemed public highways and that they shall be forever free, both to the inhabitants of the state and of the United States, without tax, duty, impost or toll, etc. As for the states carved out of the Northwest Territory, the ordinance of 1787 became inoperative, except in so far as voluntarily adopted by them, or in so far as it was re-enacted by congress and made applicable to their new condition, immediately upon their admission into the Union; but aside from that fact, this provision whether found in the ordinance of 1787 or elsewhere, has reference solely to political regulations conferring exclusive privileges or imposing burdens in the way of taxes, imposts or tolls upon the right of navigation; it has no operative force in limiting the new state's rights of property, sovereignty and dominion in and over navigable waters as compared with those possessed by original states. In other words, such a provision confers no more power over the navigable waters of the new states, upon the government of the United States, than that government possesses over the navigable waters of other states under the provisions of the constitution.<sup>48</sup> So far as provisions of this character are concerned the state may regulate the rights of riparian owners, construct or authorize the construction of bridges and crossings, dams, locks and canals, remove obstructions and provide for deepening, changing or otherwise improving the navigable channel of streams, harbors, roadsteads, etc., within its borders as freely as though such provision were nonexistent and subject only to the same limitation as other states.<sup>49</sup>

to the rights granted to the United States by the constitution." *Shively v. Bowlby*, 152 U. S. 1, 57, 38 L. Ed. 331.

**48. Effect of acts prescribing free navigation, etc.**—*Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565; *Permoli v. Municipality*, No. 1, 3 How. 589, 11 L. Ed. 739; *Withers v. Buckley*, 20 How. 84, 15 L. Ed. 816; *Barney v. Keokuk*, 94 U. S. 324, 331, 24 L. Ed. 224; *Pound v. Turck*, 95 U. S. 459, 24 L. Ed. 525; *Escanaba Co. v. Chicago*, 107 U. S. 678, 27 L. Ed. 442; *Cardwell v. American Bridge Co.*, 113 U. S. 205, 211, 28 L. Ed. 959; *St. Louis v. Myers*, 113 U. S. 566, 567, 28 L. Ed. 1131; *Van Brocklin v. Tennessee*, 117 U. S. 151, 159, 29 L. Ed. 845; *Huse v. Glover*, 119 U. S. 543, 30 L. Ed. 487; *Hamilton v. Vicksburg, etc., Railroad*, 119 U. S. 280, 30 L. Ed. 393; *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 31 L. Ed. 149; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 12, 31 L. Ed. 629; *Mann v. Tacoma Land Co.*, 153 U. S. 273, 284, 38 L. Ed. 714; *Baer v. Moran Bros. Co.*, 153 U. S. 287, 38 L. Ed. 718; *St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs*, 168 U. S. 349, 360, 42 L. Ed. 497; *Leovy v. United States*, 177 U. S. 621, 631, 44 L. Ed. 914.

**49. Same.**—*Pollard v. Hagan*, 3 How. 212, 223, 11 L. Ed. 565; *Withers v. Buckley*, 20 How. 84, 15 L. Ed. 816; *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224; *Pound v. Turck*, 95 U. S. 459, 24 L. Ed. 525; *Escanaba Co. v. Chicago*, 107 U. S. 678, 688, 27 L. Ed. 442; *St. Louis v. Myers*, 113 U. S. 566, 28 L. Ed. 1131; *Cardwell v. American Bridge Co.*, 113 U. S. 205, 211, 28 L. Ed. 959; *Hamilton v. Vicksburg, etc., Rail-*

*road*, 119 U. S. 280, 30 L. Ed. 393; *Huse v. Glover*, 119 U. S. 543, 546, 30 L. Ed. 487; *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 295, 31 L. Ed. 149; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 9, 31 L. Ed. 629; *Mann v. Tacoma Land Co.*, 153 U. S. 273, 284, 38 L. Ed. 714; *Baer v. Moran Bros. Co.*, 153 U. S. 287, 38 L. Ed. 718; *St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs*, 168 U. S. 349, 360, 42 L. Ed. 497; *Leovy v. United States*, 177 U. S. 621, 631, 44 L. Ed. 914.

**The ordinance of 1787.**—"There was no contract in the fourth article of the ordinance of 1787, respecting the freedom of the navigable waters of the territory northwest of the Ohio River emptying into the St. Lawrence, which bound the people of the territory, or of any portion of it, when subsequently formed into a state and admitted into the Union." *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 295, 31 L. Ed. 149.

When any new state was admitted into the Union from the Northwest Territory, the ordinance in question ceased to have any operative force in limiting its powers as compared with those possessed by the original states. On the admission of any such new state, it at once became entitled to and possessed all the rights of dominion and sovereignty which belonged to them. *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565; *Permoli v. Municipality*, No. 1, 3 How. 589, 11 L. Ed. 739; *Escanaba Co. v. Chicago*, 107 U. S. 678, 27 L. Ed. 442; *Cardwell v. American Bridge Co.*, 113 U. S. 205, 28 L. Ed. 959; *Huse v. Glover*, 119 U. S. 543, 30 L. Ed. 487; *Willamette Iron*



**C. As between the States of the Union—1. GENERALLY.**—As between the states of the Union, questions of title, jurisdiction and sovereignty over boundary waters are, in the majority of instances, dependent questions, necessarily settled when the boundary is ascertained, which being the line of territory, is the line of power over the stream.<sup>50</sup>

**As Affected by Compact or Terms of Cession.**—The general rule may be varied, however, by the terms of a compact between the states, or by the terms of the act of cession in cases where one state originally ceded the territory beyond the river.<sup>51</sup> Such a compact may provide for a concurrent jurisdiction

*Bridge Co. v. Hatch*, 125 U. S. 1, 9, 31 L. Ed. 629.

Independently of these considerations, the terms of the ordinance were not violated because the navigable streams were subject to such crossings as the public necessities and convenience might require. The rivers did not change their character as common highways, if the crossings were allowed under reasonable conditions and so as not unnecessarily to obstruct them. The erection of bridges with dams, and the establishment of ferries for the transit of persons and property, are consistent with the free navigation of the rivers declared in the ordinance of 1787. *Huse v. Glover*, 119 U. S. 543, 547, 30 L. Ed. 487; *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 296, 31 L. Ed. 149.

"This provision does not prevent a state from improving the navigableness of these waters by removing obstructions, or by dams and locks so increasing the depth of the water as to extend the line of navigation. Nor does the ordinance prohibit the construction of any work on the river which the state may consider important to commercial intercourse. A dam may be thrown over the river, provided a lock is so constructed as to permit boats to pass with little or no delay, and without charge. A temporary delay, such as passing a lock, could not be considered as an obstruction prohibited by the ordinance." *Huse v. Glover*, 119 U. S. 543, 547, 30 L. Ed. 487.

"The provision of the clause, that the navigable streams shall be highways without any tax, impost, or duty, has reference to their navigation in their natural state. It did not contemplate that such navigation might not be improved by artificial means, by the removal of obstructions, or by the making of dams, for deepening the waters, or by turning into the rivers waters from other streams to increase their depth." *Huse v. Glover*, 119 U. S. 543, 546, 30 L. Ed. 487; *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 296, 31 L. Ed. 149.

**Acts admitting new states.**—The provision found in the acts admitting certain states into the Union that the navigable waters in said states shall be forever free, etc., does not prohibit physical obstructions and impediments to the navigation of the streams. It prohibits the imposition of duties for the use of the naviga-

tion, and any discrimination denying to citizens of other states the equal right to such use. *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 10, 31 L. Ed. 629.

It prevents any exclusive use of the navigable waters of the state—a possible farming out of the privilege of navigating them to particular individuals, classes or corporations, or by vessels of a particular character. *Huse v. Glover*, 119 U. S. 543, 548, 30 L. Ed. 487.

An act of congress declaring certain rivers to be public highways, and that the navigation thereof shall be forever free does not, therefore, prevent the state from constructing, or authorizing the construction of bridges across the same and regulating the operation of the draws in such bridges for the passage of vessels upon the stream, until congress shall see fit to interfere by further legislation. *Escanaba Co. v. Chicago*, 107 U. S. 678, 27 L. Ed. 442.

It is well settled that the legislatures of such states have the same power to authorize the erection of bridges, dams, etc., in and upon the navigable waters wholly within their limits, as have the original states, in reference to which no such clause exists. *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 10, 31 L. Ed. 629. See, also, *Pollard v. Hagan*, 3 How. 212, 230, 11 L. Ed. 565; *Pound v. Turck*, 95 U. S. 459, 24 L. Ed. 525; *Cardwell v. American Bridge Co.*, 113 U. S. 205, 28 L. Ed. 959; *Hamilton v. Vicksburg, etc., Railroad*, 119 U. S. 280, 30 L. Ed. 393; *Huse v. Glover*, 119 U. S. 543, 30 L. Ed. 487; *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 31 L. Ed. 149.

In *St. Louis v. Myers*, 113 U. S. 566, 28 L. Ed. 1131, the federal supreme court held that the act of March 6, 1820, 3 Stat. 545, admitting the state of Missouri into the Union, which declares that the Mississippi River shall be "a common highway and forever free," left the rights of riparian owners on the Mississippi River to be settled according to the principles of state law. *St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs*, 168 U. S. 349, 362, 42 L. Ed. 497.

**50. Title, jurisdiction, etc., as between states of the Union.**—See the title **BOUNDARIES**, vol. 3, p. 494.

**51. As affected by compact or terms of cession.**—See *Handly v. Anthony*, 5 Wheat. 374, 5 L. Ed. 113; *Howard v. Ingersoll*, 13 How. 381, 14 L. Ed. 189; *Alabama v. Geor-*



for certain purposes, as, for example, the service of process, enforcement of police regulations, etc., notwithstanding the boundary of one state may be defined as extending to low-water mark on the opposite side of the river.<sup>52</sup>

2. **As to FREE NAVIGATION.**—Where there is a compact between states with respect to boundary streams, such compact usually provides for the free navigation thereof by both states.<sup>53</sup> Regardless of the existence or nonexistence of such a stipulation, however, no state has the power to impose any tax or other burden upon the privilege of navigation upon any boundary or interstate stream. Such an imposition amounts to a regulation of interstate commerce, and is clearly forbidden.<sup>54</sup>

3. **RIPARIAN RIGHTS AS BETWEEN STATES.**—See, generally, the titles STATES; WATERS AND WATERCOURSES.

**As to the Diversion of the Waters of an Interstate Stream.**—See the titles CONSTITUTIONAL LAW, vol. 4, p. 326; COURTS, vol. 4, p. 1011; STATES; WATERS AND WATERCOURSES.

**As to the Contamination of an Interstate Stream.**—See the titles COURTS, vol. 4, p. 1011; NUISANCES; WATERS AND WATERCOURSES.

gia, 23 How. 505, 515, 16 L. Ed. 556; *South Carolina v. Georgia*, 93 U. S. 4, 23 L. Ed. 782; *Indiana v. Kentucky*, 136 U. S. 479, 34 L. Ed. 329; *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 43 L. Ed. 823; *Wedding v. Meyler*, 192 U. S. 573, 48 L. Ed. 570; *Cincinnati, etc., Packet Co. v. Bay*, 200 U. S. 179, 183, 50 L. Ed. 428. See, also, the title BOUNDARIES, vol. 3, pp. 491, 495, 498, 499.

52. *Same.*—*Handly v. Anthony*, 5 Wheat. 374, 385, 5 L. Ed. 113; *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 621, 43 L. Ed. 823; *Wedding v. Meyler*, 192 U. S. 573, 585, 48 L. Ed. 570; *Cincinnati, etc., Packet Co. v. Bay*, 200 U. S. 179, 183, 50 L. Ed. 428.

**Concurrent jurisdiction of the Ohio River under the Virginia compact.**—The compact with Virginia, under which Kentucky became a state, stipulates that the navigation of, and jurisdiction over, the Ohio River, shall be concurrent between the new states, and the states which may possess the opposite shores of the said river. This term seems to be a repetition of the idea under which the cession was made. *Handly v. Anthony*, 5 Wheat. 374, 385, 5 L. Ed. 113.

"The states opposite to Kentucky have the jurisdiction, whatever it is, over the Ohio River, which the Virginia compact provided for." *Wedding v. Meyler*, 192 U. S. 573, 583, 48 L. Ed. 570.

This has been recognized by the federal supreme court and elsewhere whenever the question has come up. *Wedding v. Meyler*, 192 U. S. 573, 583, 48 L. Ed. 570; *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 621, 43 L. Ed. 823.

"What the Virginia compact most certainly conferred on the states north of the Ohio, was the right to administer the law below low-water mark on the river, and, as part of that right, the right to serve process there with effect." *Wedding v. Meyler*, 192 U. S. 573, 584, 48 L. Ed. 570.

"Jurisdiction, unqualified, being, as it is, the sovereign authority to make, decide on, and execute laws, a concurrence of jurisdiction, therefore, must entitle Indiana to as much power—legislative, judiciary, and executive—as that possessed by Kentucky, over so much of the Ohio River as flows between them." *Wedding v. Meyler*, 192 U. S. 573, 585, 48 L. Ed. 570.

Ohio equally has jurisdiction on the Ohio River with Kentucky. *Cincinnati, etc., Packet Co. v. Bay*, 200 U. S. 179, 183, 50 L. Ed. 428; *Wedding v. Meyler*, 192 U. S. 573, 48 L. Ed. 570.

"The concurrent jurisdiction given is jurisdiction 'on' the river, and does not extend to permanent structures attached to the river bed and within the boundary of one or the other state." *Wedding v. Meyler*, 192 U. S. 573, 585, 48 L. Ed. 570, distinguishing *Mississippi, etc., R. Co. v. Ward*, 2 Black 485, 17 L. Ed. 311.

53. **As to free navigation.**—*Handly v. Anthony*, 5 Wheat. 374, 385, 5 L. Ed. 113; *Alabama v. Georgia*, 23 How. 505, 515, 16 L. Ed. 556; *South Carolina v. Georgia*, 93 U. S. 4, 23 L. Ed. 782.

By the terms of the contract of cession between the United States and Georgia, the navigation of the Chattahoochee River is free to both Georgia and Alabama. *Alabama v. Georgia*, 23 How. 505, 515, 16 L. Ed. 556.

Congress has sanctioned the compact made between Virginia and Kentucky, viz: "That the use and navigation of the River Ohio, so far as the territory of Virginia or Kentucky is concerned, shall be free and common to the citizens of the United States." This compact is obligatory, and can be carried out by the federal supreme court. *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 14 L. Ed. 249.

54. *Same; in absence of compact.*—See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 441, 445, 446.

**As to Bridges, Dams, and Other Obstructions, Stoppage or Alteration of Channel, etc.**—As to powers of congress, see ante, "Limitations of Doctrine," II, B, 1, e; post, "Power to Improve Includes Power to Obstruct, Alter Course of Channel, etc.," IV, A, 2; "Power to Improve Includes Power to Protect and to Prevent or Remove Obstructions," IV, A, 3. As to powers of states, see post, "States," IV, F, 2, a, (2); "Proceeding Instituted by State," IV, F, 2, b, (2).

**Same; as a Violation of Compact between States.**—See ante, "As to Free Navigation," II, C, 2; post, "Power to Improve Includes Power to Obstruct, Alter Course of Channel, etc.," IV, A, 2. See, also, the title BRIDGES, vol. 3, p. 519.

**D. As between the State, or Its Subdivisions, and Individuals**—1. IN ENGLAND AND AT COMMON LAW.—By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, and of all the lands below high water mark, where the tide ebbs and flows, within the jurisdiction of the Crown of England, are in the King for the benefit of the whole people. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects. Therefore the title, *jus privatum*, in such lands, as of waste and unoccupied lands, belongs to the King as the sovereign; and the dominion thereof, *jus publicum*, is vested in him as the representative of the nation and for the public benefit.<sup>55</sup>

**Foundation of Doctrine.**—The doctrine of the dominion over and ownership by the crown of lands within the realm under tidewaters is founded upon the existence of the tide over the lands because of the fact that there the ebb and flow of the tide constitutes the usual test of the navigability of the waters, tidewaters and navigable waters being used as synonymous terms in England. The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the crown, which could alone exercise such dominion over the waters as would insure freedom in their use so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment.<sup>56</sup>

**Crown Grants to Be Strictly Construed.**—The dominion and property in navigable waters and the lands under them, being held by the king as a public trust, the grant to an individual of an exclusive fishery in any portion of it is so much taken from the common fund entrusted to his care for the common benefit. Grants of that description are therefore construed strictly; and it will not be presumed that the king intended to part with any portion of the public

**55. Dominion and ownership as between state and individuals; at common law.**—*Martin v. Waddell*, 16 Pet. 367, 10 L. Ed. 997; *Den v. The Jersey Co.*, 15 How. 426, 14 L. Ed. 757; *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224; *Packer v. Bird*, 137 U. S. 661, 666, 34 L. Ed. 819; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 346, 36 L. Ed. 1018; *Shively v. Bowlby*, 152 U. S. 1, 11, 38 L. Ed. 331; *Grand Rapids, etc., R. Co. v. Butler*, 159 U. S. 87, 92, 40 L. Ed. 85; *Morris v. United States*, 174 U. S. 196, 226, 43 L. Ed. 946.

In order that the passage ways of commerce and navigation might be subject to public authority and control, the title to the land under water and to the shore below ordinary high-water mark, in navigable rivers and arms of the sea, was, by the common law, vested in the sovereign

for the public use and benefit. *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224.

In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high-water mark, is in the king, except so far as an individual or a corporation has acquired rights in it by express grant, or by prescription or usage. And that this title, *jus privatum*, whether in the king or in a subject, is held subject to the public right, *jus publicum*, of navigation and fishing. *Shively v. Bowlby*, 152 U. S. 1, 13, 38 L. Ed. 331.

**56. Same; foundation of doctrine.**—*Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224; *Packer v. Bird*, 137 U. S. 661, 667, 34 L. Ed. 819; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 346, 36 L. Ed. 1018; *Grand*



domain unless clear and special words are used to denote it.<sup>57</sup>

**Extent of Riparian Ownership under Grant.**—It is well settled, therefore, that at common law the extent of a grant of land bounded by a stream of water depended upon its navigability as determined by the tidal test. If it were land bounded by the sea or an arm thereof, or by a stream affected by the ebb and flow of the tide, the title of the riparian owner, under a grant from the sovereign, extended only to high-water mark, unless either the language of the grant or long usage under it clearly indicated a contrary intention; while if it were a stream not affected by the ebb and flow of the tide, although actually navigable, the rights of the riparian owner extended to the center or middle thread of the current.<sup>58</sup>

**Riparian Ownership Subject to Public Easements.**—In the latter case, however, the riparian owner took subject to the public easement of navigation.<sup>59</sup>

**2. IN THE COLONIES.**—In America the country discovered and settled by Englishmen was held by the king in his public and regal character as the representative of the nation and in trust for them; and upon the settlement of the colonies, like rights passed to the grantees in the royal charters. Those charters conveyed to the grantees both the territory described and the powers of government, including the property and the dominion of lands under tidewaters. By those charters the dominion and property in the navigable waters and in the soils under them, in each colony, passed as a part of the prerogative rights annexed to the political powers conferred on the proprietor, and in his hands were intended to be a trust for the common use of the new community about to be established, as a public trust for the whole community, to be freely used by all for navigation and fishery, and not as private property to be parcelled out and sold for his individual emolument.<sup>60</sup>

Rapids, etc., *R. Co. v. Butler*, 159 U. S. 87, 92, 40 L. Ed. 85.

**57. Crown grants strictly construed.**—*Martin v. Waddell*, 16 Pet. 367, 10 L. Ed. 997.

**58. Extent of riparian ownership under crown grant.**—*Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224; *Packer v. Bird*, 137 U. S. 661, 666, 34 L. Ed. 819; *Shively v. Bowlby*, 152 U. S. 1, 13, 38 L. Ed. 331; *Grand Rapids, etc., R. Co. v. Butler*, 159 U. S. 87, 92, 40 L. Ed. 85; *Morris v. United States*, 174 U. S. 196, 236, 43 L. Ed. 946; *Illinois Cent. R. Co. v. Chicago*, 176 U. S. 646, 660, 44 L. Ed. 622.

"By the law of England, Scotland and Ireland, the owners of the banks *prima facie* own the beds of all fresh water rivers above the ebb and flow of the tide, even if actually navigable, to the thread of the stream, *usque ad filum aquæ*." *Shively v. Bowlby*, 152 U. S. 1, 31, 38 L. Ed. 331.

In the absence of any local statute or usage, a grant of lands by the state does not pass title to submerged lands below high-water mark. *Illinois Cent. R. Co. v. Chicago*, 176 U. S. 646, 660, 44 L. Ed. 622, citing *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565; *Goodtitle v. Kibbe*, 9 How. 471, 13 L. Ed. 220; *United States v. Pacheco*, 2 Wall. 587, 17 L. Ed. 865; *Weber v. Harbor Comm'rs*, 18 Wall. 57, 21 L. Ed. 798; *Hardin v. Jordan*, 140 U. S. 371, 381, 35 L. Ed. 428; *Shively v. Bowlby*, 152 U. S. 1, 13, 38 L. Ed. 331.

**59. Same; subject to public easements.**—*Shively v. Bowlby*, 152 U. S. 1, 13, 38

L. Ed. 331; *Grand Rapids, etc., R. Co. v. Butler*, 159 U. S. 87, 92, 40 L. Ed. 85.

"At common law, only arms of the sea, and streams where the tide ebbs and flows, are deemed navigable. Streams above tide-water, although navigable in fact at all times, or in freshets, were not deemed navigable in law. To these riparian proprietors, bounded on or by the river, could acquire exclusive ownership of the soil, water and fishery, to the middle thread of the current; subject, however, to the public easement of navigation." *Grand Rapids, etc., R. Co. v. Butler*, 159 U. S. 87, 92, 40 L. Ed. 85.

**60. In the colonies; nature of grants to the proprietors.**—*Martin v. Waddell*, 16 Pet. 367, 10 L. Ed. 997; *Den v. The Jersey Co.*, 15 How. 426, 14 L. Ed. 757; *Shively v. Bowlby*, 152 U. S. 1, 38 L. Ed. 331; *Morris v. United States*, 174 U. S. 196, 226, 43 L. Ed. 946. See, also, *Smith v. Maryland*, 18 How. 71, 74, 15 L. Ed. 269; *County of St. Clair v. Lovingsston*, 23 Wall. 46, 68, 23 L. Ed. 59.

Construing the charter granted by Charles II to his brother, the Duke of York, in 1664 and 1674 for the purpose of enabling him to plant a colony in the continent of America, it was held that the rivers, bays and arms of the sea, and all the prerogative rights within the limit of the charter undoubtedly passed to the Duke of York, and were intended to pass except those saved in the letters patent. *Martin v. Waddell*, 16 Pet. 367, 10 L. Ed. 997.

But the dominion and propriety in the



**Further Grants; Surrender to Crown.**—The same principles apply with equal force to further grants made by the lord proprietors to other proprietors, and to a surrender made by those proprietors to the crown. Such other proprietors received the interests of the lord proprietors upon the same conditions upon which the grant was originally made; and the surrender restored these rights, privileges and prerogatives to the crown in the same plight and condition in which they were originally held.<sup>61</sup>

3. AS BETWEEN THE STATES, OR THEIR SUBDIVISIONS, AND INDIVIDUALS—a. *Generally.*—Upon the American Revolution the people of each state became themselves sovereign, and all the rights of the crown and of parliament in the navigable waters and in the soils under them vested in the several states as an incident of their sovereignty; and in that character they hold the absolute right to the navigable waters within their borders, and the soils under them for the common use of the people of each state, subject as between themselves and the United States, to the rights surrendered by the constitution, and, as between themselves and individuals, subject to any lawful grants of that soil by them-

navigable waters and in the soils under them passed only as a part of the prerogative rights annexed to the political powers conferred on the duke. They were intended to be in his hands a trust for the common use of the new community about to be established and not private property to be parceled out and sold to individuals for his own benefit. The lands under the navigable waters passed to the grantee in the charter as one of the royalties incident to the powers of government, and were held by him in the same manner and for the same purpose that the navigable waters of England and the soils under them are held by the crown. *Martin v. Waddell*, 16 Pet. 367, 10 L. Ed. 997.

61. **Subsequent grants; surrenders to the crown.**—*Martin v. Waddell*, 16 Pet. 367, 10 L. Ed. 997; *Den v. The Jersey Co.*, 15 How. 426, 14 L. Ed. 757; *Morris v. United States*, 174 U. S. 196, 227, 229, 43 L. Ed. 946. See, also, *Smith v. Maryland*, 18 How. 71, 74, 15 L. Ed. 269; *County of St. Clair v. Lovingsston*, 23 Wall. 46, 68, 23 L. Ed. 59.

**In New Jersey.**—The same principles apply with equal force to the surrender afterwards made by the twenty-four proprietors of East New Jersey who were grantees of the Duke of York. It appears that all the interests of the Duke in East New Jersey including the royalties and powers of government were conveyed to these proprietors as fully and amply and with the same conditions as they had been granted to him, and that they had the same dominion and propriety in the bays and rivers and arms of the sea and the soil under them and in the rights of fishery, that had belonged to him under the original charter. In their hands, therefore, as in those of the duke, this dominion and propriety was held by them as a prerogative right associated with the powers of government, and not as private property. *Martin v. Waddell*, 16 Pet. 367, 10 L. Ed. 997.

The surrender by the proprietors to Queen Anne in 1702, of all the powers,

authority and privileges of and concerning the government of the province, restored these rights, privileges and prerogatives to the crown in the same plight and condition in which they originally came into the hands of the Duke of York. The rights of private property retained by the proprietors did not include the exclusive right to the soil under the navigable waters of East New Jersey or the exclusive right to take fish and oysters therein. When the people of New Jersey took possession of the reins of government and took into their own hands the power of sovereignty the prerogatives and royalties which before belonged either to the crown or to the parliament became immediately and rightfully vested in the state. Therefore the soil under the navigable waters of East New Jersey belonged to the state and not to the proprietors. *Martin v. Waddell*, 16 Pet. 367, 10 L. Ed. 997, followed in *Den v. The Jersey Co.*, 15 How. 426, 432, 14 L. Ed. 757.

**As to state of Maryland; grants of Lord Baltimore.**—"It does not appear that, in the administration of his affairs as lord proprietor, Lord Baltimore, or his successors, ever made a sale, or executed a patent which upon its face, and in terms, granted the bed or shores of any tidewater in the province of Maryland or ever claim the right to do so." *Morris v. United States*, 174 U. S. 196, 229, 43 L. Ed. 946.

Upon the revolution, the state of Maryland became possessed of the navigable waters of the state, including the Potomac River, and of the soils thereunder, for the common use and benefit of its inhabitants; and by the act of cession of the District of Columbia that portion of the Potomac River, with the subjacent soil which was appurtenant to and part of the territory granted, became vested in the United States. *Morris v. United States*, 174 U. S. 196, 227, 43 L. Ed. 946.

The Marshall heirs, therefore, have no "right, title or interest in any part of the land or water composing any part of the Potomac River, or its flats, in charge of

selves, or by the state or sovereign power which governed its territory before the Declaration of Independence,<sup>62</sup> or, in the case of the new states, before their admission into the Union.<sup>63</sup>

b. *As to Grants and Surrenders Made by the Colonial Proprietors.*—See ante, "In the Colonies," II, D, 2.

c. *As to Reclaimed Lands.*—The principle covers a case where lands had been reclaimed from the water under an act of the legislature.<sup>64</sup>

d. *Character in Which Title Held by State.*—The people of each state hold their navigable waters and soils under them in their sovereign character in trust for the public uses for which they are adapted, including the public rights of navigation and fishery, as well shell fish as floating fish.<sup>65</sup>

the secretary of war." *Morris v. United States*, 174 U. S. 196, 232, 43 L. Ed. 946.

**62. Ownership as between states and individuals.**—*Martin v. Waddell*, 16 Pet. 367, 10 L. Ed. 997; *Pollard v. Hagan*, 3 How. 212, 229, 11 L. Ed. 565; *Goodtitle v. Kibbe*, 9 How. 471, 13 L. Ed. 220; *Den v. The Jersey Co.*, 15 How. 426, 14 L. Ed. 757; *Smith v. Maryland*, 18 How. 71, 15 L. Ed. 269; *Mumford v. Wardwell*, 6 Wall. 423, 438, 18 L. Ed. 756; *Weber v. Harbor Comm'rs*, 18 Wall. 57, 66, 21 L. Ed. 798; *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224; *McCready v. Virginia*, 94 U. S. 391, 24 L. Ed. 248; *St. Louis v. Myers*, 113 U. S. 566, 28 L. Ed. 1131; *Packer v. Bird*, 137 U. S. 661, 666, 34 L. Ed. 819; *St. Louis v. Rutz*, 138 U. S. 226, 242, 34 L. Ed. 941; *Manchester v. Massachusetts*, 139 U. S. 240, 35 L. Ed. 159; *Hardin v. Jordan*, 140 U. S. 371, 35 L. Ed. 428; *Kaukauna Water Power Co. v. Green Bay, etc.*, Canal Co., 142 U. S. 254, 35 L. Ed. 1004; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 456, 36 L. Ed. 1018; *Shively v. Bowlby*, 152 U. S. 1, 16, 38 L. Ed. 331; *Wharton v. Wise*, 153 U. S. 155, 38 L. Ed. 669; *St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs*, 168 U. S. 349, 359, 42 L. Ed. 497; *Morris v. United States*, 174 U. S. 196, 227, 43 L. Ed. 946; *Illinois Cent. R. Co. v. Chicago*, 176 U. S. 646, 660, 44 L. Ed. 622; *Mobile Transp. Co. v. Mobile*, 187 U. S. 479, 482, 47 L. Ed. 266; *Kean v. Calumet Canal, etc.*, Co., 190 U. S. 452, 47 L. Ed. 1134; *Kansas v. Colorado*, 206 U. S. 46, 93, 51 L. Ed. 956.

"Whatever soil below low-water mark is the subject of exclusive propriety and ownership, belongs to the state on whose maritime border, and within whose territory it lies, subject to any lawful grants of that soil by the state, or the sovereign power which governed its territory before the declaration of independence. *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565; *Martin v. Waddell*, 16 Pet. 367, 10 L. Ed. 997; *Den v. The Jersey Co.*, 15 How. 426, 14 L. Ed. 757." *Smith v. Maryland*, 18 How. 71, 15 L. Ed. 269; *McCready v. Virginia*, 94 U. S. 391, 394, 24 L. Ed. 248; *Packer v. Bird*, 137 U. S. 661, 666, 34 L. Ed. 819; *Manchester v. Massachusetts*, 139 U. S. 240, 261, 35 L. Ed. 159; *Shively v. Bowlby*, 152 U. S. 1, 24, 38 L. Ed. 331; *Wharton v. Wise*, 153 U. S. 155, 173, 38 L. Ed. 669.

**As to Chesapeake Bay**, see *Smith v. Maryland*, 18 How. 71, 15 L. Ed. 269.

**63. In the territories and new states.**—See ante, "But United States or Former Proprietors May Make Grants That Will Be Binding upon Future States," II, B, 2, b.

**64. Ownership of reclaimed lands.**—*Den v. The Jersey Co.*, 15 How. 426, 14 L. Ed. 757. See, also, *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565; *Smith v. Maryland*, 18 How. 71, 15 L. Ed. 269; *County of St. Clair v. Lovingson*, 23 Wall. 46, 68, 23 L. Ed. 59; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, 27 L. Ed. 1070; *Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656, 683, 31 L. Ed. 543; *Morris v. United States*, 174 U. S. 196, 271, 43 L. Ed. 946.

In *Pollard v. Hagan*, 3 How. 212, 220, 11 L. Ed. 565, it was said "that if \* \* \* the premises sued for were below usual high-water mark at the time Alabama was admitted to the Union, then an act of congress and a patent in pursuance thereof could give the plaintiffs no title, whether the waters had receded by the labor of man only, or by alluvion."

**65. Character in which held by state.**—*Martin v. Waddell*, 16 Pet. 367, 410, 10 L. Ed. 997; *Pollard v. Hagan*, 3 How. 212, 220, 11 L. Ed. 565; *Den v. The Jersey Co.*, 15 How. 426, 14 L. Ed. 757; *Smith v. Maryland*, 18 How. 71, 15 L. Ed. 269; *McCready v. Virginia*, 94 U. S. 391, 394, 24 L. Ed. 248; *Hardin v. Jordan*, 140 U. S. 371, 382, 35 L. Ed. 428; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 457, 36 L. Ed. 1018; *Shively v. Bowlby*, 152 U. S. 1, 49, 38 L. Ed. 331.

"The title to the shore and lands under tidewater, said Mr. Justice Bradley, 'is regarded as incidental to the sovereignty of the state—a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery.'" *Hardin v. Jordan*, 140 U. S. 371, 381, 35 L. Ed. 428; *Shively v. Bowlby*, 152 U. S. 1, 49, 38 L. Ed. 331.

**As to rights of fishery.**—"The principle has long been settled in this court, that each state owns the beds of all tidewaters within its jurisdiction, unless they have been granted away. In like manner, the states own the tidewaters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the state represents its people, and



e. *Right of State to Use or Dispose of Lands.*—The soil under navigable waters being held by the people of the state in trust for the common use and as a portion of their inherent sovereignty, any act of legislation concerning their use affects the public welfare. It is, therefore, appropriately within the exercise of the police power of the state.<sup>66</sup> This being true, it follows that the legislature of a state can make no irrevocable grant of the soils under navigable waters inconsistent with the public trusts upon which they are held.<sup>67</sup>

**Otherwise Where Conveyance Not to Detriment of Public Interests.**—Subject to the limitations stated in the preceding paragraph, state ownership of and dominion and sovereignty over lands covered by tidewaters and navigable lakes, streams, etc., carries with it the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in such waters, and subject to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce.<sup>68</sup>

the ownership is that of the people in their united sovereignty. The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States." *Martin v. Waddell*, 16 Pet. 367, 410, 10 L. Ed. 997; *McCready v. Virginia*, 94 U. S. 391, 394, 24 L. Ed. 248; *Manchester v. Massachusetts*, 139 U. S. 240, 259, 35 L. Ed. 159; *Shively v. Bowlby*, 152 U. S. 1, 24, 38 L. Ed. 331.

The state of Maryland is the owner of the navigable waters within its limits and the lands under them, holding them in trust for the public, and authorized to pass all necessary laws for the protection of the fish therein, whether floating or shell, and the punishment of any citizens of its own or other states for taking them against its prohibitions. *Wharton v. Wise*, 153 U. S. 155, 173, 38 L. Ed. 669. Accord: *McCready v. Virginia*, 94 U. S. 391, 394, 24 L. Ed. 248. See, generally, as to the character in which state holds the public fisheries under tidewaters as against its own citizens and those of other states, the titles CONSTITUTIONAL LAW, vol. 4, pp. 473, 474; FISH AND FISHERIES, vol. 6, pp. 292, 293, 298, 299.

**66. Power of state with respect to use and disposal of land.**—*Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 459, 36 L. Ed. 1018.

**67. Irrevocable grants of trust property.**—*Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 36 L. Ed. 1018; *Illinois Cent. R. Co. v. Chicago*, 176 U. S. 646, 44 L. Ed. 622. See, on this point, the title CONSTITUTIONAL LAW, vol. 4, pp. 321, 323.

"There can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it." *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 460, 36 L. Ed. 1018.

While it was held in *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 36 L. Ed. 1018, that the state could not convey its right to the soil beneath navigable waters, that case came up from a circuit court of the

United States which was called upon to declare as an original question what power the state of Illinois had to convey the property in question to the Illinois Central Railroad Company. It is different where the case comes up from the supreme court of a state which has itself put a construction upon an act of its own legislature and upon its conformity to the constitution of the state. In such case the decision of the state court is obligatory upon the federal supreme court. *Mobile Transp. Co. v. Mobile*, 187 U. S. 479, 491, 47 L. Ed. 266.

**68. Where conveyance not to detriment of public interest.**—*Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565; *Mumford v. Wardwell*, 6 Wall. 423, 18 L. Ed. 756; *Weber v. Harbor Comm'rs*, 18 Wall. 57, 21 L. Ed. 798; *San Francisco v. Le Roy*, 138 U. S. 656, 670, 34 L. Ed. 1096; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 435, 36 L. Ed. 1018; *Shively v. Bowlby*, 152 U. S. 1, 46, 38 L. Ed. 331; *Morris v. United States*, 174 U. S. 196, 236, 43 L. Ed. 946; *Mobile Transp. Co. v. Mobile*, 187 U. S. 479, 491, 47 L. Ed. 266; *United States v. Mission Rock Co.*, 189 U. S. 391, 404, 47 L. Ed. 865. See, also, ante, "Generally," II, B, 1, a.

A state has the right, in its discretion, to appropriate and regulate concerning its tidewaters and their beds to be used by its people as a common for taking and cultivating oysters, so far as it may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. The right which the people of the state thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship. *McCready v. Virginia*, 94 U. S. 391, 24 L. Ed. 248; *Manchester v. Massachusetts*, 139 U. S. 240, 260, 35 L. Ed. 159; *Geer v. Connecticut*, 161 U. S. 519, 528, 40 L. Ed. 793. See, also, *Smith v. Maryland*, 18 How. 71, 74, 15 L. Ed. 269; *Martin v. Waddell*, 16 Pet. 367, 410, 10 L. Ed. 997.

"The interest of the people in the navigation of the waters and in commerce over



**Conveyance to Municipal Corporation.**—While it has been held that a state legislature holds the title to soils under navigable waters upon a public trust and that it cannot convey the same to a private corporation, a different doctrine applies when the conveyance is to a municipal corporation whose officers are “created and declared trustees to hold, possess, direct, control and manage,” the soil and shore so granted in such manner as they may deem best for the public good. In such case the state legislature has the right to devolve the trust upon the municipal corporation.<sup>69</sup> But while in the administration of government the use of such powers may, for a limited period, be delegated to a municipality or other body, there always remains in the state the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes.<sup>70</sup>

*f. Application of Principles to Inland Lakes and to Navigable Streams above Tidewater.*—In England, as repeatedly stated, tidewaters only were regarded as navigable; and hence the rule as to property was often expressed as applicable to them only.<sup>71</sup> But in this country the same reasons exist for the exclusion of private ownership over the soil under the navigable waters of our great inland lakes and navigable streams above the ebb and flow of the tide, as when their navigability is determined by the tidal test. The common-law doctrine on this subject prevailing in England is held in some of the states, but in a large

them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state.” *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 452, 36 L. Ed. 1018.

“Such title being in the state, the lands are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by congress with regard to public navigation and commerce. The state may even dispose of the usufruct of such lands, as is frequently done by leasing oyster beds in them, and granting fisheries in particular localities; also, by the reclamation of submerged flats, and the erection of wharves and piers and other adventitious aids of commerce. Sometimes large areas so reclaimed are occupied by cities, and are put to other public or private uses, state control and ownership therein being supreme, subject only to the paramount authority of congress in making regulations of commerce, and in subjecting the lands to the necessities and uses of commerce. See *Martin v. Waddell*, 16 Pet. 367, 10 L. Ed. 997; *Den v. The Jersey Co.*, 15 How. 426, 14 L. Ed. 757; *Smith v. Maryland*, 18 How. 71, 15 L. Ed. 269; *McCready v. Virginia*, 94 U. S.

391, 24 L. Ed. 248; *Manchester v. Massachusetts*, 139 U. S. 240, 35 L. Ed. 159.” *Hardin v. Jordan*, 140 U. S. 371, 381, 35 L. Ed. 428.

“It is true, as was said by the court in *Shively v. Bowlby*, 152 U. S. 1, 13, 38 L. Ed. 331, that if either the language of the grant or long usage under it clearly indicates an intention that waters submerged by the sea shall be included, it is within the power of the sovereign to grant them. But we know of nothing in the way of constant usage with regard to these submerged waters which lends support to the argument of the railroad company that this case is within the exception and not within the general principle of *Shively v. Bowlby*, 152 U. S. 1, 38 L. Ed. 331. To make usage significant of the proper interpretation of the grant, it should appear that it was a usage for the railroad company to appropriate such lands without the express consent of the city, but with its silent acquiescence. Undoubtedly such usage might be inferred from repeated appropriations by the railroad without objection from the city authorities. But the facts seem to be that, wherever the railroad has taken such lands, it has done so with the express consent or subsequent ratification of the state or city.” *Illinois Cent. R. Co. v. Chicago*, 176 U. S. 646, 660, 44 L. Ed. 622.

**69. Conveyance to municipal corporation.**—*Mobile Transp. Co. v. Mobile*, 187 U. S. 479, 491, 47 L. Ed. 266; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 36 L. Ed. 1018.

**70. Same; revocation.**—*Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 453, 36 L. Ed. 1018.

**71. Application of principles to streams above tidewater.**—*Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224.

number it has been considered as inapplicable to the waters of the country which, though above the ebb and flow of the tide, are actually navigable.<sup>72</sup> Since the decision of the supreme court of the United States in 1851, declaring all the great lakes and rivers of the country navigable that are really such, there is no longer any reason for thus restricting the title of the state, except as a change in that respect might interfere with vested rights and established rules of property. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, is for the several states themselves to determine. If, says the supreme court, they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections.<sup>73</sup>

*g. Same; Federal Grants; Extent and Incidents of Riparian Ownership Determined by State Law.*—So far as grants from the federal government are concerned, that government, as previously stated, cannot make and has not attempted to make any grant of the lands below high-water mark in the states, since as between the states and the United States, the dominion sovereignty and propriety of lands below high-water mark belong to the former and not to the

**72. Common law prevails in some states.**—*Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224; *Packer v. Bird*, 137 U. S. 661, 667, 34 L. Ed. 819.

"The common law of England upon this subject (that is, riparian rights beyond high water) at the time of the emigration of our ancestors, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes or usages of the several colonies and states, or by the constitution and laws of the United States." *Shively v. Bowlby*, 152 U. S. 1, 14, 38 L. Ed. 331.

"This right of the states to regulate and control the shores of tidewaters, and the land under them, is the same as that which is exercised by the crown in England." *Hardin v. Jordan*, 140 U. S. 371, 382, 35 L. Ed. 428.

The form, instead of the substance, of the rule has been adopted in many of the states of this country; and in them the public title to the beds and shores of navigable streams is confined to tide-water. *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224.

**73. A question for each state.**—The *Propeller Genesee Chief*, 12 How. 443, 13 L. Ed. 1058; *Barnev v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224; *Packer v. Bird*, 137 U. S. 661, 671, 34 L. Ed. 819; *St. Louis v. Rutz*, 138 U. S. 226, 242, 34 L. Ed. 941; *Hardin v. Jordan*, 140 U. S. 371, 381, 35 L. Ed. 428; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 36 L. Ed. 1018; *Shively v. Bowlby*, 152 U. S. 1, 38 L. Ed. 331; *St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs*, 168 U. S. 349, 365, 42 L. Ed. 497; *Kansas v. Colorado*, 206 U. S. 46, 93, 51 L. Ed. 956.

"In *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224, Mr. Justice Bradley said (p. 338): 'And since this court, in the case of *The Propeller Genesee Chief*, 12 How. 443, 13 L. Ed. 1058, has declared that the Great Lakes and other navigable waters of the country, above as well as below

the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters and amenable to the admiralty jurisdiction, there seems to be no sound reasons for adhering to the old rule as to the proprietorship of beds and shores of such waters. It properly belongs to the states by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water.'" *Kansas v. Colorado*, 206 U. S. 46, 93, 51 L. Ed. 956.

"In our view of the subject the correct principles were laid down in *Martin v. Waddell*, 16 Pet. 367, 10 L. Ed. 997; *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565, and *Goodtitle v. Kibbe*, 9 How. 471, 13 L. Ed. 220. These cases related to tide-water, it is true; but they enunciate principles which are equally applicable to all navigable waters." *Barney v. Keokuk*, 94 U. S. 324, 338, 24 L. Ed. 224, quoted with approval in *Packer v. Bird*, 137 U. S. 661, 671, 34 L. Ed. 819; *St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs*, 168 U. S. 349, 361, 42 L. Ed. 497.

"Although the question in that case (*Martin v. Waddell*, 16 Pet. 367, 10 L. Ed. 997) arose in regard to lands covered with water in Raritan Bay, yet the principles upon which the case was decided have been stated to apply to the rights of the states in regard to all navigable waters within their jurisdiction." *St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs*, 168 U. S. 349, 360, 42 L. Ed. 497.

"In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also in some of the states to navigable rivers." *Hardin v. Jordan*, 140 U. S. 371, 382, 35 L. Ed. 428.

**As to inland lakes and ponds.**—See ante, "Grant of Navigable Waters and Underlying Soils in the States," II, B, 4; "Doc-



latter.<sup>74</sup> The whole question of the extent of riparian and littoral ownership and the incidents thereof, whether bordering upon tidal waters, or upon streams above tidal waters, or upon the navigable waters of inland lakes, is a matter to be determined by the law of each state, subject to the rights granted to the federal government by the constitution of the United States.<sup>75</sup>

trine Extends to Lands Bordering upon Sea Shore and to Inland Lakes," II, B, 1, b.

**74. Federal grants; extent and incidents of riparian ownership determined by state law.**—See ante, "Generally," II, B, 1, a; "United States Has Not Undertaken to Grant Soils under Navigable Waters; Operation of Surveys and General Grants," II, B, 2, c; "Grant of Navigable Waters and Underlying Soils in the States," II, B, 4.

**75. Same.**—Pollard *v.* Hagan, 3 How. 212, 11 L. Ed. 565; Goodtitle *v.* Kibbe, 9 How. 471, 13 L. Ed. 220; Rundle *v.* Delaware, etc., Canal Co., 14 How. 80, 91, 93, 94, 14 L. Ed. 335; Fisher *v.* Haldeman, 20 How. 186, 194, 15 L. Ed. 879; Weber *v.* Harbor Comm'rs, 18 Wall. 57, 21 L. Ed. 798; Barney *v.* Keokuk, 94 U. S. 324, 338, 24 L. Ed. 224; St. Louis *v.* Myers, 113 U. S. 566, 28 L. Ed. 1131; Packer *v.* Bird, 137 U. S. 661, 667, 34 L. Ed. 819; St. Louis *v.* Rutz, 138 U. S. 226, 242, 34 L. Ed. 941; Hardin *v.* Jordan, 140 U. S. 371, 35 L. Ed. 428; Mitchell *v.* Smale, 140 U. S. 406, 412, 35 L. Ed. 442; Kaukauna Water Power Co. *v.* Green Bay, etc., Canal Co., 142 U. S. 254, 272, 35 L. Ed. 1004; Shively *v.* Bowlby, 152 U. S. 1, 38 L. Ed. 331; Lowndes *v.* Huntington, 153 U. S. 1, 19, 38 L. Ed. 615; Mann *v.* Tacoma Land Co., 153 U. S. 273, 283, 38 L. Ed. 714; Baer *v.* Moran Bros. Co., 153 U. S. 287, 38 L. Ed. 718; Grand Rapids, etc., R. Co. *v.* Butler, 159 U. S. 87, 92, 40 L. Ed. 85; Eldridge *v.* Trezevant, 160 U. S. 452, 467, 40 L. Ed. 490; St. Anthony Falls Water Power Co. *v.* St. Paul Water Comm'rs, 168 U. S. 349, 42 L. Ed. 497; Kean *v.* Calumet Canal, etc., Co., 190 U. S. 452, 47 L. Ed. 1134; Hardin *v.* Shedd, 190 U. S. 508, 47 L. Ed. 1156; Whitaker *v.* McBride, 197 U. S. 510, 49 L. Ed. 857; Joy *v.* St. Louis, 201 U. S. 332, 342, 50 L. Ed. 776; Kansas *v.* Colorado, 206 U. S. 46, 93, 51 L. Ed. 956. See ante, "Grant of Navigable Waters and Underlying Soils in the States," II, B, 4. See, also, the titles CONSTITUTIONAL LAW, vol. 4, p. 160; DUE PROCESS OF LAW, vol. 5, pp. 564, 596.

The subject matter of such rights and regulations falls within the control of the states, and the provisions of the fourteenth amendment do not extend to nor override public rights, existing in the form of servitudes or easements, held by the courts of a state to be valid under the constitution and laws of such state. Eldridge *v.* Trezevant, 160 U. S. 452, 468, 40 L. Ed. 490.

"The foregoing summary of the laws of the original states shows that there is no universal and uniform law upon the subject; but that each state has dealt with

the lands under the tidewaters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution, therefore, is necessary in applying precedents in one state to cases arising in another." Shively *v.* Bowlby, 152 U. S. 1, 26, 38 L. Ed. 331. See, also, United States *v.* Mission Rock Co., 189 U. S. 391, 404, 47 L. Ed. 865.

"The decisions of this court, referred to at the bar, regarding the shores of waters where the ebb and flow of the tide from the sea is not felt, but which are really navigable, should be considered with reference to the facts upon which they were made, and keeping in mind the local laws of the different states, as well as the provisions of the acts of congress relating to such waters." Shively *v.* Bowlby, 152 U. S. 1, 31, 38 L. Ed. 331.

With respect to riparian rights the law of the state, as declared by its supreme court, is controlling as a rule of property. Barney *v.* Keokuk, 94 U. S. 324, 24 L. Ed. 224; Packer *v.* Bird, 137 U. S. 661, 34 L. Ed. 819; Hardin *v.* Jordan, 140 U. S. 371, 35 L. Ed. 428; Kaukauna Water Power Co. *v.* Green Bay, etc., Canal Co., 142 U. S. 254, 272, 35 L. Ed. 1004.

"The question as to whether the fee of the plaintiff, as a riparian proprietor on the Mississippi River, extends to the middle thread of the stream, or only to the water's edge, is a question in regard to a rule of property, which is governed by the local law of Illinois. Barney *v.* Keokuk, 94 U. S. 324, 338, 24 L. Ed. 224; St. Louis *v.* Myers, 113 U. S. 566, 28 L. Ed. 1131; Packer *v.* Bird, 137 U. S. 661, 34 L. Ed. 819." St. Louis *v.* Rutz, 138 U. S. 226, 242, 34 L. Ed. 941.

"In this case we accept the view of the supreme court of California in its opinion as expressing the law of that state, 'that the Sacramento River being navigable in fact, the title of the plaintiff extends no farther than the edge of the stream.'" Packer *v.* Bird, 137 U. S. 661, 669, 34 L. Ed. 819.

"It was because of this difference in the law of Pennsylvania from that of England and of most of the older states, and because the decisions of the supreme court of Pennsylvania upon the subject were deemed binding precedents, that this court, speaking by Mr. Justice Grier, held that riparian owners, erecting dams on navigable rivers in Pennsylvania, did so only by license from the state, revocable at its



h. *In the New States*.—See ante, "New States Admitted upon an Equality with the Old," II, B, 5; "Effect of Acts Prescribing Free Navigation, etc.," II, B, 6.

i. *State May Grant Bed without Regard to Ownership of Adjacent Upland*.—Since the right of disposition is an incident of the sovereignty and ownership of the state, it follows that the state may, in those states where riparian owner-

pleasure, and could therefore claim no compensation for injuries caused to such dams by subsequent improvements under authority of the state for the convenience of navigation; and also that by the law of Pennsylvania pre-emption rights to islands in such rivers could not be obtained by settlement." *Shively v. Bowlby*, 152 U. S. 1, 32, 38 L. Ed. 331. See *Rundle v. Delaware, etc., Canal Co.* (1852), 14 How. 80, 91, 93, 94, 14 L. Ed. 335; *Fisher v. Halde- man* (1857), 20 How. 186, 194, 15 L. Ed. 879.

**As to inland lakes and ponds**.—See ante, "Doctrine Extends to Lands Bordering upon Seashore, and to Inland Lakes," II, B, 1, b; "Grant of Navigable Waters and Underlying Soils in the States," II, B, 4.

**Rule in different states**.—"The rule of the common law on this point appears to have been followed in all the original states—except in Pennsylvania, Virginia and North Carolina, and except as to great rivers such as the Hudson, the Mohawk and the St. Lawrence in New York—as well as in Ohio, Illinois, Michigan and Wisconsin. But it has been wholly rejected, as to rivers navigable in fact, in Pennsylvania, Virginia and North Carolina, and in most of the new states. For a full collection and careful analysis of the cases, see Gould on Waters (2d Ed.), §§ 56-78." *Shively v. Bowlby*, 152 U. S. 1, 31, 38 L. Ed. 331.

**The doctrine of the Alabama court** that a grant of land from the United States extends to the water line of low water, has no application to lands upon tidal streams. Therefore a grant by the state of the shore and soil underneath tidal waters does not infringe any rights of a riparian owner claiming under a prior grant from the United States. *Mobile Transp. Co. v. Mobile*, 187 U. S. 479, 486, 47 L. Ed. 266.

**In California**.—See *Packer v. Bird*, 137 U. S. 661, 34 L. Ed. 819.

**In Connecticut**.—See discussion in *Shively v. Bowlby*, 152 U. S. 1, 20, 38 L. Ed. 331.

**In Delaware**.—See *Shively v. Bowlby*, 152 U. S. 1, 23, 38 L. Ed. 331.

**In Georgia**, the rules of the common law would seem to be in force as to tide-waters, except as affected by statutes of the state providing that "the right of the owner of lands adjacent to navigable streams extends to low-water mark in the bed of the stream." *Shively v. Bowlby*, 152 U. S. 1, 25, 38 L. Ed. 331. Georgia Code of 1882, §§ 962, 2229, 2230; *Howard v. Ingersoll*, 13 How. 381, 411, 421, 14 L. Ed. 189; *Alabama v. Georgia*, 23 How. 505, 16 L. Ed. 556.

**In Illinois**.—"The common law is the true and only law of Illinois on the subject of land titles, and especially as to the rights of riparian owners, and the construction of deeds and grants of land bounded by streams and permanent bodies of water except the great navigable lakes." *Hardin v. Jordan*, 140 U. S. 371, 385, 35 L. Ed. 428.

"The supreme court of Illinois has established and steadily maintained, as a rule of property, that the fee of the riparian owner of lands in Illinois bordering on the Mississippi River extends to the middle line of the main channel of that river." *St. Louis v. Rutz*, 138 U. S. 226, 242, 34 L. Ed. 941.

**In Iowa**, the true rule has been adopted; and it is held that the bed of the Mississippi River and its banks to high-water mark belong to the state, and that the title of the riparian proprietor extends only to that line. *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224.

This rule applies as well where the land was granted to bound upon the river generally (as in the case of the Halfbreed Sac and Fox reservation), as where it was granted according to surveys run along the bank by a meandering line. Hence, it applies in the city of Keokuk, which is on that reservation. *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224.

**In Maryland**.—See *Shively v. Bowlby*, 152 U. S. 1, 23, 38 L. Ed. 331; *Morris v. United States*, 174 U. S. 196, 43 L. Ed. 946.

**In Massachusetts**.—By the old laws of Massachusetts a littoral proprietor of land owned down to low-water mark, if not beyond one hundred rods; subject, however, to the condition that, until he occupied the space between high-water and low-water mark the public had a right to use it for the purposes of navigation. *Boston v. Lecraw*, 17 How. 426, 15 L. Ed. 118; *Richardson v. Boston*, 19 How. 263, 15 L. Ed. 639; *Richardson v. Boston*, 24 How. 188, 192, 16 L. Ed. 625; *Shively v. Bowlby*, 152 U. S. 1, 18, 38 L. Ed. 331.

"But his title is subject to the public rights of navigation and fishery; and therefore, so long as the flats have not been built upon or enclosed, those public rights are not restricted or abridged; and the state, in the exercise of its sovereign power of police for the protection of harbors and the promotion of commerce, may, without making compensation to the owners of the flats, establish harbor lines over those flats, beyond which wharves shall not thereafter be built, even when they would be no actual injury to navigation."

ship is held to extend only to high water, dispose of its tide lands and of the soil permanently submerged beneath the waters of the sea and of navigable

*Shively v. Bowlby*, 152 U. S. 1, 19, 38 L. Ed. 331; *Boston v. Lecraw*, 17 How. 426, 432, 433, 15 L. Ed. 118; *Richardson v. Boston*, 19 How. 263, 15 L. Ed. 639; *Richardson v. Boston*, 24 How. 188, 16 L. Ed. 625.

"In **Michigan** the common law prevails, and the rule is sustained by an unbroken line of authorities that a grant of land bounded by a stream, whether navigable in fact or not, carries with it the bed of the stream to the centre of the thread thereof." *Grand Rapids, etc., R. Co. v. Butler*, 159 U. S. 87, 93, 40 L. Ed. 85. See, also, *Scranton v. Wheeler*, 179 U. S. 141, 163, 45 L. Ed. 126.

By the law of **Nebraska**, as interpreted by its highest court, the riparian proprietors are the owners of the bed of a stream to the center of the channel, that the government, as original proprietor, has the right to survey and sell any lands, including islands in a river or other body of water; but if it omits to survey an island in a stream and refuses, when its attention is called to the matter, to make any survey thereof, no citizen can overrule the action of the department, assume that the island ought to have been surveyed, and proceed to occupy it for the purposes of homestead or pre-emption entry. In such a case the rights of riparian proprietors are to be preferred to the claims of the settler. *Whitaker v. McBride*, 197 U. S. 510, 515, 49 L. Ed. 857.

In **New Hampshire**.—See *Shively v. Bowlby*, 152 U. S. 1, 20, 38 L. Ed. 331.

In **New Jersey** all navigable waters within the territorial limits of the state, and the soil under such waters, belong in actual propriety to the public; and the riparian owner, by the common law, has no peculiar rights in this public domain as incidents of his estate. The privileges he possesses by the local custom or by force of the wharf act, to acquire such rights, can, before possession has been taken, be regulated or revoked at the will of the legislature. The result is that it is competent for the legislative power of the state to grant to a stranger lands constituting the shore of a navigable river under tidewater, below high-water mark, to be occupied and used with structures and improvements in such a manner as to cut off the access of the riparian owner from his land to the water, and that without making compensation to him for such loss. *Martin v. Waddell*, 16 Pet. 367, 10 L. Ed. 997; *Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656, 688, 690, 31 L. Ed. 543; *Shively v. Bowlby*, 152 U. S. 1, 22, 38 L. Ed. 331.

In **New York**.—See *Shively v. Bowlby*, 152 U. S. 1, 20, 38 L. Ed. 331.

In **North Carolina**.—See *Shively v. Bowlby*, 152 U. S. 1, 25, 38 L. Ed. 331.

In **Oregon**.—"By the law of the state of Oregon, as declared and established by the decisions of its supreme court, the owner of upland bounding on navigable water has no title in the adjoining lands below high-water mark, and no right to build wharves thereon, except as expressly permitted by statutes of the state." *Shively v. Bowlby*, 152 U. S. 1, 32, 38 L. Ed. 331.

"In **Pennsylvania**, likewise, upon the Revolution, the state succeeded to the rights, both of the crown and of the proprietors, in the navigable waters and the soil under them. *Rundle v. Delaware, etc., Canal Co.*, 14 How. 80, 90, 14 L. Ed. 335; *Gilman v. Philadelphia*, 3 Wall. 713, 726, 18 L. Ed. 96. But by the established law of the state, the owner of lands bounded by navigable water has the title in the soil between high and low-water mark, subject to the public right of navigation, and to the authority of the legislature to make public improvements upon it, and to regulate his use of it." *Shively v. Bowlby*, 152 U. S. 1, 23, 38 L. Ed. 331.

"The law of **Pennsylvania**, by which the title and rights of the plaintiffs must be tested, differs materially from that of England, and most of the other states of the Union. As regards her large fresh water rivers, she has adopted the principles of the civil law. In the case of *Carson v. Blazer*, the supreme court of that state decided that the large rivers, such as the Susquehanna and Delaware, were never deemed subject to the doctrines of the common law of England, applicable to fresh water streams, but that they are to be treated as navigable rivers; that the grants of William Penn, the proprietary, never extended beyond the margin of the river, which belonged to the public, and that the riparian owners have therefore no exclusive rights to the soil or water of such rivers *ad filum medium aquæ*." *Rundle v. Delaware, etc., Canal Co.*, 14 How. 80, 91, 14 L. Ed. 335. See, also, *Hardin v. Jordan*, 140 U. S. 371, 382, 35 L. Ed. 428.

In **Rhode Island**.—See *Shively v. Bowlby*, 152 U. S. 1, 20, 38 L. Ed. 331.

In **South Carolina**.—See *Shively v. Bowlby*, 152 U. S. 1, 25, 38 L. Ed. 331.

In **Virginia**.—See *Shively v. Bowlby*, 152 U. S. 1, 24, 38 L. Ed. 331.

In **Wisconsin**.—"It is the settled law of Wisconsin, announced in repeated decisions of its supreme court, that the ownership of riparian proprietors extends to the centre or thread of the stream, subject, if such stream be navigable, to the right of the public to its use as a public highway for the passage of vessels." *Kaukauna Water Power Co. v. Green Bay, etc., Canal Co.*, 142 U. S. 254, 271, 35 L. Ed. 1004.

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streams, without regard to the ownership or easement of the adjacent proprietor and without making him compensation.<sup>76</sup>

j. *Ownership as between Municipal Corporations and Individual Proprietors.*—In determining the relative rights of a municipality and of an individual,

**lumbia.**—See post, "Ownership as between Municipal Corporations and Individual Proprietors," II, D, 3, j.

**76. Grant of bed without regard to ownership of adjacent upland.**—*Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224; *Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656, 683, 31 L. Ed. 543; *Shively v. Bowlby*, 152 U. S. 1, 26, 38 L. Ed. 331; *United States v. Mission Rock Co.*, 189 U. S. 391, 404, 47 L. Ed. 865.

**In Iowa.**—The public authorities have the right, in Iowa, to build wharves and levees on the bank of the Mississippi below high water, and make other improvements thereon, necessary to navigation, or public passage by railways or otherwise, without the consent of the adjacent proprietor, and without making him compensation. *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224.

**In New Jersey.**—Under the law of New Jersey, the title to lands under navigable waters and beyond high-water mark is in the state, and the state may grant said lands beyond high-water mark to whomsoever it pleases and without regard to the ownership of the adjacent uplands. *Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656, 683, 31 L. Ed. 543.

Under the law of that state the owner of lands bordering upon navigable waters can acquire no easement or other right by adverse possession or by reason of his riparian ownership, as against the right of the state to sell and convey such lands to third persons wholly discharged of such easement. *Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656, 683, 31 L. Ed. 543.

The state may confer upon the owner of the adjacent upland the privilege of purchasing and reclaiming the land beyond high-water mark; and in the event of his failure to avail himself of said privilege it may convey said lands to third persons, who will then hold said lands under a separate and independent title and independent of any easement or other right which the adjacent owner may have claimed in such lands. *Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656, 683, 31 L. Ed. 543.

And although a riparian proprietor upon navigable waters in New Jersey may undertake to sell and convey his alleged easement in and right to reclaim lands beyond high-water mark, his grantee, upon receiving a new conveyance directly from the state, will hold said lands entirely discharged of the alleged easement by virtue of his independent title. *Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656, 683, 31 L. Ed. 543.

This doctrine applies even to the case of the right of the city of Hoboken to ex-

tend its streets across the reclaimed lands to the new water front. Any such right of the city of Hoboken is subject to the paramount right of the legislature to convey the lands beyond high-water mark wholly discharged of such easement. *Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656, 683, 31 L. Ed. 543.

The license granted to the Hoboken Land and Improvement Company by the 4th section of their charter did not convey an unqualified title to the reclaimed lands below high-water mark in front of the streets terminating upon the water front in the city of Hoboken. It was not intended by said section to exclude the public right of access to the navigable water by an extension of the streets and highways laid out on the original land for that purpose. The Hoboken Land and Improvement Company, therefore, held the lands beyond high-water mark, reclaimed under the authority of this section, subject to the public right to extend the streets of the city of Hoboken across said reclaimed lands to the new water front. *Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656, 683, 31 L. Ed. 543.

Under these principles, it is held that the Pennsylvania Railroad Company and the other companies holding the reclaimed lands beyond the original high-water mark in front of the city of Hoboken, under the acts of New Jersey of March 31, 1869, confirming and enlarging their titles derived by grant from the Hoboken Land and Improvement Company, own the entire beneficial interest in their respective properties and hold said lands entirely free and discharged from the right or easement (to which they were subject in the hands of the Hoboken Land and Improvement Company, by reason of the original dedication, on the Loss map, to high-water mark) of the city of Hoboken to extend its streets across said reclaimed lands to the new water front. *Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656, 683, 31 L. Ed. 543.

**In Oregon.**—"By the law of the state of Oregon, as declared and established by the decisions of its supreme court, the owner of upland bounding on navigable water has no title in the adjoining lands below high-water mark, and no right to build wharves thereon, except as expressly permitted by statutes of the state; but the state has the title in those lands, and, unless they have been so built upon with its permission, the right to sell and convey them to any one, free of any right in the proprietor of the upland, and subject only to the paramount right of navigation inherent in the public." *Shively v. Bowlby*, 152 U. S. 1, 52, 38 L. Ed. 331.



both of whom claim exclusive rights in lands situated under tidewaters, the state law controls.<sup>77</sup> When a town is situated on a navigable river, it is generally the custom to leave an open space between the line of the lots next the river and the river itself.<sup>78</sup>

**77. Ownership as between municipal corporation and individual proprietor.**—*Lowndes v. Huntington*, 153 U. S. 1, 38 L. Ed. 615.

**In Huntington Bay.**—The grant of the lands under tidewater in Huntington Bay made to the town of Huntington by the governor general in 1666, construed in connection with the subsequent grants confirmatory thereof, and with the New York act of May 10, 1888, c. 279. Held, that whatever title the state had to said lands passed to the trustees of said town as against the rights of any individual claiming an exclusive right to take oysters in a defined portion thereof. *Lowndes v. Huntington*, 153 U. S. 1, 38 L. Ed. 615.

**78. Custom as to space between lots and river.**—*Morris v. United States*, 174 U. S. 196, 246, 43 L. Ed. 946.

**In Washington City.**—It was the intention of the founders of the city of Washington to locate it upon the bank or shore of the Potomac River, and to bound it by a street or levee, so as to secure to the inhabitants and those engaged in commerce free access to the navigable water, and such intention has never been departed from. *Morris v. United States*, 174 U. S. 196, 246, 43 L. Ed. 946.

"From the first conception of the federal city, the establishment of a public street, bounding the city on the south, and to be known as Water street, was intended, and \* \* \* such intention has never been departed from." *Morris v. United States*, 174 U. S. 196, 270, 43 L. Ed. 946.

In the case of Potomac Steamboat Co. v. Upper Potomac Steamboat Co., 109 U. S. 672, 27 L. Ed. 1070, it was held, following *Van Ness v. Washington*, 4 Pet. 232, 7 L. Ed. 842, that the fee of the streets was in the city, and further that the strip between the squares and lots and the Potomac River was such a street, and that there were no private riparian rights in *Notley Young* and those who succeeded to his title. *Morris v. United States*, 174 U. S. 196, 266, 43 L. Ed. 946.

Mistakes arose in the case of the lots on the north side of Water street, owing to the fact that the street existed only on paper, and for a long time remained an unexecuted project; property appearing to be riparian, because lying on the water's edge, which, when the street was actually made, had lost its river front. They were thought to be "water lots," because appearing to be so in fact but were not so in law, because they were bounded by the street, and not by the river. *Barclay v. Howell*, 6 Pet. 498, 505, 8 L. Ed. 477; *Boston v. Lecraw*, 17 How. 426, 15 L. Ed. 118; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, 693, 27 L.

Ed. 1070; *Morris v. United States*, 174 U. S. 196, 287, 43 L. Ed. 946.

"With this conclusion reached, it follows that the holders of lots and squares abutting on the line of Water street are not entitled to riparian rights; nor are they entitled to rights of private property in the waters or the reclaimed lands lying between Water street and the navigable channels of the river, unless they can show valid grants to the same from congress, or from the city under authority from congress, or such a long protracted and notorious possession and enjoyment of defined parcels of land as to justify a court, under the doctrine of prescription, in inferring grants." *Morris v. United States*, 174 U. S. 196, 271, 43 L. Ed. 946.

**Same; property of Chesapeake and Ohio Canal Co.**—The Chesapeake and Ohio Canal Company cannot validly claim riparian rights as appurtenant to those lots or parts of lots which the company purchased from individual owners who held lots north of Water street in the city of Washington. Having themselves no riparian rights, such owners could not convey or impart them to the canal company. *Morris v. United States*, 174 U. S. 196, 272, 43 L. Ed. 946.

"The Chesapeake and Ohio Canal Company does not, either as to lots procured from private owners, or as to lands occupied under the permission of congress and of the city authorities, own or possess riparian rights along the line of its canal within the limits of the city." *Morris v. United States*, 174 U. S. 196, 275, 43 L. Ed. 946.

**Property between Seventeenth and Twenty-Seventh streets west.**—As for the lot owners between Seventeenth street west and Twenty-Seventh street west, all these lots, with respect to which riparian rights are claimed, lie to the north of Water street, which intervenes between them and the channels of the river. Under the principles already established, no riparian rights belonged to these lots. *Morris v. United States*, 174 U. S. 196, 276, 43 L. Ed. 946.

**The claim of Edward M. Willis,** as alienee of A. I. Harvey, defendant, to land lying between Thirteen-and-a-Half street and Maryland avenue, and fronting on the Potomac, cannot be distinguished by the circumstance that Water street has never been actually constructed and opened as a thoroughfare in front of this land. The failure of the city to open Water street could not create any title in Willis to the land and water lying south of the territory appropriated for that street. His occupancy, or that of his predecessors, of such land for wharfing or other purposes may

k. *Ownership of Accretions, Islands, etc.*—See the titles ACCESSION, ACCRETION AND RELICTION, vol. 1, pp. 52, 54; BOUNDARIES, vol. 3, pp. 476, 480, 481; PUBLIC LANDS; WATERS AND WATERCOURSES.

### III. Riparian and Littoral Rights.

**A. Riparian Proprietor Defined.**—A riparian proprietor is one whose land is bounded by a navigable stream.<sup>79</sup>

**B. Extent of Riparian and Littoral Ownership.**—See ante, "As between the State, or Its Subdivisions, and Individuals," II, D, et seq.

**C. Incidents of Riparian and Littoral Ownership**—1. **GENERALLY.**—The owner of land bounded by a navigable river has certain riparian rights, whether his title extend to the middle of the stream or not.<sup>80</sup> These rights are the result of that full dominion which every one has over his own land, by which he is authorized to keep all others from coming upon it except upon his own terms. It is a form of enjoyment of the land and of the river in connection with the land.<sup>81</sup> Among these rights, it is said, are free access to the navigable part of the stream, and the right to make a landing, wharf, or pier for his own use, or for the use of the public.<sup>82</sup> It is also said that these rights are valuable, and are property, and can be taken for the public good only when due compensation is made.<sup>83</sup> These statements, however, if correct at all, are to be taken subject to very great qualifications. In the first place, it is laid down in several

be presumed to have been with the consent of the city authorities, but could not, under the facts shown in the record, avail to raise the presumption of a grant. *Morris v. United States*, 174 U. S. 196, 286, 43 L. Ed. 946; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, 692, 27 L. Ed. 1070.

**The Marshall heirs**, have no right, title or interest in any part of the land or water composing any part of the Potomac River or its flats in charge of the secretary of war. *Morris v. United States*, 174 U. S. 196, 232, 43 L. Ed. 946.

To sum up, no riparian rights in the waters of the Potomac River belong to the owners of lots lying north of Water street, and no presumption of grants in fee can arise, in these cases, from actual occupation of lands and water south of that street. *Morris v. United States*, 174 U. S. 196, 290, 43 L. Ed. 946.

**79. Riparian proprietor defined.**—*Yates v. Milwaukee*, 10 Wall. 497, 504, 19 L. Ed. 984; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, 682, 27 L. Ed. 1070.

**80. Incidents of riparian ownership.**—*Dutton v. Strong*, 1 Black 23, 17 L. Ed. 29; *Railroad Co. v. Schurmeir*, 7 Wall. 272, 19 L. Ed. 74; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984; *Weber v. Harbor Comm'rs*, 18 Wall. 57, 21 L. Ed. 798; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, 682, 27 L. Ed. 1070; *St. Louis v. Rutz*, 138 U. S. 226, 246, 34 L. Ed. 941; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 445, 36 L. Ed. 1018.

**81. Same.**—*Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, 27 L. Ed. 1070.

"It seems to us clear," said Pollock, C. B., in *Stockport Waterworks Co. v. Potter*, 3 Hurl. & Co. 300, 326, 'that the rights

which a riparian proprietor has with respect to the water are entirely derived from his possession of land abutting on the river. If he grants away a portion of his land so abutting, then the grantee becomes a riparian proprietor and has similar rights." *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, 27 L. Ed. 1070.

**82. Same; access, landing, wharves, etc.**—*Dutton v. Strong*, 1 Black 23, 17 L. Ed. 29; *Railroad Co. v. Schurmeir*, 7 Wall. 272, 19 L. Ed. 74; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984; *Weber v. Harbor Comm'rs*, 18 Wall. 57, 21 L. Ed. 798; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 699, 27 L. Ed. 584; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, 682, 27 L. Ed. 1070; *St. Louis v. Rutz*, 138 U. S. 226, 246, 34 L. Ed. 941; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 445, 36 L. Ed. 1018.

"By recent judgments of the House of Lords, after conflicting decisions in the courts below, it has been established in England, that the owner of land fronting on a navigable river in which the tide ebbs and flows has a right of access from his land to the river; and may recover compensation for the cutting off of that access by the construction of public works authorized by an act of parliament which provides for compensation for 'injuries affecting lands,' 'including easements, interests, rights and privileges in, over or affecting lands.' The right thus recognized, however, is not a title in the soil below high-water mark, nor a right to build thereon, but a right of access only, analogous to that of an abutter upon a highway." *Shively v. Bowlby*, 152 U. S. 1, 14, 38 L. Ed. 331.

**83. Rights as property.**—*Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984.



instances that these rights are subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public.<sup>84</sup> In addition, we have already seen that the extent of a riparian owner's title and the incidents attached thereto, are dependent wholly upon the law of each state,<sup>85</sup> and that the state may, if it sees fit, make a grant of the soil, shore or bed beyond high-water mark to third persons, wholly freed from any right or easement claimed by the owner of the adjacent upland;<sup>86</sup> and, as we shall presently see, at common law, a riparian proprietor had no right to erect a building or wharf below high-water mark of navigable waters, without a license from the king;<sup>87</sup> and that, generally speaking, whatever may be the nature of these rights, they are held subject to the public easements of commerce and navigation, and that in the prosecution of schemes for the improvement of navigation, deepening of harbors, channels, roadsteads, etc., these rights may be wholly destroyed without any compensation whatever being made to the owner of the beds or shores.<sup>88</sup>

2. **RIGHT OF ACCESS.**—See ante, "Generally," III, C, 1; post, "Right to Construct and Maintain Wharves, Piers, etc.," III, C, 3. See, also, the titles *DUE PROCESS OF LAW*, vol. 5, pp. 564, 574, 596, et seq.; *WATERS AND WATERCOURSES*.

3. **RIGHT TO CONSTRUCT AND MAINTAIN WHARVES, PIERS, ETC.**—**At Common Law.**—By the common law, the title to the shores of the sea, and in the soils under tidewaters, is, in England, in the king, and in this country, in the state. The erection of any wharf or other structure thereon below high-water mark is, therefore, deemed an encroachment upon the property of the sovereign, or, as it is termed in the language of the law, a purpresture, which he may remove at pleasure, whether it tends to obstruct navigation or otherwise.<sup>89</sup>

**In America.**—In this country, as stated in a former paragraph, the supreme court has on a number of occasions given utterance to the general statement that a riparian proprietor is entitled to access to the navigable part of the water in front of his land, and for that purpose to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general regulations as the legislature may prescribe for the protection of the rights of the public.<sup>90</sup> This statement is true, however, only in so far as the common law has been modified by legislation or usage in each state.<sup>91</sup> At an early day, however, the

84. **Qualifications of principles.**—*Yates v. Milwaukee*, 10 Wall. 497, 504, 19 L. Ed. 984; *Weber v. Harbor Comm'rs*, 18 Wall. 57, 21 L. Ed. 798; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, 27 L. Ed. 1070; *Illinois Central R. Co. v. Illinois*, 146 U. S. 387, 445, 36 L. Ed. 1018.

85. **Same; as dependent upon law of each state.**—See ante, "United States Has Not Undertaken to Grant Soils under Navigable Waters; Operation of Surveys and General Grants," II, B, 2, c; "Grant of Navigable Waters and Underlying Soils in the States," II, B, 4; "As between the States, or Their Subdivisions and Individuals," II, D, 3, et seq.; "Same, Federal Grants, Extent and Incidents of Riparian Ownership Determined by State Law," II, D, 3, g. See, also, the title *DUE PROCESS OF LAW*, vol. 5, pp. 564, 574, 596.

86. **Same; grant of bed without regard to adjacent ownership.**—See ante, "State May Grant Bed without Regard to Ownership of Adjacent Upland," II, D, 3, i.

87. **Same; wharfing out at common law.**—See post, "Right to Construct and Maintain Wharves, Piers, etc.," III, C, 3.

88. **Held subordinate to public use and rights.**—See post, "Nature of Riparian Ownership; Deprivation without Compensation or Without Due Process," III, C, 5; "Adjustment of Individual Rights; Right to Compensation, etc.," IV, D, et seq. See, also, the title *DUE PROCESS OF LAW*, vol. 5, pp. 564, 574, 596, et seq.

89. **Wharfing out; at common law.**—*Weber v. Harbor Comm'rs*, 18 Wall. 57, 21 L. Ed. 798; *Barney v. Keokuk*, 94 U. S. 324, 337, 24 L. Ed. 224; *Shively v. Bowlby*, 152 U. S. 1, 13, 40, 38 L. Ed. 331.

"By the law of England, also, every building or wharf erected, without license, below high-water mark, where the soil is the king's, is a purpresture, and may, at the suit of the king, either be demolished, or be seized and rented for his benefit, if it is not a nuisance to navigation." *Shively v. Bowlby*, 152 U. S. 1, 13, 38 L. Ed. 331. See, also, *Weber v. Harbor Comm'rs*, 18 Wall. 57, 65, 21 L. Ed. 798; *Barney v. Keokuk*, 94 U. S. 324, 337, 24 L. Ed. 224.

90. **Same; in America.**—See ante, "Generally," III, C, 1.

91. **Statement true only in qualified sense.**—*Weber v. Harbor Comm'rs*, 18 Wall. 57, 65, 21 L. Ed. 798; *Atlee v. Packet*



governments of the several colonies allowed to the owners of lands bordering on tidewaters greater rights and privileges in the shore below high-water mark than they had in England. From the first settlement of the country to the present time riparian proprietors have been permitted to exercise the right to erect such structures in the navigable waters.<sup>92</sup> In some states the modification of the common law has been through express legislative enactment and in others through immemorial usage. But through the one source or the other the right is claimed and exercised in practically all of the states, subject to the limitation that the structures erected do not contravene the positive law of the state nor impair the paramount right of navigation. The whole question is now one of state regulation, subject to the paramount control of congress over commerce and navigation.<sup>93</sup>

Co., 21 Wall. 389, 22 L. Ed. 619; *Shively v. Bowlby*, 152 U. S. 1, 40, 38 L. Ed. 331.

In *Weber v. Harbor Comm'rs*, 18 Wall. 57, 21 L. Ed. 798, Mr. Justice Field, in delivering judgment, while recognizing the correctness of the doctrine "that a riparian proprietor, whose land is bounded by a navigable stream, has the right of access to the navigable part of the stream in front of his land, and to construct a wharf or pier projecting into the stream, for his own use, or the use of others, subject to such general rules and regulations as the legislature may prescribe for the protection of the public," and admitting that in several of the states, by general legislation or immemorial usage, the proprietor of land bounded by the shore of the sea, or of an arm of the sea, has a right to wharf out to the point where the waters are navigable, said: "In the absence of such legislation or usage, however, the common-law rule would govern the rights of the proprietor, at least in those states where the common law obtains. By that law, the title to the shore of the sea, and of the arms of the sea, and in the soils under tidewaters is, in England, in the king, and, in this country, in the state. Any erection thereon without license is, therefore, deemed an encroachment upon the property of the sovereign, or, as it is termed in the language of the law, a purpresture, which he may remove at pleasure, whether it tends to obstruct navigation or otherwise." See, also, *Shively v. Bowlby*, 152 U. S. 1, 40, 38 L. Ed. 331.

"Some passages in the opinions in *Dutton v. Strong* (1861), 1 Black 23, 17 L. Ed. 29; *Railroad Co. v. Schurmeir* (1868), 7 Wall. 272, 19 L. Ed. 74; and *Yates v. Milwaukee* (1870), 10 Wall. 497, 19 L. Ed. 984, were relied on by the learned counsel for the plaintiff in error, as showing that the owner of land adjoining any navigable water, whether within or above the ebb and flow of the tide, has, independently of local law, a right of property in the soil below high-water mark, and the right to build out wharves so far, at least, as to reach water really navigable. But the remarks of Mr. Justice Clifford in the first of those cases upon which his own remarks in the second case and those of Mr. Jus-

tice Miller in the third case were based, distinctly recognized the diversity of law and usages in the different states upon this subject, and went no further than to say that wharves, piers and landing places, 'where they conform to the regulations of the state' and do not extend below low-water mark, have never been held to be nuisances, unless they obstruct the paramount right of navigation; that the right of the riparian proprietor to erect such structures in the navigable waters of the Atlantic states has been claimed, exercised and sanctioned from the first settlement of the country to the present time; that 'different states adopted different regulations upon the subject, and in some the right of the riparian proprietor rests upon immemorial local usage;' and that 'no reason is perceived why the same general principle should not be applicable to the lakes,' so far as to permit the owner of the adjacent land to build out as far as where the water first becomes deep enough to be navigable. 1 Black 31, 32. And none of the three cases called for the laying down or defining of any general rule, independent of local law or usage, or of the particular facts before the court." *Shively v. Bowlby*, 152 U. S. 1, 36, 38 L. Ed. 331.

**92. Same; modification of common law.**—*Boston v. Lecraw*, 17 How. 426, 15 L. Ed. 118; *Dutton v. Strong*, 1 Black 23, 17 L. Ed. 29; *Shively v. Bowlby*, 152 U. S. 1, 18, 36, 38 L. Ed. 331.

**93. Same; same; limitations.**—*Boston v. Lecraw*, 17 How. 426, 15 L. Ed. 118; *Dutton v. Strong*, 1 Black 23, 31, 32, 17 L. Ed. 29; *Railroad Co. v. Schurmeir*, 7 Wall. 272, 19 L. Ed. 74; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984; *Weber v. Harbor Comm'rs*, 18 Wall. 57, 21 L. Ed. 798; *Atlee v. Packet Co.*, 21 Wall. 389, 22 L. Ed. 619; *Boom Co. v. Patterson*, 98 U. S. 403, 409, 25 L. Ed. 206; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 699, 27 L. Ed. 584; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 36 L. Ed. 1018; *Shively v. Bowlby*, 152 U. S. 1, 18, 38 L. Ed. 331; *Illinois v. Illinois Cent. R. Co.*, 184 U. S. 77, 46 L. Ed. 440.

"Our ancestors, when they immigrated here, undoubtedly brought the common law with them, as part of their inherit-

**Where Title to Land Not Sustained.**—Of course if the plaintiff's title to the land is not sustained, he can no longer claim the rights of a riparian proprietor, and is cut off from access to the river or harbor and the privilege of erecting a wharf.<sup>94</sup>

ance; but they soon found it indispensable, in order to secure these conveniences, to sanction the appropriation of the soil between high and low-water mark to the accomplishment of these objects. Different states adopted different regulations upon the subject; and, in some, the right of the riparian proprietor rests upon immemorial local usage." *Dutton v. Strong*, 1 Black 23, 32, 17 L. Ed. 29.

Riparian proprietors have a right to erect bridge piers and landing places on the shores of navigable rivers, lakes, bays, and arms of the sea, if they conform to the regulations of the state, and do not obstruct the paramount right of navigation. *Dutton v. Strong*, 1 Black 23, 17 L. Ed. 29.

Although riparian proprietors on navigable streams are limited to the stream, still they also have the same right to construct suitable landings and wharves, for the convenience of commerce and navigation, as is accorded riparian proprietors bordering on navigable waters affected by the ebb and flow of the tide. *Dutton v. Strong*, 1 Black 23, 17 L. Ed. 29; *Railroad Co. v. Schurmeir*, 7 Wall. 272, 19 L. Ed. 74.

That private wharves may be had and owned, even on a navigable river, is not open to controversy. It was so decided in *Dutton v. Strong*, 1 Black 23, 17 L. Ed. 29, and in *Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 699, 27 L. Ed. 584.

Wharves, levees, and landing places are essential to commerce by water, no less than a navigable channel and a clear river. But they are attached to the land; they are private property, real estate; and they are primarily, at least, subject to the local state laws. Congress has never yet interposed to supervise their administration; it has hitherto left this exclusively to the states. There is little doubt, however, that congress, if it saw fit, in case of prevailing abuses in the management of wharf property—abuses materially interfering with the prosecution of commerce—might interpose and make regulations to prevent such abuses. *Transportation Co. v. Parkersburg*, 107 U. S. 691, 701, 27 L. Ed. 584.

Under the Massachusetts law the owner of lands abutting upon tidewaters owns to low-water mark, and may defeat the public right of navigation over the same by redeeming the land, or by constructing wharves, or by enclosing the land. *Boston v. Lecraw*, 17 How. 426, 432, 15 L. Ed. 118.

**Where pier or boom obstructs and endangers navigation.**—A pier erected in the navigable water of the Mississippi River for the sole use of the riparian owner, as part of a boom for saw-logs, without li-

cense or authority of any kind, except such as may arise from his ownership of the adjacent shore, is an unlawful structure, and the owner is liable for the sinking of a barge run against it in the night. *Atlee v. Packet Co.*, 21 Wall. 389, 22 L. Ed. 619.

Such a structure differs very materially from wharves, piers, and others of like character, made to facilitate and aid navigation, and generally regulated by city or town ordinances, or by statutes of the state, or other competent authority. Such a structure cannot be sustained by any of these considerations. *Atlee v. Packet Co.*, 21 Wall. 389, 22 L. Ed. 619.

They also have a very different standing in the courts from piers built for railroad bridges across navigable streams, which are authorized by acts of congress or statutes of the states. *Atlee v. Packet Co.*, 21 Wall. 389, 22 L. Ed. 619.

**Limitation of decision in *Atlee v. Packet Company*.**—"It is not our present purpose to decide, nor to lay down any invariable rule on the subject. It is sufficient to say that we do not consider the case before us as falling within the principles on which that class of cases (*Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984; *Dutton v. Strong*, 1 Black 23, 17 L. Ed. 29, and *Railroad Co. v. Schurmeir*, 7 Wall. 272, 19 L. Ed. 74; *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. Ed. 96) has been decided." *Atlee v. Packet Co.*, 21 Wall. 389, 392, 22 L. Ed. 619.

"He rests his defense solely on the ground that at any place where a riparian owner can make such a structure useful to his personal pursuits or business, he can, without license or special authority, and by virtue of this ownership, and of his own convenience, project a pier or roadway into the deep water of a navigable stream, provided he does it with care, and leaves a large and sufficient passway of the channel unobstructed." *Atlee v. Packet Co.*, 21 Wall. 389, 394, 22 L. Ed. 619.

"While in *Atlee v. Packet Co.*, 21 Wall. 389, 22 L. Ed. 619, we held that a pier obstructing navigation, erected in the river as part of a boom, without license or authority of any kind except such as arises from the ownership of the adjacent shore, was an unlawful structure, we did not mean to intimate that the owner of land on the Mississippi could not have a boom adjoining it for the reception of logs of his own or of others, if he did not thereby impede the free navigation of the stream." *Boom Co. v. Patterson*, 98 U. S. 403, 409, 25 L. Ed. 206.

**94. Rights of access and wharfage where title to adjacent land not sustained.**—



**Presumption and Proof of Nuisance.**—Where they are confined to the shore, and no positive law or regulation is violated by their construction, he who alleges them to be a nuisance or an obstruction to navigation must prove it—for the presumption is the other way.<sup>95</sup> “Whether a nuisance or not is a question of fact.”<sup>96</sup>

**Rule as to Lakes.**—No reason is perceived why the same general principle should not be applicable to the lakes, although those waters are not affected by the ebb and flow of the tide; and, consequently, the terms “high and low-water mark” are not strictly applicable. But the lakes are not navigable, in any proper sense, at least in certain places, for a considerable distance from the margin of the water. Wherever the water of the shore, so to speak, is too shoal to be navigable, there is the same necessity for such erections as in the bays and arms of the sea; and where that necessity exists, it is difficult to see any reason for denying to the adjacent owner the right to supply it.<sup>97</sup>

**Distance to Which Wharf or Other Structure May Extend.**—The right to make such erections, it has been said, terminates at the point of navigability,

Weber v. Harbor Comm’rs, 18 Wall. 57, 21 L. Ed. 798; Potomac Steamboat Co. v. Upper Potomac Steamboat Co., 109 U. S. 672, 27 L. Ed. 1070; St. Louis v. Rutz, 138 U. S. 226, 246, 34 L. Ed. 941; Mead v. Portland, 200 U. S. 148, 160, 50 L. Ed. 413. See, also, the title DUE PROCESS OF LAW, vol. 5, p. 604.

In the city of Washington the government owns the wharfing privileges appurtenant to the strip of land bordering the Potomac River originally dedicated as Water street. Potomac Steamboat Co. v. Upper Potomac Steamboat Co., 109 U. S. 672, 27 L. Ed. 1070. See, also, Morris v. United States, 174 U. S. 196, 43 L. Ed. 946.

The legislature of California, on the 26th of March, 1851, at its first session after the admission of the state into the Union, passed an act granting to the city of San Francisco for the term of ninety-nine years the use and occupation of portions of the lands covered by the tidewaters of the bay of San Francisco in front of the city, lying within a certain designated line, described according to a map of the city on record in the recorder’s office of the county, and declared that the line thus designated should “be and remain a permanent water front” of the city. It also provided that the authorities of the city should keep the space beyond the line, to the distance of five hundred yards, “clear and free from all obstructions whatsoever,” and reserved to the state the right to regulate the construction of wharves and other improvements, so that they should not interfere with the shipping and commercial interests of the bay and harbor. A subsequent act of the legislature, passed on the 1st of May, 1851, authorized the city of San Francisco to construct wharves at the end of all the streets commencing with the bay, the wharves to be made by extending the streets into the bay for a distance not exceeding two hundred yards beyond the line established as the permanent water front of the city; and provided that the space between the

wharves, when extended, should remain free from obstructions and be used as public slips for the accommodation and benefit of the general commerce of the city and state. After the passage of these acts the predecessors of the complainant acquired the title of the city, under the grant of the state above mentioned, to lots lying along the line of the said water front, and erected a wharf in front of the lots into the bay. It was held that the complainant took whatever interest he obtained in subordination to the control by the city over the space immediately beyond the line of the water front, and the right of the state to regulate the construction of wharves and other improvements; and that he was not a riparian proprietor, having a right to wharf out into the bay; that the erection of the wharf was an interference with the rightful control of the city over the space occupied by it, and an encroachment upon the soil of the state which she could remove at pleasure. Having the power of removal, the state could, without regard to the existence of the wharf, authorize improvements in the harbor by the construction of which the use of the wharf would necessarily be destroyed. Weber v. Harbor Comm’rs, 18 Wall. 57, 58, 21 L. Ed. 798.

**95. Wharf as a nuisance; presumption and proof.**—Dutton v. Strong, 1 Black 23, 17 L. Ed. 29.

**96. Same; questions of fact.**—Dutton v. Strong, 1 Black 23, 31, 17 L. Ed. 29.

**97. Rule as to wharves in lakes.**—Dutton v. Strong, 1 Black 23, 32, 17 L. Ed. 29; Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 36 L. Ed. 1018.

As to the piers, wharves, and slips constructed in front of the lots actually owned by the Illinois Central Railroad Company bordering upon the waters of Lake Michigan in the city of Chicago, the company’s claim of ownership and right to use is well founded so far as said piers do not extend beyond the point of navigability in the waters of the lake. Illinois Cent. R. Co.



where the necessity for such erections ordinarily ceases.<sup>98</sup> But such structures are also allowable in a part of the water which can be used for navigation, on the ground that they are essential aids to navigation itself.<sup>99</sup>

**Regulation and Control of Right.**—As the right to maintain wharves and other structures beyond high-water mark exists only by permission of the states, the states may, by its legislature, or by authority expressly or impliedly delegated to municipal governments, control the construction, erection, and use of such wharves and landings, so as to secure their safety and usefulness and to prevent their being obstructions to navigation. The right is to be exercised subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public.<sup>1</sup>

**Same; Harbor Lines, etc.**—The general police power to regulate includes the power to establish, for the protection of public harbors against encroachments and for the convenience and benefit of commerce and navigation, harbor lines, not inconsistent with any legislation of congress, limiting the building of wharves and other structures upon lands not already built upon.<sup>2</sup> This may be done either through the legislature, or through a board of harbor commissioners, or through the local municipal authorities.<sup>3</sup>

**Same; as a Deprivation of Property without Due Process.**—"The establishment of general harbor lines, of itself, takes or injures no one's property.

*v. Illinois*, 146 U. S. 387, 446, 36 L. Ed. 1018.

**98. Distance to which wharf or pier may extend.**—*Dutton v. Strong*, 1 Black 23, 17 L. Ed. 29. *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 446, 447, 36 L. Ed. 1018.

**99. Same.**—*Atlee v. Packet Co.*, 21 Wall. 389, 393, 22 L. Ed. 619.

"The navigable streams of the country would be of little value for that purpose if they had no places where the vessels which they floated could land, with conveniences for receiving and discharging cargo, for laying by safely until this is done, and then departing with ease and security in the further prosecution of their voyage. Wharves and piers are as necessary almost to the successful use of the stream in navigation as the vessels themselves, and are to be considered as an important part of the instrumentalities of this branch of commerce." *Atlee v. Packet Co.*, 21 Wall. 389, 393, 22 L. Ed. 619.

The structures erected in Lake Michigan by the Illinois Central Railroad, and which gave rise to the controversy involved in *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 36 L. Ed. 1018, do not extend into the lake beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on the lake. *Illinois v. Illinois Cent. R. Co.*, 184 U. S. 77, 46 L. Ed. 440.

**1. Regulation and control of right.**—*Yates v. Milwaukee*, 10 Wall. 497, 504, 19 L. Ed. 984; *Weber v. Harbor Comm'rs*, 18 Wall. 57, 21 L. Ed. 798; *Atlee v. Packet Co.*, 21 Wall. 389, 22 L. Ed. 619; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, 27 L. Ed. 1070; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 445, 36 L. Ed. 1018; *Shively v. Bowlby*, 152 U. S. 1, 41, 38 L. Ed. 331.

**2. Same; harbor lines, etc.**—*Boston v. Lecraw*, 17 How. 426, 432, 433, 15 L. Ed.

118; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984; *Weber v. Harbor Comm'rs*, 18 Wall. 57, 21 L. Ed. 798; *Atlee v. Packet Co.*, 21 Wall. 389, 393, 22 L. Ed. 619; *Yesler v. Washington, etc., Comm'rs*, 146 U. S. 646, 36 L. Ed. 1119; *Prosser v. Northern Pac. Railroad*, 152 U. S. 59, 64, 38 L. Ed. 352.

While under the Massachusetts law the owner of lands abutting upon tidewaters owns to low-water mark and may defeat the public right of navigation over the same by redeeming the land, or by constructing wharves or inclosing the land, said property between high and low-water mark is subject to the restriction that the state in the exercise of its sovereign power of police, for the protection of public harbors, and to prevent encroachments therein, may establish lines, and restrain and limit this power of the owner over his own property. *Boston v. Lecraw*, 17 How. 426, 432, 433, 15 L. Ed. 118.

**3. Same; same.**—*Prosser v. Northern Pac. Railroad*, 152 U. S. 59, 64, 38 L. Ed. 352; *Yesler v. Washington, etc., Comm'rs*, 146 U. S. 646, 36 L. Ed. 1119; *Weber v. Harbor Comm'rs*, 18 Wall. 57, 21 L. Ed. 798; *Atlee v. Packet Co.*, 21 Wall. 389, 393, 22 L. Ed. 619; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984.

"In all incorporated towns or cities located on navigable waters, there is in their charters, or in some general statute of the state, either express or implied power for the establishment and regulation of these landings." *Atlee v. Packet Co.*, 21 Wall. 389, 393, 22 L. Ed. 619.

"This may be done by the legislature of the state or by authority expressly or impliedly delegated to the local municipal government. In all such cases there is exercised a control over the location, erection, and use of such wharves or landings, which will prevent their being made ob-

and cannot, consistently with the interests of the public, or with the principles of equity, be restrained by injunction."<sup>4</sup> But if the state, city or any public officer or private individual, shall thereafter take active measures, or bring suit, so as to injure or affect the supposed title or rights of the plaintiff, or his use and enjoyment thereof, the dismissal of his bill will not stand in the way of a full and fair trial of the title and rights claimed.<sup>5</sup>

**Same; Violation of Federal Law; Who May Object.**—If the location and establishment of harbor lines by commissioners appointed under state law is actually in violation of the laws of the United States, their vindication may properly be left to the federal government.<sup>6</sup>

4. **DIVERSION OF NAVIGABLE WATERS**—a. *Rights of State*—(1) *Generally*.—The power of changing the common-law rule as to streams within its dominion undoubtedly belongs to each state, subject to two limitations: First, that in the absence of specific authority from congress a state cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property. Second, that it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States.<sup>7</sup> This includes the right of the state courts to decide, as a matter of local law, the question as to the right of the state to divert the waters of navigable streams, subject to the acknowledged jurisdiction of the United States under the constitution in regard to commerce and the navigation of the waters of rivers.<sup>8</sup>

(2) *As against the United States*.—See ante, "Limitations of Doctrine," II, B, 1, e. And see post, "Power of Congress Over Navigable Waters a Paramount Power," IV, A, 6; "States Have Full Control of Their Navigable Waters, Subject to Paramount Power of Congress," IV, B, 1; "Limitations of Power of Congress to Intervene," IV, B, 3.

(3) *As against the Rights of Other States*.—See the titles CONSTITUTIONAL LAW, vol. 4, p. 326; COURTS, vol. 4, p. 1011; STATES; WATERS AND WATER-COURSES.

(4) *As Impairing Contract Rights; Rights of Licensees*.—Charters and grants authorizing corporations and individuals to construct dams out into navigable rivers for the purpose of utilizing the power have been held to confer no contract rights and to be at all times subject to the paramount right of the state to di-

structions to navigation and standing menaces of danger." *Atlee v. Packet Co.*, 21 Wall. 389, 393, 22 L. Ed. 619.

4. **Establishment of harbor lines as a deprivation of property**.—*Prosser v. Northern Pac. Railroad*, 152 U. S. 59, 65, 38 L. Ed. 352.

5. **Same**.—*Prosser v. Northern Pac. Railroad*, 152 U. S. 59, 65, 38 L. Ed. 352. See, generally, the title DUE PROCESS OF LAW, vol. 5, pp. 602, 603, 604.

**Summary abatement by ordinance as a deprivation of property without due process**.—See the title DUE PROCESS OF LAW, vol. 5, pp. 602, 603.

6. **Violation of federal law; who may object**.—*Yesler v. Washington, etc., Comm'rs*, 146 U. S. 646, 655, 36 L. Ed. 1119.

An objection that the action of harbor line commissioners, appointed under state law, is in conflict with the act of congress of September 19, 1890 (26 Stat. 426, 454, ch. 907), relating to the establishment of harbor lines and forbidding the construc-

tion of piers, wharves, or other structures beyond said lines, cannot be raised by an individual who claims to have suffered injury through the action of such commissioners in locating a harbor line across the outer end of an existing wharf. *Yesler v. Washington, etc., Comm'rs*, 146 U. S. 646, 655, 36 L. Ed. 1119.

7. **Diversion of waters; rights of states**.—*United States v. Rio Grande Dam, etc., Co.*, 174 U. S. 690, 703, 43 L. Ed. 1136; *Kansas v. Colorado*, 206 U. S. 46, 86, 51 L. Ed. 956; *Gutierrez v. Albuquerque Land, etc., Co.*, 188 U. S. 545, 554, 47 L. Ed. 588. See ante, "Limitations of Doctrine," II, B, 1, e. And see post, "Power of Congress Over Navigable Waters a Paramount Power," IV, A, 6; "States Have Full Control of Their Navigable Waters Subject to Paramount Control of Congress," IV, B, 1; "Limitations of Power of Congress to Intervene," IV, B, 3.

8. **Same**.—*St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs*, 168 U. S. 349, 365, 42 L. Ed. 497.



vert a portion of the water so used for public purposes.<sup>9</sup>

(5) *As against Rights of Riparian Owner.*—See the titles CONSTITUTIONAL LAW, vol. 4, p. 437; DUE PROCESS OF LAW, vol. 5, pp. 599, 614, 681; WATERS AND WATERCOURSES.

b. *Rights of Individuals.*—See the title WATERS AND WATERCOURSES.

5. NATURE OF RIPARIAN OWNERSHIP; DEPRIVATION WITHOUT COMPENSATION OR WITHOUT DUE PROCESS.—“Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his up-

9. *Diversion by state as impairing contract rights and rights of licensees.*—*St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs*, 168 U. S. 349, 371, 42 L. Ed. 497.

The contention of the St. Anthony Falls Water Power Company that their charters granted in 1856, gave and guaranteed to them the right to use and develop the water power of St. Anthony Falls, and authorized them to build such structures in and upon the river as were necessary to develop that power, and that when these provisions of their charters were accepted and acted upon, they became contract obligations between the state of Minnesota and the plaintiffs, and that a statute, authorizing the diversion of some portion of the natural flow of the water without compensation to the plaintiffs, was a violation of the federal constitution, as impairing the obligation of the contracts contained in the charters, cannot be maintained. The true construction of these territorial charters does not give such contract rights as are claimed by the plaintiffs in error. They were grants of power to the respective companies, under which they were licensed to build their dams out into the river for the purpose of utilizing the power, and of using the water that flowed down the river. These grants were in legal effect subject at all times to the paramount right of the state as trustee for the public to divert a portion of the waters for public uses, and they were also subject to the rights in regard to navigation and commerce existing in the general government under the constitution of the United States. *St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs*, 168 U. S. 349, 371, 42 L. Ed. 497.

“We ought not to adopt a construction leading to that result unless the legislative act be plain and beyond all doubt.” *Rundle v. Delaware, etc., Canal Co.*, 14 How. 80, 94, 14 L. Ed. 335; *St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs*, 168 U. S. 349, 372, 42 L. Ed. 497.

*Rights of licensee.*—“He who accepts a license from the legislature, knowing that he is dealing with an agent bound by duty not to impair public rights, does so at his risk; and a voluntary expenditure on the foot of it, gives him no claim to

compensation.” *Rundle v. Delaware, etc., Canal Co.*, 14 How. 80, 92, 14 L. Ed. 335.

“His interest in the water may be said to resemble a right of common, which by custom is subservient to the right of the lord of the soil; so that the lord may dig clay pits, or empower others to do so, without leaving sufficient herbage on the common.” *Rundle v. Delaware, etc., Canal Co.*, 14 How. 80, 93, 14 L. Ed. 335.

*Same; prescription.*—“Nor can the plaintiff claim by prescription against the public for more than the act confers on him, which is at best immunity for a nuisance. His license, or rather toleration, gives him a good title to keep up his dam and use the waters of the river, as against every one but the sovereign and those diverting them by public authority for public uses.” *Rundle v. Delaware, etc., Canal Co.*, 14 How. 80, 93, 14 L. Ed. 335.

*Same; diversion of waters of navigable boundary river.*—“By the laws of Pennsylvania, the River Delaware is a public, navigable river, held by its joint sovereigns, in trust, for the public; that riparian owners of land have no title to the river, or any right to divert its waters, unless by license from the state. That such license is revocable and in subjection to the superior right of the state to divert the water for public improvements,” either by the state directly or by corporations created for that purpose. *Rundle v. Delaware, etc., Canal Co.*, 14 How. 80, 94, 14 L. Ed. 335.

By the laws in one state, therefore, the licensee can have no remedy against a corporation authorized to take the whole waters of the river for purposes of canals for improving the navigation; neither can he sustain a suit against a corporation created by New Jersey for the same purposes and which has taken part of the waters. *Rundle v. Delaware, etc., Canal Co.*, 14 How. 80, 14 L. Ed. 335.

The licensee being but a tenant at usufruct in the usufruct of the water to the two states who own the river as tenants in common, is not in a position to question the relative rights of either to use its waters without consent of the other. *Rundle v. Delaware, etc., Canal Co.*, 14 How. 80, 14 L. Ed. 335.

The proviso of the provisional acts of Pennsylvania and New Jersey of 1771 does



land, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation."<sup>10</sup> Riparian ownership, therefore, is subject to

not operate as a grant of the usufruct of the waters of the river to Adams Hoops and his assigns, but only as a license or toleration of the dam. *Rundle v. Delaware, etc., Canal Co.*, 14 How. 80, 14 L. Ed. 335.

**Same; as against subsequent licensee; presumption as to secondary use.**—Whether a first licensee for private emolument can support an action against a later licensee of either sovereign or both who for private purposes diverts the water to the injury of the first, undecided. *Rundle v. Delaware, etc., Canal Co.*, 14 How. 80, 14 L. Ed. 335.

"It is true that the plaintiff's declaration in this case alleges that the waters diverted by defendants' dam and canal are used for the purpose of mills, and for private emolument. But as it is not alleged, or pretended, that defendants have taken more water than was necessary for the canal, or have constructed a canal of greater dimensions than they were authorized and obliged by the charter to make, this secondary use must be considered as merely incidental to the main object of their charter. We do not, therefore, consider the question before us, whether the plaintiff might not recover damages against an individual, or private corporation, diverting the water of this river to their injury, for the purpose of private emolument only, with or without license, or authority of either of its sovereign owners." *Rundle v. Delaware, etc., Canal Co.*, 14 How. 80, 93, 14 L. Ed. 335.

**10. Nature of riparian ownership; subordinate to public use and right.**—*Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 567, 14 L. Ed. 249; *South Carolina v. Georgia*, 93 U. S. 4, 23 L. Ed. 782; *Shively v. Bowlby*, 152 U. S. 1, 38 L. Ed. 331; *Eldridge v. Trezevant*, 160 U. S. 452, 40 L. Ed. 490; *Gibson v. United States*, 166 U. S. 269, 271, 41 L. Ed. 996; *Scranton v. Wheeler*, 179 U. S. 141, 163, 45 L. Ed. 126; *Chicago, etc., R. Co. v. Drainage Comm'rs*, 200 U. S. 561, 50 L. Ed. 596; *West Chicago St. R. Co. v. Chicago*, 201 U. S. 506, 50 L. Ed. 845; *Union Bridge Co. v. United States*, 204 U. S. 364, 389, 51 L. Ed. 523.

"Lands under tidewaters are incapable of cultivation or improvement in the manner of lands above high-water mark. They are of great value to the public for the purposes of commerce, navigation and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore the title and the control of them are vested in the sovereign for the benefit of the whole people." *Shively v. Bowlby*, 152 U. S. 1, 57, 38 L. Ed. 331.

"Chancellor Kent, in the 3d volume of his Commentaries, 411, says: 'The common law, while it acknowledged and protected the right of the owners of the adjacent lands to the soil and water of the river, rendered that right subordinate to the public convenience, and all erections and impediments made by the owners, to the obstruction of the free use of the river as a highway for boats and rafts, are deemed nuisances.'" *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 567, 14 L. Ed. 249.

"All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various states and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the federal government by the constitution." *South Carolina v. Georgia*, 93 U. S. 4, 23 L. Ed. 782; *Shively v. Bowlby*, 152 U. S. 1, 38 L. Ed. 331; *Eldridge v. Trezevant*, 160 U. S. 452, 40 L. Ed. 490; *Gibson v. United States*, 166 U. S. 269, 271, 41 L. Ed. 996; *Scranton v. Wheeler*, 179 U. S. 141, 156, 45 L. Ed. 126; *Union Bridge Co. v. United States*, 204 U. S. 364, 389, 51 L. Ed. 523.

The primary use of the waters and the lands under navigable waters, whether the title is in the state or in the riparian owners, is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. *Union Bridge Co. v. United States*, 204 U. S. 364, 392, 51 L. Ed. 523; *Gibson v. United States*, 166 U. S. 269, 271, 41 L. Ed. 996; *Scranton v. Wheeler*, 179 U. S. 141, 162, 45 L. Ed. 126.

**Under the law of Massachusetts.**—By the law of the state of Massachusetts the owner of land bordering upon the sea owns to low-water mark, but the public have a right of navigation over the soil of the proprietor between high and low-water mark without invoking the presumption of any grant or dedication upon his part. *Boston v. Lecraw*, 17 How. 426, 15 L. Ed. 118; *Richardson v. Boston*, 19 How. 263, 15 L. Ed. 639; *S. C.*, 24 How. 188, 192, 16 L. Ed. 625.

The public right of navigation, however, is a defeasible right and subject to the right of the owner to reclaim and improve his land between high and low-water mark. *Boston v. Lecraw*, 17 How. 426, 15 L. Ed. 118; *Richardson v. Boston*, 19 How. 263, 15 L. Ed. 639; *S. C.*, 24 How. 188, 192, 16 L. Ed. 625.

Nor can the public acquire an indefeasible right of navigation by lapse of time. The owner is not bound to exercise his right to reclaim or improve the land

the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the government in that regard. In other words, uncompensated injuries not amounting to a taking of property, occasioned by the operations of the government in improving, straightening or changing navigable channels, with a view to rendering them more useful for purposes of navigation, do not constitute a deprivation of property without due process of law.<sup>11</sup>

**Duty of Municipal Corporation as to Stream within Its Limits.**—It is the duty of a municipal corporation to protect the free navigation of a river and its branches within its limits;<sup>12</sup> nor can such corporation exempt itself from such duty by any agreement it may make with a railroad company owning the fee on either side of the river.<sup>13</sup> The rights of the company, as the owner of the fee of land on either side of the river or in its bed, are subject to the paramount right of navigation over the waters of the river.<sup>14</sup>

6. **RIPARIAN RIGHTS OF MUNICIPAL CORPORATION.**—If a municipal corporation can claim the original dedication to the river, or to the shore of tidewaters, it has all the rights of a riparian or littoral proprietor.<sup>15</sup>

within a given time, or forfeit it. So long as the owner leaves his land unreclaimed from the sea, he cannot hinder public navigation over it when covered with water, and cannot, therefore, be properly said to acquiesce in that which he could not hinder. He cannot lose his title to the land by leaving it in its natural state without improvement or forfeit it by nonuser. *Boston v. Lecraw*, 17 How. 426, 15 L. Ed. 118. See, also, *Richardson v. Boston*, 19 How. 263, 15 L. Ed. 639; *S. C.*, 24 How. 188, 192, 16 L. Ed. 625; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, 684, 27 L. Ed. 1070.

11. **Deprivation without compensation or without due process.**—*Gibson v. United States*, 166 U. S. 269, 276, 41 L. Ed. 996; *Chicago, etc., R. Co. v. Drainage Comm'rs*, 200 U. S. 561, 50 L. Ed. 596; *West Chicago St. R. Co. v. Chicago*, 201 U. S. 506, 526, 50 L. Ed. 845. See, generally, as to the destruction or injury of riparian rights without compensation and without due process of law, the title **DUE PROCESS OF LAW**, vol. 5, pp. 596, 603, 612.

Damages resulting from the prosecution of the improvement of a navigable highway, for the public good, is not the result of a taking of property, but is merely incidental to the exercise of a servitude to which this property has always been subject. *Gibson v. United States*, 166 U. S. 269, 276, 41 L. Ed. 996.

"To maintain the navigable character of the stream in a lawful way is not, within the meaning of the law, the taking of private property or any property right of the owner of the soil under the river, such ownership being subject to the right of free and unobstructed navigation." *Chicago, etc., R. Co. v. Drainage Comm'rs*, 200 U. S. 561, 50 L. Ed. 596; *West Chicago St. R. Co. v. Chicago*, 201 U. S. 506, 526, 50 L. Ed. 845.

"In *Railway Co. v. Renwick* (1880), 102 U. S. 180, 26 L. Ed. 51, affirming the judgment of the supreme court of Iowa in 49 Iowa 664, it was by virtue of an express

statute passed by the legislature of Iowa in 1874, that the owner of a similar pier and boom recovered compensation for the obstruction of access to it from the river by the construction of a railroad in front of it." *Shively v. Bowlby*, 152 U. S. 1, 41, 38 L. Ed. 331.

**Uncompensated injury or destruction of bridges, tunnels, etc.**—See the titles **CONSTITUTIONAL LAW**, vol. 4, p. 405, et seq; **DUE PROCESS OF LAW**, vol. 5, p. 583.

12. **Duty of municipal corporation to protect free navigation of stream.**—*West Chicago St. R. Co. v. Chicago*, 201 U. S. 506, 523, 50 L. Ed. 845.

13. **Same; contracts exempting from duty.**—*West Chicago St. R. Co. v. Chicago*, 201 U. S. 506, 523, 50 L. Ed. 845.

14. **Same; rights of riparian owner.**—*West Chicago St. R. Co. v. Chicago*, 201 U. S. 506, 524, 50 L. Ed. 845, citing *Weber v. Harbor Comm'rs*, 18 How. 57, 66, 21 L. Ed. 798, *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 458, 36 L. Ed. 1018; *Shively v. Bowlby*, 152 U. S. 1, 30, 38 L. Ed. 331; *Gibson v. United States*, 166 U. S. 269, 276, 41 L. Ed. 996; *Scranton v. Wheeler*, 179 U. S. 141, 163, 45 L. Ed. 126.

15. **Riparian rights of municipal corporation.**—*New Orleans v. United States*, 10 Pet. 662, 663, 717, 9 L. Ed. 573; *Boston v. Lecraw*, 17 How. 426, 15 L. Ed. 118; *Richardson v. Boston*, 19 How. 263, 271, 15 L. Ed. 639; *S. C.*, 24 How. 188, 192, 16 L. Ed. 625; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, 27 L. Ed. 1070.

The city of Boston has the same rights as other littoral proprietors, and consequently had the control over a dock which was situated between two wharves; one end of the dock being at high-water mark, and the other at low-water mark. It had, therefore, the right to construct a sewer for the purpose of carrying off the drainage from the high-water to the low-water end of the dock. *Boston v. Lecraw*, 17 How. 426, 15 L. Ed. 118;

**As Affected by Rights of Grantee or Licensee Who Does Not Own Adjacent Upland.**—See post, "Rights of Grantee or Licensee Who Does Not Own Adjacent Upland," III, C, 8.

**Riparian Ownership as between Municipal and Individual Proprietors.**—See ante, "Ownership as between Municipal Corporations and Individual Proprietors," II, D, 3, j.

7. **RIPARIAN RIGHTS OF STATES.**—See ante, "Riparian Rights as between States," II, C, 3.

8. **RIGHTS OF GRANTEE OR LICENSEE WHO DOES NOT OWN ADJACENT UPLAND.**—The construction of a pier or the extension of any land into navigable waters for a railroad or other purpose, by one not the owner of lands on the shore, does not give the builder of such pier or extension, whether an individual or corporation, any riparian rights. Those rights are incident to riparian ownership. They exist with such ownership and pass with the transfer of the land. And the land must not only be contiguous to the water, but in contact with it. Proximity without contact is insufficient. The riparian right attaches to land on the border of navigable water without any declaration to that effect from the former owner, and its designation in a conveyance by him would be surplusage.<sup>16</sup>

*Richardson v. Boston*, 19 How. 263, 15 L. Ed. 639; S. C., 24 How. 188, 192, 16 L. Ed. 625.

The city had not dedicated the dock to public uses by merely abstaining from any control over it. *Boston v. Lecraw*, 17 How. 426, 15 L. Ed. 118; *Richardson v. Boston*, 19 How. 263, 15 L. Ed. 639; S. C., 24 How. 188, 192, 16 L. Ed. 625.

16. **Rights of grantee or licensee who does not own adjacent upland.**—*Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 445, 36 L. Ed. 1018.

**Rights of Illinois Central Railway in Lake Michigan.**—The extensive works of the Illinois Central Railroad Company under the permission given to locate its road within the city of Chicago by the ordinance of June 14, 1852, were constructed under the authority of the law by the requirement of the city as a condition of its consent that the company might locate its road within its limits, and cannot be regarded as such an encroachment upon the domain of the state as to require the interposition of the court for their removal or for any restraint in their use. *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 443, 36 L. Ed. 1018.

"The railroad company never acquired by the reclamation from the waters of the lake of the land upon which its tracks are laid, or by the construction of the road and works connected therewith, an absolute fee in the tract reclaimed, with a consequent right to dispose of the same to other parties, or to use it for any other purpose than the one designated—the construction and operation of a railroad thereon with one or more tracks and works in connection with the road or in aid thereof. The act incorporating the company only granted to it a right of way over the public lands for its use and

control, for the purpose contemplated, which was to enable it to survey, locate, and construct and operate a railroad. All lands, waters, materials and privileges belonging to the state were granted solely for that purpose. It did not contemplate, much less authorize, any diversion of the property to any other purpose. The use of it was restricted to the purpose expressed." *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 444, 36 L. Ed. 1018.

"Nor did the railroad company acquire by the mere construction of its road and other works any rights as a riparian owner to reclaim still further lands from the waters of the lake for its use, or the construction of piers, docks and wharves in the furtherance of its business. The extent to which it could reclaim the land under the waters was limited by the conditions of the ordinance, which was simply for the construction of a railroad on a tract not to exceed a specified width, and of works connected therewith." *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 445, 36 L. Ed. 1018.

**Same: construction of charter.**—The grant of "waters" in the second sentence of section three of the charter of the Illinois Central Railroad Company granted by the general assembly of Illinois of February 15th, 1851, is, as shown by the context, still less decisive of an intent on the part of the legislature to make a general grant of the waters of Lake Michigan. By the first sentence of this section power is given to the corporation to appropriate land not exceeding two hundred feet in width through its entire length, and "to enter upon and take possession of and use all and singular any lands, streams and materials of every kind for the location of depots and stopping places, etc.. \* \* \* for the complete operation of said road;" and by the sec-



#### IV. Regulation, Improvement, and Obstruction of Navigable Waters.

**A. Powers of Congress**—1. GENERALLY AS TO THE POWER TO REGULATE AND IMPROVE.—All navigable waters of the United States are under the control of the federal government for the purpose of regulating and improving navigation. The power of congress to regulate such waters is not expressly granted in the constitution, but is incidental to the power to regulate foreign and inter-

ond sentence "all such lands, waters, materials and privileges, belonging to the state, are hereby granted to said corporation for the said purposes, \* \* \* provided that nothing in this section contained shall be so construed as to authorize the said corporation to interrupt the navigation of said streams." Obviously the words "such waters" in the second sentence is limited to the "streams" specified in the first sentence, and power was given to the railroad company to take possession of such streams for the purpose of constructing bridges, dams, embankments, excavations, station grounds, etc., upon the theory that the navigable streams of the state could not be bridged, diverted or encroached upon, except with the express authority of the state. The object of the section was evidently to confer such authority, subject, of course, to the navigation laws of the United States. *Escanaba Co. v. Chicago*, 107 U. S. 678, 683, 27 L. Ed. 442; *Illinois Cent. R. Co. v. Chicago*, 176 U. S. 646, 663, 44 L. Ed. 622.

"The word 'streams' was evidently used to denote running waters, and is wholly inapplicable to a body of water like Lake Michigan. *Trustees of Schools v. Schroll*, 120 Illinois 509. That this was the intention of the legislature is also evident from the proviso of the section 'that nothing in this section contained shall be so construed as to authorize the said corporation to interrupt the navigation of said streams.' The use of this word 'streams' was not only intended to differentiate the waters of rivers from the waters of the lake but also has its bearing as tending to show that the word 'land' was used in the sense of dry lands, or upland, as distinguished from submerged land." *Illinois Cent. R. Co. v. Chicago*, 176 U. S. 646, 664, 44 L. Ed. 622.

**Same; same; necessity for consent of city.**—But even if the grant were as broad as claimed, and gave the company a right to take parcels of submerged land, as it became necessary for its railroad purposes, it could not do so without the consent of the common council. The eighth section of the charter provides that "nothing in this act contained shall authorize said corporation to make a location of their track within any city, without the consent of the common council of said city." There is nothing in the act from which an intention can be inferred to confine this proviso to the main track of the road. It included its depots, engine houses and the necessary track approaches to the same.

*Illinois Cent. R. Co. v. Chicago*, 176 U. S. 646, 664, 44 L. Ed. 622.

This restriction applies not only to the city as bounded in 1851, at the date of the charter but such consent is now necessary to be obtained, though the boundaries of the city have long since been extended to a point below the land proposed to be taken. *Illinois Cent. R. Co. v. Chicago*, 176 U. S. 646, 665, 44 L. Ed. 622.

"The assent of the common council was intended to be required as a permanent condition. Especially is this so in view of the insistence of the railroad company that the power to appropriate these submerged lands is a continuing one. In such case the condition upon which the power should be exercised, namely, the consent of the common council, should also be construed as continuous. In other words, the railroad company cannot assert the power and in the same breath repudiate the condition." *Illinois Cent. R. Co. v. Chicago*, 176 U. S. 646, 667, 44 L. Ed. 622.

"The subjection of the railroad company to the will of the common council deprived the company of nothing it before possessed, but limited the exercise of a right which had not yet become vested and was still subject to the police power." *Illinois Cent. R. Co. v. Chicago*, 176 U. S. 646, 667, 44 L. Ed. 622.

**Effect of grant to railroad company upon riparian rights of city.**—"The city of Chicago, as riparian owner of the grounds on its east or lake front of the city, between the north line of Randolph street and the north line of block twenty-three, each of the lines being produced to Lake Michigan, and in virtue of authority conferred by its charter, has the power to construct and keep in repair on the lake front, east of said premises, within the lines mentioned, public landing places, wharves, docks and levees, subject, however, in the execution of that power, to the authority of the state to prescribe the lines beyond which piers, docks, wharves and other structures, other than those erected by the general government, may not be extended into the navigable waters of the harbor, and to such supervision and control as the United States may rightfully exercise." *Illinois Cent. R. Co. v. Chicago*, 176 U. S. 646, 667, 44 L. Ed. 622.

The fact that the land which the city had a right to fill in and appropriate by virtue of its ownership of the grounds in front of the lake had been filled in by the railroad company in the construction of the tracks for its railroad and for the

state commerce. The right to regulate commerce includes the right to regulate navigation, and hence to regulate and improve navigable waters of the United States and ports on such waters.<sup>17</sup>

2. POWER TO IMPROVE INCLUDES POWER TO OBSTRUCT, ALTER COURSE OF CHANNEL, ETC.—**Generally.**—See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 342, 343.

**As against Right of State to Continued Flow.**—This power is paramount to any alleged right of a state bordering upon a stream to have the same to continue to flow in its ancient and accustomed channel.<sup>18</sup>

**Not Affected by Compact between States.**—The power of congress in this respect is not limited by any compact between states providing for the continued free and unobstructed navigation of the stream.<sup>19</sup>

breakwater on the shore west of it, did not deprive the city of its riparian rights. The exercise of those rights was only subject to the condition of the agreement with the city, under which the tracks and breakwater were constructed by the railroad company, and that was for a perpetual right of way over the ground for its tracks of railway, and, necessarily, the continuance of the breakwater as a protection of its works and the shore from the violence of the lake. With this reservation of the right of the railroad company to its use of the tracks on ground reclaimed by it and the continuance of the breakwater, the city possesses the same right of riparian ownership, and is at full liberty to exercise it, which it ever did. *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 462, 36 L. Ed. 1018.

17. **Generally as to power of congress to regulate and improve.**—*Gibbons v. Ogden*, 9 Wheat. 1, 194, 6 L. Ed. 23; *Willson v. Black-Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. Ed. 412; *Pennsylvania v. Wheeling, etc.*, Bridge Co., 18 How. 421, 15 L. Ed. 435; *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. Ed. 96; *South Carolina v. Georgia*, 93 U. S. 4, 23 L. Ed. 782; *Wisconsin v. Duluth*, 96 U. S. 379, 383, 24 L. Ed. 668; *Boom Co. v. Patterson*, 98 U. S. 403, 409, 25 L. Ed. 296; *Mobile County v. Kimball*, 102 U. S. 691, 697, 26 L. Ed. 238; *Bridge Co. v. United States*, 105 U. S. 470, 26 L. Ed. 1143; *Escanaba Co. v. Chicago*, 107 U. S. 678, 682, 27 L. Ed. 442; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 700, 27 L. Ed. 584; *Miller v. Mayor*, 109 U. S. 385, 27 L. Ed. 971; *Cardwell v. American Bridge Co.*, 113 U. S. 205, 208, 28 L. Ed. 959; *Huse v. Glover*, 119 U. S. 543, 548, 30 L. Ed. 487; *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 295, 31 L. Ed. 149; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8, 31 L. Ed. 629; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 335, 37 L. Ed. 463; *Shively v. Bowlby*, 152 U. S. 1, 38 L. Ed. 331; *In re Debs*, 158 U. S. 564, 586, 39 L. Ed. 1092; *Eldridge v. Trezevant*, 160 U. S. 452, 40 L. Ed. 490; *Gibson v. United States*, 166 U. S. 269, 41 L. Ed. 996; *United States v. Rio Grande Dam, etc., Co.*, 174 U. S. 690, 703, 43 L. Ed. 1136; *United States v. Bellingham Bay Boom Co.*, 176 U. S. 211, 215,

44 L. Ed. 437; *Leovy v. United States*, 177 U. S. 621, 632, 44 L. Ed. 914; *Scranton v. Wheeler*, 179 U. S. 141, 45 L. Ed. 126; *Union Bridge Co. v. United States*, 204 U. S. 364, 389, 51 L. Ed. 523; *Kansas v. Colorado*, 206 U. S. 46, 85, 51 L. Ed. 956.

"The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable rivers of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by congress." *Gilman v. Philadelphia*, 3 Wall. 713, 724, 18 L. Ed. 96; *South Carolina v. Georgia*, 93 U. S. 4, 10, 23 L. Ed. 782. See, also, the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 338, et seq.

As commerce embraces navigation, the improvement of harbors and bays along our coast, and of navigable rivers within the states connecting with them, falls within the power. *Mobile County v. Kimball*, 102 U. S. 691, 697, 26 L. Ed. 238.

18. **Power to alter or obstruct as against right of state to continued flow.**—*South Carolina v. Georgia*, 93 U. S. 4, 23 L. Ed. 782; *Wisconsin v. Duluth*, 96 U. S. 379, 24 L. Ed. 668.

A state has no right to have the waters of a navigable river of the United States flow past its boundary in its natural state, and to have the continued benefit of its scouring and cutting effect upon a harbor situated upon its boundary, as against the right of the United States to cut a canal for the purpose of improving and affording access to a harbor in another state, even though the effect of such canal be to deflect the current of the river to the detriment of the harbor formerly scoured and deepened thereby. *Wisconsin v. Duluth*, 96 U. S. 379, 24 L. Ed. 668.

19. **Effect of compact between states.**—*Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. 421, 433, 15 L. Ed. 435; *South Carolina v. Georgia*, 93 U. S. 4, 23 L. Ed. 782. See, also, *Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 9 L. Ed. 1012; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 1, 4 L. Ed. 249.

A compact between two states respecting a river which constitutes their common



### As a Preference of the Ports of One State Over Those of Another.—

See the titles BRIDGES, vol. 3, p. 518; INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 308, 309.

3. POWER TO IMPROVE INCLUDES POWER TO PROTECT, AND TO PREVENT OR REMOVE OBSTRUCTIONS.—The power vested in congress to regulate commerce with foreign nations and among the several states includes the control of the navigable waters of the United States so far as may be necessary to insure their free navigation.<sup>20</sup> This necessarily includes the power to keep these open and free from

boundary and declaring that it shall be ever free and open as a public navigable waterway cannot operate as a restriction upon the power of congress under the constitution to regulate commerce among the several states. Such a compact does not prevent congress from declaring what shall constitute a lawful bridge across such stream and prescribing its height and position above the bed of the stream. *Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. 421, 433, 15 L. Ed. 435.

**Georgia-South Carolina compact.**—See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 342.

**Virginia-Maryland compact; the Alexandria canal case.**—The compact between Virginia and Maryland, in 1785, was made by the two states in their character of states; the citizens, individually, of both commonwealths, were subject to all the obligations, and entitled to all the benefits, conferred by that compact; but the citizens of each, individually, were, in no just sense, the parties to it; these parties were the two states of which they were citizens. The same power which established it was competent to annul or to modify it; Virginia and Maryland, if they had retained the portions of territory, which respectively belonged to them, on the right and left banks of the Potomac, could have so far modified this compact, as to have agreed to change any or all of its stipulations; they could, by their joint will, have made any improvements which they chose; either by canals along the margin of the river; or by bridges or aqueducts across it; or in any other manner whatsoever. When they ceded to congress the portions of the territory embracing the Potomac River within their limits, whatever the legislatures of Virginia and Maryland could have done by their joint will, after that cession, could be done by congress, subject only to the limitations imposed by the acts of cession. *Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 9 L. Ed. 1012.

A bill was filed by the corporation of Georgetown, on behalf of themselves and the citizens of Georgetown, against the Alexandria Canal Company, stating that the company were constructing an aqueduct across the Potomac river, within the corporate limits of Georgetown; that the Potomac was a public highway; and that the free use of the river was secured to all persons residing on the border of the river, or interested in its navigation, by

the compact of 1785, between Virginia and Maryland; the aqueduct, with the works of the Alexandria Canal Company, the bill stated, obstructed the navigation of the river, and injured the owners of wharf property on the same; the bill asked an injunction to stay the further proceedings of the defendants, and for other relief. The Alexandria Canal Company, incorporated by congress, denied the right of the corporation of Georgetown to interfere in the matter; denied that their works were within the corporate limits of Georgetown; and that the court had jurisdiction to interfere or could restrain them from prosecuting their works under their charter; averring they had not transcended the power granted to them by congress on the 26th of May, 1830. The circuit court dismissed the bill; and on an appeal to the supreme court, the decree of the circuit court was affirmed. *Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 9 L. Ed. 1012.

The act of congress, which granted the charter to the Alexandria Canal Company, was in no degree a violation of the compact between the states of Virginia and Maryland; or of any of the rights that the citizens of either, or both states, claimed as being derived from it. *Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 9 L. Ed. 1012.

20. Power of congress to insure free navigation.—*Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 14 L. Ed. 249; *Gilman v. Philadelphia*, 3 Wall. 713, 725, 18 L. Ed. 96; *South Carolina v. Georgia*, 93 U. S. 4, 23 L. Ed. 782; *Wisconsin v. Duluth*, 96 U. S. 379, 383, 24 L. Ed. 668; *Mobile County v. Kimball*, 102 U. S. 691, 696, 26 L. Ed. 238; *Bridge Co. v. United States*, 105 U. S. 470, 26 L. Ed. 1143; *Escanaba Co. v. Chicago*, 107 U. S. 678, 682, 27 L. Ed. 442; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 700, 27 L. Ed. 584; *Miller v. Mayor*, 109 U. S. 385, 395, 27 L. Ed. 971; *Cardwell v. American Bridge Co.*, 113 U. S. 205, 209, 28 L. Ed. 959; *Huse v. Glover*, 119 U. S. 543, 548, 30 L. Ed. 487; *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 31 L. Ed. 149; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 31 L. Ed. 629; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. Ed. 463; *Shively v. Bowlby*, 152 U. S. 1, 38 L. Ed. 331; *Luxton v. North River Bridge Co.*, 153 U. S. 525, 38 L. Ed. 808; *In re Debs*, 158 U. S. 564, 586, 39 L. Ed. 1092; *Eldridge v. Trezevant*, 160 U. S. 452, 40



any obstruction to their navigation interposed by the states, or under their authority, or otherwise; to remove such obstructions where they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of the offenders. For these purposes congress possesses all the powers which existed in the states before the adoption of the national constitution, and which have always existed in the parliament in England. Such has uniformly been the construction given to that clause of the constitution which confers upon congress the power to regulate commerce.<sup>21</sup>

**Power to Prevent Obstruction Includes Power to Determine What Constitutes an Obstruction, or to Legalize an Existing Obstruction.—**

See, generally, the titles BRIDGES, vol. 3, p. 518; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 342. See footnote.<sup>22</sup> In addition to what is stated in the references given, it may be said that this power on the part of congress is not affected by the fact that a suit is pending to abate such obstruction as a nuisance,<sup>23</sup> or even by the fact that such suit has been prosecuted to final judgment or decree.<sup>24</sup>

**4. OBSTRUCTION NOT A COMMON-LAW OFFENSE AGAINST THE UNITED STATES.—**At common law any obstruction of navigation upon a navigable

L. Ed. 490; Lake Shore, etc., R. Co. v. Ohio, 165 U. S. 365, 41 L. Ed. 747; Gibson v. United States, 166 U. S. 269, 41 L. Ed. 996; United States v. Rio Grande Dam, etc., Co., 174 U. S. 690, 703, 43 L. Ed. 1136; United States v. Bellingham Bay Boom Co., 176 U. S. 211, 215, 44 L. Ed. 437; Leovy v. United States, 177 U. S. 621, 44 L. Ed. 914; Scranton v. Wheeler, 179 U. S. 141, 156, 45 L. Ed. 126; Cummings v. Chicago, 188 U. S. 410, 427, 47 L. Ed. 525; Calumet Grain Co. v. Chicago, 188 U. S. 431, 47 L. Ed. 532; Union Bridge Co. v. United States, 204 U. S. 364, 401, 51 L. Ed. 523; Kansas v. Colorado, 206 U. S. 46, 85, 51 L. Ed. 956; Stone v. Southern Illinois, etc., Bridge Co., 206 U. S. 267, 274, 51 L. Ed. 1057.

**21. To prevent and remove obstructions.**

—Pennsylvania v. Wheeling, etc., Bridge Co., 13 How. 518, 14 L. Ed. 249; Gilman v. Philadelphia, 3 Wall. 713, 24, 18 L. Ed. 96; Railroad Co. v. Fuller, 17 Wall. 560, 21 L. Ed. 710; South Carolina v. Georgia, 93 U. S. 4, 10, 23 L. Ed. 782; Wisconsin v. Duluth, 96 U. S. 379, 383, 24 L. Ed. 668; Mobile County v. Kimball, 102 U. S. 691, 26 L. Ed. 238; Bridge Co. v. United States, 105 U. S. 470, 26 L. Ed. 1143; Escanaba Co. v. Chicago, 107 U. S. 678, 682, 27 L. Ed. 442; Miller v. Mayor, 109 U. S. 385, 393, 27 L. Ed. 971; Cardwell v. American Bridge Co., 113 U. S. 205, 209, 28 L. Ed. 959; Huse v. Glover, 119 U. S. 543, 548, 30 L. Ed. 487; Sands v. Manistee River Imp. Co., 123 U. S. 288, 295, 31 L. Ed. 149; Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 8, 31 L. Ed. 629; Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. Ed. 463; Luxton v. North River Bridge Co., 153 U. S. 525, 38 L. Ed. 808; In re Debs, 158 U. S. 564, 586, 39 L. Ed. 1092; Eldridge v. Trezevant, 160 U. S. 452, 40 L. Ed. 490; Lake Shore, etc., R. Co. v. Ohio, 165 U. S. 365, 41 L. Ed. 747; Gibson v. United States, 166 U. S. 269, 41 L. Ed. 996; United States v. Rio Grande Dam, etc., Co., 174 U. S. 690, 703, 43 L. Ed. 1136; United States v. Bellingham Bay

Boom Co., 176 U. S. 211, 215, 44 L. Ed. 437; Leovy v. United States, 177 U. S. 621, 44 L. Ed. 914; Scranton v. Wheeler, 179 U. S. 141, 156, 45 L. Ed. 126; Cummings v. Chicago, 188 U. S. 410, 427, 47 L. Ed. 525; Calumet Grain Co. v. Chicago, 188 U. S. 431, 47 L. Ed. 532; Union Bridge Co. v. United States, 204 U. S. 364, 401, 51 L. Ed. 523; Kansas v. Colorado, 206 U. S. 46, 85, 51 L. Ed. 956; Stone v. Southern Illinois, etc., Bridge Co., 206 U. S. 267, 274, 51 L. Ed. 1057. See, also, the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 341, 342.

**22. Power to determine what constitutes an obstruction; to legalize actual obstruction.**—See, also, Georgetown v. Alexandria Canal Co., 12 Pet. 91, 97, 9 L. Ed. 1012, where it is said in substance, that the courts cannot declare an aqueduct across a navigable stream to be a nuisance where congress has authorized its construction and the builders are proceeding in accordance with the authority given. And see Transportation Co. v. Chicago, 99 U. S. 635, 643, 25 L. Ed. 336.

**23. Same; effect of pending suit.**—The Clinton Bridge, 10 Wall. 454, 19 L. Ed. 969; Wisconsin v. Duluth, 96 U. S. 379, 24 L. Ed. 668.

A suit in chancery, begun previously to the passage of an act of congress declaring a bridge across a navigable river to be a lawful structure, is abated by such an act notwithstanding pleas and replication have been filed, proofs taken, and the case ready for hearing. The Clinton Bridge, 10 Wall. 454, 19 L. Ed. 969.

**24. Same; after judgment or decree.**—Pennsylvania v. Wheeling, etc., Bridge Co., 18 How. 421, 15 L. Ed. 435; The Clinton Bridge, 10 Wall. 454, 19 L. Ed. 969. See, also, the title CONSTITUTIONAL LAW, vol. 4, pp. 222, 440, 441.

**Legalization of obstruction as a violation of compact between states.**—See ante, "Power to Improve Includes Power to Obstruct, Alter Course of Channel, etc.," IV, A, 2.

stream, whether by the erection of a bridge or any other work, is punishable unless authorized by law.<sup>25</sup> But there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers. There must be a direct statute of the United States in order to bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the states. Such obstructions and nuisances are offenses against the laws of the states within which the navigable waters lie, and may be indicted or prohibited as such; but they are not offenses against the United States laws which do not exist; and none such exist except what are to be found on the statute book.<sup>26</sup>

5. DELEGATION OF POWER TO IMPROVE, OBSTRUCT, OR REMOVE OBSTRUCTIONS, TO HEADS OF DEPARTMENTS.—See the titles BRIDGES, vol. 3, p. 518; CONSTITUTIONAL LAW, vol. 4, p. 289; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 341.

6. POWER OF CONGRESS OVER NAVIGABLE WATERS A PARAMOUNT POWER.—Since the constitution of the United States and the laws of congress enacted under the authority thereof are the supreme law of the land, it follows that the control of congress over the public navigable waters of the United States, and as included therein the power to improve and protect and to prevent and remove obstructions, is, in its nature, paramount to any similar power resting with the states; and that not only is the expressed will of congress conclusive of any right to the contrary asserted by a state or under its authority, but that congress may act retrospectively, and remove improvements, obstructions, etc., already existing by virtue of state authority. Whenever congress takes charge of the matter, its right to an exclusive control cannot be denied.<sup>27</sup>

**25. Obstruction as a common-law offense.**—Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 559, 9 L. Ed. 773.

**26. Same; against the United States.**—Willson *v.* Black-Bird Creek Marsh Co., 2 Pet. 245, 7 L. Ed. 412; Pennsylvania *v.* Wheeling, etc., Bridge Co., 13 How. 518, 14 L. Ed. 249; Pound *v.* Turck, 95 U. S. 459, 24 L. Ed. 525; Transportation Co. *v.* Parkersburg, 107 U. S. 691, 701, 27 L. Ed. 584; Willamette Iron Bridge Co. *v.* Hatch, 125 U. S. 1, 8, 31 L. Ed. 629; United States *v.* Bellingham Bay Boom Co., 176 U. S. 211, 217, 44 L. Ed. 437.

This doctrine is the result of many cases and expressions of opinion on the part of the federal supreme court. See the following: Willson *v.* Black-Bird Creek Marsh Co., 2 Pet. 245, 7 L. Ed. 412; Pollard *v.* Hagan, 3 How. 212, 229, 11 L. Ed. 565; The Passaic Bridges, 3 Wall., appx., 782; Gilman *v.* Philadelphia, 3 Wall. 713, 724, 18 L. Ed. 96; Pound *v.* Turck, 95 U. S. 459, 24 L. Ed. 525; Escanaba Co. *v.* Chicago, 107 U. S. 678, 27 L. Ed. 442; Cardwell *v.* American Bridge Co., 113 U. S. 205, 28 L. Ed. 959; Hamilton *v.* Vicksburg, etc., Railroad, 119 U. S. 280, 30 L. Ed. 393; Huse *v.* Glover, 119 U. S. 543, 30 L. Ed. 487; Sands *v.* Manistee River Imp. Co., 123 U. S. 288, 31 L. Ed. 149; Transportation Co. *v.* Parkersburg, 107 U. S. 691, 700, 27 L. Ed. 584.

**27. Power of congress a paramount power.**—Willson *v.* Black-Bird Creek Marsh Co., 2 Pet. 245, 7 L. Ed. 412; Pennsylvania *v.* Wheeling, etc., Bridge Co., 13 How. 518, 14 L. Ed. 249; Pennsylvania *v.* Wheeling, etc., Bridge Co., 18 How. 421,

15 L. Ed. 435; Gilman *v.* Philadelphia, 3 Wall. 713, 725, 18 L. Ed. 96; The Passaic Bridges, 3 Wall., appx., 782, 793; Crandall *v.* Nevada, 6 Wall. 35, 18 L. Ed. 745; The Clinton Bridge, 10 Wall. 454, 19 L. Ed. 969; Railroad Co. *v.* Fuller, 17 Wall. 560, 21 L. Ed. 710; South Carolina *v.* Georgia, 93 U. S. 4, 23 L. Ed. 782; Pound *v.* Turck, 95 U. S. 459, 24 L. Ed. 525; Wisconsin *v.* Duluth, 96 U. S. 379, 383, 24 L. Ed. 668; Boom Co. *v.* Patterson, 98 U. S. 403, 409, 25 L. Ed. 206; Transportation Co. *v.* Chicago, 99 U. S. 635, 643, 25 L. Ed. 336; Mobile County *v.* Kimball, 102 U. S. 691, 696, 26 L. Ed. 238; Bridge Co. *v.* United States, 105 U. S. 470, 482, 26 L. Ed. 1143; Escanaba Co. *v.* Chicago, 107 U. S. 678, 27 L. Ed. 442; Transportation Co. *v.* Parkersburg, 107 U. S. 691, 704, 27 L. Ed. 584; Miller *v.* Mayor, 109 U. S. 385, 396, 27 L. Ed. 971; Cardwell *v.* American Bridge Co., 113 U. S. 205, 209, 28 L. Ed. 959; Huse *v.* Glover, 119 U. S. 543, 548, 30 L. Ed. 487; Sands *v.* Manistee River Imp. Co., 123 U. S. 288, 31 L. Ed. 149; Willamette Iron Bridge Co. *v.* Hatch, 125 U. S. 1, 31 L. Ed. 629; Monongahela Nav. Co. *v.* United States, 148 U. S. 312, 335, 37 L. Ed. 463; Shively *v.* Bowlby, 152 U. S. 1, 33, 38 L. Ed. 331; Luxton *v.* North River Bridge Co., 153 U. S. 525, 38 L. Ed. 808; Lake Shore, etc., R. Co. *v.* Ohio, 165 U. S. 365, 41 L. Ed. 747; United States *v.* Rio Grande Dam, etc., Co., 174 U. S. 690, 703, 43 L. Ed. 1136; Lindsay, etc., Co. *v.* Mullen, 176 U. S. 126, 44 L. Ed. 400; United States *v.* Bellingham Bay Boom Co., 176 U. S. 211, 215, 44 L. Ed. 437; Leovy *v.* United States, 177 U. S. 621, 629, 44 L. Ed. 914; Cum-



7. NOT CONTROLLABLE BY THE JUDICIARY.—Whether navigation upon waters over which congress may exert its authority requires improvement at all, or improvement in a particular way, are matters wholly within its discretion; and the judiciary is without power to control or defeat the will of congress, so long as that branch of the government does not transcend the limits established by the supreme law of the land.<sup>28</sup> Likewise, as we have seen, it rests with congress to determine what constitutes an obstruction to navigation, and when it has authorized the construction of a particular work in or over a navigable water, it does not rest with the judiciary to declare it a nuisance and order its removal.<sup>29</sup>

**B. Powers of States**—1. STATES HAVE FULL CONTROL OF THEIR NAVIGABLE WATERS, SUBJECT TO PARAMOUNT CONTROL OF CONGRESS.—The full dominion and control which each state has over navigable waters within its limits includes not only the power to provide for the removal of obstructions from their rivers, harbors and roadsteads, to deepen their channels, and improve their navigability in all proper ways, but to authorize the construction of dams, bridges, and other works operating a partial or even a total obstruction of navigable streams, wholly within their limits, even though by their connection with other waters, they are capable of use as highways for interstate or foreign commerce; provided, always that such action on the part of the states or under their authority does not conflict with any act of congress touching the same matter nor interfere with any system of improvements constructed or being constructed under the authority of the federal government; the doctrine being, as previously stated, that congress has the paramount authority and the right to assume exclusive control at any time, and to not only forbid the erection of future works, except in conformity with such regulations as it may impose, but to remove such as already exist.<sup>30</sup>

*mings v. Chicago*, 188 U. S. 410, 427, 47 L. Ed. 525; *Calumet Grain Co. v. Chicago*, 188 U. S. 431, 47 L. Ed. 532; *Manigault v. Springs*, 199 U. S. 473, 50 L. Ed. 274.

**May grant privileges in spite of refusal by state.**—The United States, having paramount control over the navigable public waters of the United States, may grant to a riparian owner a license to construct a boom adjoining his land, notwithstanding the state may have refused one. *Boom Co. v. Patterson*, 98 U. S. 403, 409, 25 L. Ed. 206.

**28. Power of congress not controllable by the judiciary.**—*Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 97, 9 L. Ed. 1012; *Gilman v. Philadelphia*, 3 Wall. 713, 725, 18 L. Ed. 96; *Wisconsin v. Duluth*, 96 U. S. 379, 24 L. Ed. 668; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 701, 27 L. Ed. 584; *Scranton v. Wheeler*, 179 U. S. 141, 162, 45 L. Ed. 126.

If, congress, in the exercise of a lawful authority, has adopted and is carrying out a system of harbor improvements, the federal supreme court can have no lawful authority to forbid the work. *Wisconsin v. Duluth*, 96 U. S. 379, 387, 24 L. Ed. 668.

When a public work of this character has been inaugurated or adopted by congress, and its management placed under the control of its officers, there exists no right in any other branch of the government to forbid the work, or to prescribe the manner in which it shall be conducted. *Wisconsin v. Duluth*, 96 U. S. 379, 383, 24 L. Ed. 668.

**29. Same; as to what constitutes an obstruction.**—*Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 97, 9 L. Ed. 1012; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. 421, 430, 15 L. Ed. 435; *Gilman v. Philadelphia*, 3 Wall. 713, 725, 18 L. Ed. 96; *South Carolina v. Georgia*, 93 U. S. 4, 23 L. Ed. 782; *Wisconsin v. Duluth*, 96 U. S. 379, 383, 24 L. Ed. 668; *Transportation Co. v. Chicago*, 99 U. S. 635, 643, 25 L. Ed. 336; *Escanaba Co. v. Chicago*, 107 U. S. 678, 27 L. Ed. 442; *Bridge Co. v. United States*, 105 U. S. 470, 26 L. Ed. 1143; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 701, 27 L. Ed. 584; *Miller v. Mayor*, 109 U. S. 385, 394, 27 L. Ed. 971; *Huse v. Glover*, 119 U. S. 543, 548, 30 L. Ed. 487; *Hamilton v. Vicksburg, etc., Railroad*, 119 U. S. 280, 284, 30 L. Ed. 393; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 335, 37 L. Ed. 463; *Manigault v. Springs*, 199 U. S. 473, 479, 50 L. Ed. 274. See ante, "Power to Improve Includes Power to Protect and to Prevent and Remove Obstructions," IV, A, 3; "Obstruction Not a Common Law Offense against the United States," IV, A, 4; post, "Judicial Control of State Action," IV, B, 4; "Adjustment of Conflicting Rights and Interests," IV, D, 3.

**30. States have full control subject to paramount control of congress.**—*Gibbons v. Ogden*, 9 Wheat. 1, 194, 6 L. Ed. 23; *Willson v. Black-Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. Ed. 412; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 14 L. Ed. 249; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. 421, 15 L. Ed.



2. NOT EVERY ACT OF CONGRESS THAT OPERATES TO SUPERSEDE POWER OF STATES.—It is not every act of congress upon the subject that operates to supersede the power of the states to regulate, improve, or obstruct navigable streams within their limits. Where the regulation of such streams by congress is of only a general character, such as the establishment of ports and collection dis-

435; *Withers v. Buckley*, 20 How. 84, 15 L. Ed. 816; *Gilman v. Philadelphia*, 3 Wall. 713, 731, 18 L. Ed. 96; *The Passaic Bridges*, 3 Wall. appx., 782, 793; *Crandall v. Nevada*, 6 Wall. 35, 18 L. Ed. 745; *The Clinton Bridge*, 10 Wall. 454, 19 L. Ed. 969; *Railroad Co. v. Fuller*, 17 Wall. 560, 569, 21 L. Ed. 710; *South Carolina v. Georgia*, 93 U. S. 4, 23 L. Ed. 782; *Pound v. Turk*, 95 U. S. 459, 24 L. Ed. 525; *Wisconsin v. Duluth*, 96 U. S. 379, 387, 24 L. Ed. 668; *Boom Co. v. Patterson*, 98 U. S. 403, 409, 25 L. Ed. 206; *Transportation Co. v. Chicago*, 99 U. S. 635, 643, 25 L. Ed. 336; *Mobile County v. Kimball*, 102 U. S. 691, 697, 26 L. Ed. 238; *Bridge Co. v. United States*, 105 U. S. 470, 475, 26 L. Ed. 1143; *Escanaba Co. v. Chicago*, 107 U. S. 678, 688, 27 L. Ed. 442; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 704, 27 L. Ed. 584; *Miller v. Mayor*, 109 U. S. 385, 392, 27 L. Ed. 971; *Cardwell v. American Bridge Co.*, 113 U. S. 205, 208, 28 L. Ed. 959; *Hamilton v. Vicksburg, etc., Railroad*, 119 U. S. 280, 30 L. Ed. 393; *Huse v. Glover*, 119 U. S. 543, 30 L. Ed. 487; *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 295, 31 L. Ed. 149; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 12, 31 L. Ed. 629; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 336, 37 L. Ed. 463; *Harman v. Chicago*, 147 U. S. 396, 411, 37 L. Ed. 216; *Shively v. Bowlby*, 152 U. S. 1, 33, 38 L. Ed. 331; *Luxton v. North River Bridge Co.*, 153 U. S. 525, 38 L. Ed. 808; *Lake Shore, etc., R. Co. v. Ohio*, 165 U. S. 365, 366, 41 L. Ed. 747; *United States v. Rio Grande Dam, etc., Co.*, 174 U. S. 690, 703, 43 L. Ed. 1136; *Lindsay, etc., Co. v. Mullen*, 176 U. S. 126, 146, 44 L. Ed. 400; *United States v. Bellingham Bay Boom Co.*, 176 U. S. 211, 215, 44 L. Ed. 437; *Leovy v. United States*, 177 U. S. 621, 632, 44 L. Ed. 914; *Calumet Grain Co. v. Chicago*, 188 U. S. 431, 47 L. Ed. 532; *Cummings v. Chicago*, 188 U. S. 410, 423, 47 L. Ed. 525; *Manigault v. Springs*, 199 U. S. 473, 478, 50 L. Ed. 274; *Stone v. Southern Illinois, etc., Bridge Co.*, 206 U. S. 267, 274, 51 L. Ed. 1057. See, also, ante, "Power of Congress over Navigable Waters a Paramount Power," IV. A. 6. See, generally, the titles BRIDGES, vol. 3, pp. 518, 523; INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 337-342; 386-395.

"As an original proposition we have repeatedly held that, in the absence of legislation by congress, a state has power to improve its lands and promote the general health by authorizing a dam to be built across its interior streams, though they were previously navigable to the sea by vessels engaged in the coastwise trade.

This was decided in *Willson v. Black-Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. Ed. 412, in a brief but cogent opinion by Mr. Chief Justice Marshall." *Manigault v. Springs*, 199 U. S. 473, 478, 50 L. Ed. 274.

**An incident of equality.**—Primarily among the incidents of that equality, guaranteed by the federal constitution, is the right to make improvements in the rivers, watercourses and highways situated within the state. *Withers v. Buckley*, 20 How. 84, 93, 15 L. Ed. 816.

**Tidewater creeks.**—"The act of assembly by which the plaintiffs were authorized to construct their dam, shows plainly that this is one of those many creeks, passing through a deep level marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states." *Willson v. Black-Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. Ed. 412.

But congress has passed no act in execution of its power to regulate commerce the object of which was to control state legislation over those small navigable creeks into which the tide flows and which abound throughout the lower country of the Middle and Southern States. Under all the circumstances of the case the act empowering the Black-Bird Creek Marsh Company to place a dam across the creek cannot be condemned as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject. *Willson v. Black-Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. Ed. 412.

**The act of the state of Alabama of February 16, 1867**, to provide for the "improvement of the river, bay, and harbor of Mobile," is not invalid. *Mobile County v. Kimball*, 102 U. S. 691, 699, 26 L. Ed. 238.

"**The Manistee River** is wholly within the limits of Michigan. The state, therefore, can authorize any improvement which in its judgment will enhance its value as a means of transportation from one part of the state to another." *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 295, 31 L. Ed. 149.

**The Passaic River**, though navigable for a few miles within the state of New Jersey, and therefore a public river, belongs wholly to that state. It is no highway to other states; no commerce passes thereon from states below the bridge to states

tricts thereon, or the appropriation of funds for their improvement, the states may continue to exercise their powers in respect to such streams until a case of actual collision occurs. To render the action of the state invalid, the general government must directly interfere so as to supersede its authority and forbid or annul what it has done in the matter.<sup>31</sup>

above. Being the property of the state, and no other state having any title to interfere with her absolute dominion, she alone can regulate the harbors, wharves, ferries, or bridges, in or over it. The Passaic Bridges, 3 Wall., appx., 782, 792.

**Albany Bridge case.**—On an appeal from a bill of equity in the circuit court of the United States to enjoin a Hudson River bridge company from building a bridge over the Hudson River at Albany, under an authority which had been granted by the legislature of the state of New York, the court being equally divided upon the whole question, both as to the constitutional right of a state to pass a law authorizing the erection of bridges over navigable rivers of the United States, and upon the more special question, whether the navigation of the Hudson would practically be obstructed by this bridge as it was proposed to erect the same, no opinion on any point was given and the decree stood affirmed of necessity. *Albany Bridge Case*, 2 Wall. 403, 17 L. Ed. 876.

**Exclusive privileges.**—See, generally, the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 397.

The state cannot confer an exclusive boom privilege in the waters of a river which is a public navigable water of the United States, and even should it attempt to do so, and refuse to grant boom privileges to other persons, such action cannot prevent the United States, as having the paramount control over such waters, from granting such licenses to other persons. *Boom Co. v. Patterson*, 98 U. S. 403, 409, 25 L. Ed. 206.

**Obstructions; paramount power of congress.**—The Ohio is a navigable stream, subject to the commercial power of congress which has been exercised over it; and if the act of Virginia authorized the structure of the bridge, so as to obstruct navigation, it would afford no justification to the bridge company. *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 14 L. Ed. 249.

"It cannot be doubted, in view of the long list of authorities—for many more might be cited—that congress has the power in its discretion to compel the removal of this lock and dam as obstructions to the navigation of the river, or to condemn and take them for the purpose of promoting its navigability. In other words, it is within the competency of congress to make such provision respecting the improvement of the Monongahela River as in its judgment the public interests demand. Its dominion is su-

preme." *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 336, 37 L. Ed. 463.

**31. Operation of act as superseding power of states.**—*Gilman v. Philadelphia*, 3 Wall. 713, 18 L. Ed. 96; *The Passaic Bridges*, 3 Wall., appx., 782, 793; *Mobile County v. Kimball*, 102 U. S. 691, 699, 26 L. Ed. 238; *Escanaba Co. v. Chicago*, 107 U. S. 678, 690, 27 L. Ed. 442; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 704, 27 L. Ed. 584; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 13, 31 L. Ed. 629; *Lake Shore, etc., R. Co. v. Ohio*, 165 U. S. 365, 369, 41 L. Ed. 747; *United States v. Bellingham Bay Boom Co.*, 176 U. S. 211, 214, 44 L. Ed. 437; *Leovy v. United States*, 177 U. S. 621, 636, 44 L. Ed. 914; *Cummings v. Chicago*, 188 U. S. 410, 426, 47 L. Ed. 525; *Calumet Grain Co. v. Chicago*, 188 U. S. 431, 47 L. Ed. 532; *Montgomery v. Portland*, 190 U. S. 89, 106, 47 L. Ed. 965; *West Chicago St. R. Co. v. Chicago*, 201 U. S. 506, 527, 50 L. Ed. 845.

The police power to make bridges over its public rivers is as absolutely and exclusively vested in a state as the commercial power is in congress; and no question can arise as to which is bound to give way, when exercised over the same subject matter, till a case of actual collision occurs. This is all that was decided in the case of *Willson v. Black-Bird Creek Marsh Co.*, 2 Pet. 245, 252, 7 L. Ed. 412. *The Passaic Bridges*, 3 Wall., appx., 782, 793.

**Establishment of ports and collection districts.**—When a city is made a port of entry, congress does not thereby assume to regulate its harbor, or detract from the sovereign rights before exercised by each state over her own public rivers. Constituting a town or city a port of entry is an act for the convenience and benefit of such place and its commerce; but for the sake of this benefit the constitution does not require the state to surrender her control over the harbor or the highways leading to it, either by land or water, provided all citizens of the United States enjoy the same privileges which are enjoyed by her own. *The Passaic Bridges*, 3 Wall., appx., 782, 792; *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. Ed. 96; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 704, 27 L. Ed. 584; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 14, 31 L. Ed. 629.

Congress, by conferring the privilege of a port of entry upon a town or city, does not come in conflict with the police power of a state exercised in bridging her own rivers below such port. *The Passaic Bridges*, 3 Wall., appx., 782, 793; *Gilman*



**Necessity for Consent of State to Obstructions Not Superseded.—**  
While congress might give original authority for the erection of bridges and other

*v. Philadelphia*, 3 Wall. 713, 18 L. Ed. 96. See, also, the title BRIDGES, vol. 3, p. 519.

**Effect of improvement by congress.—**See, generally, *Escanaba Co. v. Chicago*, 107 U. S. 678, 688, 690, 27 L. Ed. 442; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 13, 31 L. Ed. 629; *United States v. Bellingham Bay Boom Co.*, 176 U. S. 211, 214, 44 L. Ed. 437; *West Chicago St. R. Co. v. Chicago*, 201 U. S. 506, 527, 50 L. Ed. 845.

"The appropriations made by congress in different years since 1884, for improvements in the Nooksack, among other rivers in the territory of Washington, did not constitute such an assumption of jurisdiction over the navigation of the Nooksack River as to prevent the state from legislating upon the subject." *United States v. Bellingham Bay Boom Co.*, 176 U. S. 211, 214, 44 L. Ed. 437.

Construing all its provisions together, it is clear that when congress declared in the river and harbor act of 1899, under the heading of "Improving Chicago River in Illinois," p. 1156, that "all the work of removing and reconstructing bridges and piers and lowering tunnels necessary to permit a navigable channel" with the prescribed "project" depth of twenty-one feet in Chicago River should be done by the city, without expense to the United States, it meant to give the assent of the United States to any work done by the city towards accomplishing the end which the government had in view. *West Chicago, St. R. Co. v. Chicago*, 201 U. S. 506, 527, 50 L. Ed. 845.

**Effect of ordinance of 1787, and of provisions in acts admitting new states, that navigable waters shall constitute public highways and remain forever free, etc.—**Such freedom is not encroached upon by the removal of obstructions to their navigability or by other legitimate improvement. All highways, whether by land or water, are subject to such crossings as the public necessities and convenience may require, and their character as such is not changed, if the crossings are allowed under reasonable conditions, and not so as to needlessly obstruct the use of the highways. In the sense in which the terms are used by publicists and statesmen, free navigation is consistent with such ferries and bridges across a river for the transit of persons and merchandise as the necessities and convenience of the community may require. *Mobile County v. Kimball*, 102 U. S. 691, 699, 26 L. Ed. 238; *Escanaba Co. v. Chicago*, 107 U. S. 678, 689, 27 L. Ed. 442. See, also, ante, "Effect of Acts Prescribing Free Navigation, etc.," II, B, 6.

**Acts relating to bridge over Pearl River.**

—There is nothing in the act of congress approved March 2d, 1868, 15 Stat. 38,

which, expressly or by implication, diminishes in any degree the legal obligation of the New Orleans, Mobile and Texas railway company to maintain such a draw-bridge in the channel of Pearl River, on the line between Mississippi and Louisiana, as is required by the laws of those states. *New Orleans, etc., R. Co. v. Mississippi*, 112 U. S. 12, 23, 28 L. Ed. 619.

Nor does said act of congress affect the authority of any court of competent jurisdiction, as to the parties, to compel the discharge of that obligation. *New Orleans, etc., R. Co. v. Mississippi*, 112 U. S. 12, 23, 28 L. Ed. 619.

Construing the act of Mississippi of Feb. 7, 1867 (Laws of 1867, 332), in the light of the Louisiana act of August 19, 1868 (Acts of 1868, No. 28, p. 32), and of the act of congress of March 2d, 1868 (15 Stat. 38), it is held that said first mentioned act imposes upon the New Orleans, Mobile and Texas Railway Company the obligation to maintain over the channel of the Pearl River, on the line between Louisiana and Mississippi, a draw bridge with an opening of not less than sixty feet in the clear for the passage of vessels navigating that stream. *New Orleans, etc., R. Co. v. Mississippi*, 112 U. S. 12, 23, 28 L. Ed. 619.

**River and harbor act of Sept. 19, 1890, and amendments, construed.—**The act of Sept. 19, 1890, 26 Stat. 423, as amended by the act of July 13, 1892, 27 Stat. 88, 100, forbidding the closing of navigable rivers of the United States without the consent of the United States, does not apply in every case to waters wholly within the limits of the states although connecting with navigable waters of the same or other states. *Leovy v. United States*, 177 U. S. 621, 636, 44 L. Ed. 914.

The construction claimed for the 5th, 7th, and 10th sections of the river and harbor act of Sept. 19, 1890, that its purpose was to deprive the states of all power as to every stream, even those wholly within their borders, cannot be sustained. The very words of the statute, saying that its terms should not be construed as conferring on the states power to give authority to build bridges on streams not wholly within their limits, by a negative pregnant with an affirmative, demonstrate that the object of the act was not to deprive the several states of the authority to consent to the erection of bridges over navigable waters wholly within their territory. *Cummings v. Chicago*, 188 U. S. 410, 429, 47 L. Ed. 525; *Lake Shore, etc., R. Co. v. Ohio*, 165 U. S. 365, 41 L. Ed. 747; *Calumet Grain Co. v. Chicago*, 188 U. S. 431, 47 L. Ed. 532.

Thus, where the reclamation of swamp and overflowed lands is not only not forbidden, but is recognized as the duty of the state in consideration of the grant of



obstructions when called for by interstate commerce,<sup>32</sup> yet its general policy has been not to ignore the original power of the states by authorizing individuals or corporations to erect such structures without the consent of the local authorities. Under existing enactments, therefore, the right of private persons to erect structures in a navigable water of the United States that is entirely within the limits of a state cannot be said to be complete and absolute without the concurrent or joint assent of both the general and state governments.<sup>33</sup> Of course,

public lands, the state is not forbidden by this statute to close a stream which is not shown to be a navigable water of the United States, actually used in interstate commerce, for the purpose of reclaiming swamp and overflowed lands. *Leovy v. United States*, 177 U. S. 621, 636, 44 L. Ed. 914.

It was, not the intention of congress by the act of Sept. 19, 1890, 26 Stat. 423, as amended by the act of July 13, 1892, 27 Stat. 88, 110, to interfere with or prevent the exercise by the state of Louisiana of its power to reclaim swamp and overflowed lands by regulating and controlling the current of small streams not used habitually as arteries of interstate commerce. *Leovy v. United States*, 177 U. S. 621, 632, 44 L. Ed. 914.

Red Pass in the state of Louisiana is not a navigable water of the United States in such a sense that a dam erected therein for the purpose, and with the effect, of reclaiming overflowed lands and rendering them fit for cultivation, could not be constructed without the previous authorization of the secretary of war as required by the act of congress of Sept. 13, 1890, ch. 907, 26 Stat. 436, 454, as amended by the act of July 13, 1892, ch. 158, 27 Stat. 110. *Leovy v. United States*, 177 U. S. 621, 625, 44 L. Ed. 914.

**Same; construction of the words "navigable waters;" effect as to structures previously erected without authority.**—Conceding, arguendo, that the words "navigable waters," as used in the act of Sept. 19, 1890, 26 Stat. 423, were intended to apply to streams wholly within a state, its obvious purpose was not to deprive the states of authority to grant power to bridge or dam such streams, or to render lawful all bridges or dams previously built without authority, but simply to create an additional and cumulative remedy to prevent such structures, although lawfully authorized, from interfering with commerce. *Leovy v. United States*, 177 U. S. 621, 630, 44 L. Ed. 914; *Lake Shore, etc., R. Co. v. Ohio*, 165 U. S. 365, 369, 41 L. Ed. 747.

**Same; same; construction of words "not affirmatively authorized by law."**—When congress, in 1890, passed the river and harbor bill the expression contained in section ten in regard to obstructions "not affirmatively authorized by law," meant not only a law of congress, but a law of the state in which the river was situated, which had been passed before congress had itself legislated upon the subject. An

obstruction created under the authority of a state statute under such circumstances, was an obstruction "affirmatively authorized by law." *United States v. Bellingham Bay Boom Co.*, 176 U. S. 211, 215, 44 L. Ed. 437.

"When, therefore, the section continues, and provides that 'any such obstruction, \* \* \* whether heretofore or hereafter created,' shall constitute an offense, it referred to an obstruction as described in the first sentence of the section, namely, an 'obstruction not affirmatively authorized by law.' If the obstruction were affirmatively authorized by a law of the state, it did not come within the condemnation of the section, and its continuance was, therefore, valid." *United States v. Bellingham Bay Boom Co.*, 176 U. S. 211, 215, 44 L. Ed. 437.

**32. Congress may give original authority.**—*Crandall v. Nevada*, 6 Wall. 35, 18 L. Ed. 745; *Boom Co. v. Patterson*, 98 U. S. 403, 409, 25 L. Ed. 206; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 13, 31 L. Ed. 629; *Luxton v. North River Bridge Co.*, 153 U. S. 525, 38 L. Ed. 808.

**33. Policy of acts; necessity for consent of state not superseded.**—*Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 31 L. Ed. 629; *Cummings v. Chicago*, 188 U. S. 410, 47 L. Ed. 525; *Calumet Grain Co. v. Chicago*, 188 U. S. 431, 47 L. Ed. 532; *Montgomery v. Portland*, 190 U. S. 89, 106, 47 L. Ed. 965.

"While § 12 of the act of 1890 forbade the construction or extension of piers, wharves, bulkheads, or other works, beyond the harbor lines established under the direction of the secretary of war, in navigable waters of the United States, 'except under such regulations as may be prescribed from time to time by him,' it does not follow that congress intended in such matters to disregard altogether the wishes of the local authorities. Its general legislation so far means nothing more than that the regulations established by the secretary in respect of waters, the navigation and commerce upon which may be regulated by congress, shall not be disregarded even by the states. Congress has not, however, indicated its purpose to wholly ignore the original power of the states to regulate the use of navigable waters entirely within their respective limits." *Montgomery v. Portland*, 190 U. S. 89, 106, 47 L. Ed. 965, following *Cummings v. Chicago*, 188 U. S. 410, 47 L. Ed. 525.

The river and harbor act of March 3,

the right of the government to erect public structures in a navigable water of the United States rests upon different grounds.<sup>34</sup>

3. LIMITATIONS OF POWER OF CONGRESS TO INTERVENE.—The statement previously made, that the power of congress with respect to navigable waters of the United States is a paramount power and that congress may interfere to supersede the power of the states, abolish improvements and obstructions, made under their authority, and forbid the making of others except in accordance with such rules and regulations as it may prescribe,<sup>35</sup> is true only in respect to those matters which by the constitution have been committed to the jurisdiction of congress.<sup>36</sup> For example, congress may very properly interfere to prevent an obstruction of commerce and navigation, since those matters are within the constitutional jurisdiction of congress; but it would have no right to intervene in a matter of private injury or inconvenience wholly unconnected with any question of commerce or navigation, since those are questions of state law and among the matters reserved to the states. It is only when in the judgment of congress the action of the state is deemed to encroach upon the navigation of the stream as a means of interstate and foreign commerce that it may interfere and control or supersede it.<sup>37</sup>

1899, does not manifest the purpose of congress under the power to regulate foreign and interstate commerce authorizing the erection, of docks and like structures in navigable waters that are entirely within the territorial limits of the several states by former parties, against or without the expressed will of a state, and thereby to supersede the original authority of the states. The effect of that act, reasonably interpreted, is to make the erection of a structure in a navigable river, within the limits of a state, depend upon the concurrent or joint assent of both the national government and the state government. The secretary of war, acting under the authority conferred by congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them. But under existing legislation they must, before proceeding under such an authority, obtain also the assent of the state acting by its constituted agencies. *Cummings v. Chicago*, 188 U. S. 410, 430, 47 L. Ed. 525; *Calumet Grain Co. v. Chicago*, 188 U. S. 431, 47 L. Ed. 532.

"In a sense, but only in a limited sense, the United States has taken possession of Calumet River, by improving it, by causing it to be surveyed, and by establishing lines beyond which no dock or other structure shall be erected in the river without the approval or consent of the secretary of war, to whom has been committed the determination of such questions. But congress has not passed any act under which parties, having simply the consent of the secretary, may erect structures in Calumet River without reference to the wishes of the state of Illinois on the subject. We say the state of Illinois, because it must be assumed, under the allegations of the bill, that the ordinances of the city of Chicago making the approval of its department of public works a condition precedent to the right of any one

to erect structures in navigable waters within its limits, are consistent with the constitution and laws of that state and were passed under authority conferred on the city by the state." *Cummings v. Chicago*, 188 U. S. 410, 426, 47 L. Ed. 525; *Calumet Grain Co. v. Chicago*, 188 U. S. 431, 47 L. Ed. 532.

It is because of the ultimate, though yet unexerted, power of congress over the whole subject matter, that the consent of congress is so frequently asked to the erection of bridges over navigable streams. It might give original authority for the erection of such bridges when called for by the demands of interstate commerce by land; but, in many, perhaps the majority of cases, its assent only is asked, and the primary authority is sought at the hands of the state. *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 13, 31 L. Ed. 629.

34. As to right of government to erect public structures.—*Montgomery v. Portland*, 190 U. S. 89, 106, 47 L. Ed. 965.

35. Limitation upon power of congress to intervene.—See ante, "Power of Congress over Navigable Waters a Paramount Power," IV, A, 6; "States Have Full Control of Their Navigable Waters, Subject to Paramount Control of Congress," IV, B, 1.

36. Same.—*Huse v. Glover*, 119 U. S. 543, 548, 30 L. Ed. 487; *Harman v. Chicago*, 147 U. S. 396, 411, 37 L. Ed. 216; *Kansas v. Colorado*, 206 U. S. 46, 51 L. Ed. 956.

37. Same.—*Willson v. Black-Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. Ed. 412; *The Passaic Bridges*, 3 Wall., appx., 782, 793; *Transportation Co. v. Chicago*, 99 U. S. 635, 643, 25 L. Ed. 336; *Miller v. Mayor*, 109 U. S. 385, 394, 27 L. Ed. 971; *Huse v. Glover*, 119 U. S. 543, 548, 30 L. Ed. 487; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 9, 31 L. Ed. 629; *Harman v. Chicago*, 147 U. S. 396, 411, 37 L. Ed. 216; *Lindsay, etc., Co. v. Mullen*, 176 U. S. 126, 146, 44 L. Ed. 400; *Manigault v. Springs*,



4. JUDICIAL CONTROL OF STATE ACTION.—Unless the action taken by the state, or under its authority, in this behalf conflicts with some valid constitutional or statutory enactment either of the state or of the United States, the courts have no jurisdiction to interfere or control its discretion in the premises.<sup>38</sup> In so far as the federal judiciary is concerned, the federal courts, until congress has acted, cannot assume control over the subject as a matter of federal cognizance. It is congress, and not the judicial department, to which the constitution has given the power to regulate foreign and interstate commerce and the courts cannot take the initiative on the subject.<sup>39</sup>

5. POWERS OF STATE AS RESTRICTED BY STATE CONSTITUTION.—This is merely a question of the proper construction of the particular provisions invoked. See the footnotes.<sup>40</sup>

6. AS BETWEEN STATES OF THE UNITED STATES.—See, generally, ante, "As between the States of the Union," II, C, et seq. As to the powers of congress, see

199 U. S. 473, 479, 50 L. Ed. 274; *Kansas v. Colorado*, 206 U. S. 46, 51 L. Ed. 956.

**Same; as to diversion of waters of interstate stream.**—Since congress has no control over the flow of waters within a state except to preserve and improve their navigability and to prevent the destruction of their flow to the detriment of the beneficial enjoyment of any property it may own, it has no standing to intervene on any other ground in a suit whereby one state seeks to restrain another from diverting the waters of an interstate river, in the reclamation of arid lands, to the detriment of the plaintiff state and its inhabitants who are alleged to be injured through the diminution of the flow. *Kansas v. Colorado*, 206 U. S. 46, 51 L. Ed. 956.

**38. Judicial control of state action.**—*Willson v. Black-Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. Ed. 412; *Gilman v. Philadelphia*, 3 Wall. 713, 725, 18 L. Ed. 96; *Pound v. Turck*, 95 U. S. 459, 24 L. Ed. 525; *Transportation Co. v. Chicago*, 99 U. S. 635, 643, 25 L. Ed. 336; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 701, 27 L. Ed. 584; *Miller v. Mayor*, 109 U. S. 385, 394, 27 L. Ed. 971; *Huse v. Glover*, 119 U. S. 543, 548, 30 L. Ed. 487; *Harman v. Chicago*, 147 U. S. 396, 411, 37 L. Ed. 216; *Lindsay, etc., Co. v. Mullen*, 176 U. S. 126, 44 L. Ed. 400; *Manigault v. Springs*, 199 U. S. 473, 479, 50 L. Ed. 274. See, generally, the title CONSTITUTIONAL LAW, vol. 4, p. 255, et seq.

**39. Same; powers of federal judiciary.**—*Willson v. Black-Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. Ed. 412; *Gilman v. Philadelphia*, 3 Wall. 713, 725, 18 L. Ed. 96; *The Passaic Bridges*, 3 Wall., appx., 782; *Pound v. Turck*, 95 U. S. 459, 24 L. Ed. 525; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 701, 27 L. Ed. 584; *Miller v. Mayor*, 109 U. S. 385, 394, 27 L. Ed. 971; *Huse v. Glover*, 119 U. S. 543, 548, 30 L. Ed. 487; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8, 31 L. Ed. 629; *Harman v. Chicago*, 147 U. S. 396, 411, 37 L. Ed. 216. See ante, "Obstructions Not a Common-Law Offense against the United States," IV, A, 4; "Not Controllable by the Judiciary," IV, A, 7.

It is for congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided. *Gilman v. Philadelphia*, 3 Wall. 713, 725, 18 L. Ed. 96.

When congress shall have interposed to supervise the erection and maintenance of wharves, improvements, obstructions, etc., it will be time enough for the courts to carry its regulations into effect by judicial proceedings properly instituted. But until congress has acted, the courts of the United States cannot assume control over the subject as a matter of federal cognizance. It is congress, and not the judicial department, to which the constitution has given the power to regulate commerce with foreign nations and among the several states. The courts can never take the initiative on this subject. *Transportation Co. v. Parkersburg*, 107 U. S. 691, 701, 27 L. Ed. 584.

**40. Power of state as restricted by state constitution; South Carolina.**—The provisions of the constitution of South Carolina do not interfere with the common-law powers of the state over its navigable waters. *Manigault v. Springs*, 199 U. S. 473, 478, 50 L. Ed. 274.

The South Carolina act of 1903, authorizing the construction of a dam across Kinloch Creek in that state, is not obnoxious to the provisions of the constitution of South Carolina, article 3, § 34, that "The general assembly of the state shall not enact local or special laws concerning any of the following subjects, or for any of the following purposes, to wit: \* \* \* II. To lay out, open, alter or work roads or highways." *Manigault v. Springs*, 199 U. S. 473, 486, 50 L. Ed. 274.

Admitting that, for the purposes of transit and travel, a river may be considered a highway, yet in connection with the words "To lay out, open, alter or work roads," the word "highways" as used in the South Carolina constitution, art. 3, § 34, is used in its ordinary sense, and as an equivalent to a public road. The power given by this section is evidently inapplicable to water highways, which are neither laid out, opened, altered or worked



ante, "Powers of Congress," IV, A, et seq. As to proceeding to abate, see post, "Proceedings to Abate or Remove Obstructions," IV, F. See, also, the title COURTS, vol. 4, p. 1011.

**Obstruction or Improvement as Violating Compact between States.**—See ante, "As to Free Navigation," II, C, 1; "Power to Improve Includes Power to Obstruct, Alter Course of Channel, etc.," IV, A, 2.

7. **RIGHT OF STATE TO CHARGE FOR USE OF IMPROVEMENTS.—As Taxation of Interstate Commerce.**—See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 395, 429, 430.

**As Affected by the Ordinance of 1787.**—See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 395, 396.

**As a Deprivation of Property without Due Process of Law.**—See the title DUE PROCESS OF LAW, vol. 5, p. 586.

**C. Right of Individual to Obstruct, Improve, Divert, etc.**—See ante, "As to Reclaimed Lands," II, D, 3, c; "Character in Which Title Held by State," II, D, 3, d; "Right of State to Use or Dispose of Lands," II, D, 3, e; "Application of Principles to Inland Lakes and to Navigable Streams above Tidewater," II, D, 3, f; "Same; Federal Grants; Extent and Incidents of Riparian Ownership Determined by State Law," II, D, 3, g; "State May Grant Bed without Regard to Ownership of Adjacent Upland," II, D, 3, i; "Right to Construct and Maintain Wharves, Piers, etc.," III, C, 3; "Rights of Individuals," III, C, 4, b; "Nature of Riparian Ownership; Deprivation without Compensation or Without Due Process," III, C, 5; "Rights of Grantee or Licensee Who Does Not Own Adjacent Upland," III, C, 8; "Power to Improve Includes Power to Protect and Prevent or Remove Obstructions," IV, A, 3; "Obstruction Not a Common-Law Offense against the United States," IV, A, 4; "States Have Full Control of Their Navigable Waters Subject to Paramount Control of Congress," IV, B, 1. See, also, post, "Adjustment of Individual Rights, Right to Compensation, etc.," IV, D, et seq.

**D. Adjustment of Individual Rights, Right to Compensation, etc.**—1. **IMPROVEMENT OF STREAMS, HARBORS, ETC., A PUBLIC PURPOSE.**—See the title EMINENT DOMAIN, vol. 5, p. 767.

**Constitutionality of Mill Acts Authorizing the Flooding of Lands for Privately Owned Mills.**—See the titles DUE PROCESS OF LAW, vol. 5, p. 611, 612; EMINENT DOMAIN, vol. 5, p. 767.

2. **RIGHT TO IMPROVE NOT HAMPERED BY OBLIGATION TO MAKE COMPENSATION FOR INJURIES CAUSED.**—See, generally, the titles DUE PROCESS OF LAW, vol. 5, pp. 564, 583, 584, 593, 595, 596, 598, et seq.; EMINENT DOMAIN, vol. 5, p. 771; INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 340, 341. See, also, ante, "Character in Which Title Held by State," II, D, 3, d; "Right of State to Use or Dispose of Lands," II, D, 3, e; "Nature of Riparian Ownership; Deprivation without Compensation or without Due Process," III, C, 5.

**Destruction, Removal, Alteration of Bridges, Tunnels, etc.**—See the titles BRIDGES, vol. 3, pp. 524, 525; CONSTITUTIONAL LAW, vol. 4, pp. 405, 406, 407; DUE PROCESS OF LAW, vol. 5, pp. 583, 584, 612; EMINENT DOMAIN, vol. 5, pp. 773, 777, 784.

**Where Property Actually Taken.**—See the titles DUE PROCESS OF LAW, vol. 5, pp. 584, 585, 596, 598, et seq.; EMINENT DOMAIN, vol. 5, pp. 777, 784.

**As to Charter or Contract Rights.**—See the titles CONSTITUTIONAL LAW, vol. 4, p. 420, et seq.; CORPORATIONS, vol. 4, p. 677, et seq.; IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, pp. 793, 799. See footnote.<sup>41</sup>

in the ordinary sense of these words. *Manigault v. Springs*, 199 U. S. 473, 486, 50 L. Ed. 274.

41. **Removal of obstructions expressly authorized.**—When in pursuance of an invitation and under authority given by the

state and the United States, a private company has constructed a lock and dam, it does not lie in the power of the state or the United States to say that such lock and dam are an obstruction and wrongfully there, or that the right to compen-

**Where Property Held under Servitude, or Right to Remove Expressly Reserved.**—See the title DUE PROCESS OF LAW, vol. 5, pp. 574, 575, 583, 584, 597.

3. **ADJUSTMENT OF CONFLICTING RIGHTS AND INTERESTS.—Powers of Congress.**—As to the conflicting rights of bridge proprietors and those who wish to use the stream for purposes of navigation, and who claim that navigation is obstructed by the bridge or other structure in the stream, we have seen that the paramount control rests with congress,<sup>42</sup> that congress has power to say what shall or shall not constitute an obstruction and to legalize what would otherwise be an unlawful obstruction,<sup>43</sup> and that its powers in these respects are not controllable by the judiciary.<sup>44</sup> In short, the judiciary has no power to declare bridges or other structures which have been authorized or legalized by congress to be nuisances at the suit of persons claiming to suffer special or peculiar injury by reason of their erection and maintenance.<sup>45</sup>

**Power of the States.**—The states having control over streams wholly within their limits may make such provisions for their use as highways as will best reconcile and accommodate the interests of all concerned in the matter; and that the regulations adopted by the state may be productive of injury and inconvenience to some of the interests seeking to use the stream, or of loss to others through injury to their business or property, is no ground for declaring them invalid. Such injury, inconvenience or loss, in the absence of any constitutional provision against the damaging of property, comes strictly within the rule of *damnum absque injuria*.<sup>46</sup> It is for the legislative department to say what shall

sation for the use of this improvement by the public does not belong to its owner, the navigation company. *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 335, 37 L. Ed. 463.

42. **Adjustment of conflicting rights and interests; powers of congress.**—See ante, "Power of Congress over Navigable Waters a Paramount Power," IV, A, 6; "States Have Full Control of Their Navigable Waters Subject to Paramount Control of Congress," IV, B, 1.

43. **Same.**—See ante, "Power to Improve Includes Power to Protect and to Prevent or Remove Obstructions," IV, A, 3. See, also, the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 342.

44. **Same.**—See ante, "Not Controllable by the Judiciary," IV, A, 7.

45. **Same; authorized structures not nuisances.**—*Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 97, 9 L. Ed. 1012; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. 421, 15 L. Ed. 435; *The Clinton Bridge*, 10 Wall. 454, 19 L. Ed. 969; *Miller v. Mayor*, 109 U. S. 385, 394, 27 L. Ed. 971; *Hamilton v. Vicksburg, etc., Railroad*, 119 U. S. 280, 284, 30 L. Ed. 393.

"If, then, as we have said, congress had power to authorize the construction of an aqueduct across the Potomac; if so having the power, they have given to the Alexandria Canal Company the authority to construct it; and if, in the construction, that company has not exceeded the authority given them, either in the thing done, or in the manner of doing it, so as to produce the least injury or inconvenience practicable, consistently with the execution of the work; it would be difficult, as a legal proposition, to predicate

of such a work that it was unlawful, or that it was a nuisance; so as to justify a court in interfering to prevent its progress towards completion." *Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 97, 9 L. Ed. 1012. See, also, the titles BRIDGES, vol. 3, p. 518; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 342; NUISANCES.

46. **Adjustment of conflicting rights; powers of states.**—*Willson v. Black-Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. Ed. 412; *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. Ed. 96; *The Passaic Bridges*, 3 Wall., appx., 782; *Mississippi, etc., R. Co. v. Ward*, 2 Black 485, 17 L. Ed. 311; *Pound v. Turck*, 95 U. S. 459, 463, 24 L. Ed. 525; *Transportation Co. v. Chicago*, 99 U. S. 635, 643, 25 L. Ed. 336; *Escanaba Co. v. Chicago*, 107 U. S. 678, 682, 27 L. Ed. 442; *Miller v. Mayor*, 109 U. S. 385, 394, 27 L. Ed. 971; *Cardwell v. American Bridge Co.*, 113 U. S. 205, 28 L. Ed. 959; *Huse v. Glover*, 119 U. S. 543, 548, 30 L. Ed. 487; *Hamilton v. Vicksburg, etc., Railroad*, 119 U. S. 280, 284, 30 L. Ed. 393; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 31 L. Ed. 629; *Harman v. Chicago*, 147 U. S. 396, 411, 37 L. Ed. 216; *Lake Shore, etc., R. Co. v. Ohio*, 165 U. S. 365, 41 L. Ed. 747; *Lindsay, etc., Co. v. Mullen*, 176 U. S. 126, 146, 44 L. Ed. 400; *Manigault v. Springs*, 199 U. S. 473, 479, 50 L. Ed. 274. See, also, ante, "Judicial Control of State Action," IV, B, 4. And see the titles DUE PROCESS OF LAW, vol. 5, pp. 577, 595; NUISANCES.

It is within the competency of the legislature to make such provisions as will prevent the use by one working injury to others; and if a party wishes to use a



or shall not be deemed an unlawful obstruction, and that which the law authorizes cannot be deemed a nuisance so as to give rise to a common-law right of action.<sup>47</sup>

**No Federal Question Arises.**—No federal question arises in this class of cases unless the acts complained of come in conflict with the constitution or laws of the United States. Even though the measure complained of stops a navigable stream it is an affair solely between the state and its own citizens, of

highway in a manner which may tend to work injury to others he cannot complain if the legislature interferes and provides some means for preventing such injury. *Lindsay, etc., Co. v. Mullen*, 176 U. S. 126, 146, 44 L. Ed. 400.

The rights of commerce by vessels are not paramount to the rights of commerce by any other way, as, for example, traffic upon bridges crossing the stream. The rights of each class are to be enjoyed without invasion of the equal rights of others. Some concession must be made on every side for the convenience and the harmonious pursuit of different occupations. *Escanaba Co. v. Chicago*, 107 U. S. 678, 682, 27 L. Ed. 442.

It is the right of a state to make dams, booms and other instrumentalities to be used in the navigation of logs and lumber. *Lindsay, etc., Co. v. Mullen*, 176 U. S. 126, 148, 44 L. Ed. 400; *Pound v. Turck*, 95 U. S. 459, 24 L. Ed. 525.

"There are within the state of Wisconsin, and perhaps other states, many small streams navigable for a short distance from their mouths in one of the great rivers of the country, by steamboats, but whose greatest value in water carriage is as outlets to saw logs, sawed lumber, coal, salt, etc. In order to develop their greatest utility in that regard, it is often essential that such structures as dams, booms, piers, etc., should be used, which are substantial obstructions to general navigation, and more or less so to rafts and barges. But to the legislature of the state may be most appropriately confided the authority to authorize these structures where their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interest of all concerned in the matter. And since the doctrine we have deduced from the cases recognizes the right of congress to interfere and control the matter whenever it may deem it necessary to do so, the exercise of this limited power may all the more safely be confided to the local legislatures." *Pound v. Turck*, 95 U. S. 459, 464, 24 L. Ed. 525.

A party is not liable in a civil action for obstructing the navigation of the river by means of a dam which he has erected under the authority and pursuant to the requirements of such a statute. *Pound v. Turck*, 95 U. S. 459, 24 L. Ed. 525.

Whenever the exercise of a right, conferred by law for the benefit of the public, is attended with temporary inconvenience

to private parties, in common with the public in general, they are not entitled to any damages therefor. The obstruction caused to the navigation of a stream during the progress of the work on a new bridge, therefore, affords no ground of action. The inconvenience is *damnum absque injuria*. *Hamilton v. Vicksburg, etc., Railroad*, 119 U. S. 280, 284, 30 L. Ed. 393.

A state may authorize a coffer dam, which is only a temporary obstruction, which is no physical encroachment upon the plaintiff's property, and which is maintained only so long as it is needed for the public improvement. *Transportation Co. v. Chicago*, 99 U. S. 635, 643, 25 L. Ed. 336.

Independently of any constitutional restriction, there is nothing unjust or unreasonable in the ordinance of the city of Chicago which forbids the opening of the draws in the bridges spanning the Chicago River between the hours of six and seven o'clock in the morning and half past five and half past six in the evening, and which forbids that any draw shall be kept open for a longer period than ten minutes at any one time between the hours of seven in the morning and five-thirty in the evening. *Escanaba Co. v. Chicago*, 107 U. S. 678, 682, 27 L. Ed. 442.

If, in the opinion of the state, greater benefit would result to her commerce by the improvements made than by leaving the river in its natural state—and on that point the state must necessarily determine for itself—it may authorize them, although increased inconvenience and expense may thereby result to the business of individuals. The private inconvenience must yield to the public good. *Huse v. Glover*, 119 U. S. 543, 548, 30 L. Ed. 487; *Harman v. Chicago*, 147 U. S. 396, 411, 37 L. Ed. 216.

**47. Authorized structures not nuisances.**—*Transportation Co. v. Chicago*, 99 U. S. 635, 640, 25 L. Ed. 336; *Miller v. Mayor*, 109 U. S. 385, 394, 27 L. Ed. 971. See, also, the titles BRIDGES, vol. 3, p. 518; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 342; NUISANCES.

The bridge over East River connecting New York and Brooklyn being constructed in accordance with the legislation of both the state and federal governments must be deemed a lawful structure. It cannot, after such legislation, be treated as a public nuisance; and however much it may interfere with the public right of navigation in the East River, and thereby



which the federal courts can take no cognizance until congress has intervened and enacted some regulation whose violation calls into play the powers of the judiciary.<sup>48</sup>

**E. Ownership of Water Power Created by Improvement.**—See, generally, the titles *CANALS*, vol. 3, pp. 550, 551; *DUE PROCESS OF LAW*, vol. 5, pp. 614, 615.

**Ownership of Surplus Water Power and Method of Recovering Same.**—See the titles *CANALS*, vol. 3, pp. 550, 551; *CONSTITUTIONAL LAW*, vol. 4, pp. 437, 438; *DUE PROCESS OF LAW*, vol. 5, pp. 614, 615, 681.

**Control and Right of Disposal as between State and United States.**—Where, in the construction of dams and a canal for the purpose of improving navigation, a water power is created, it rests with the authority (that is, state or federal) which owns and controls that navigation to say what quantity of water can be treated as surplus, with due regard to navigation, and at which points in the dam or canal the water for power may be withdrawn. In such matters there can be no divided sovereignty.<sup>49</sup> But after such waters have flowed over the

affect the profits or business of private persons, it cannot, on that ground, be the subject of complaint before the courts. *Miller v. Mayor*, 109 U. S. 385, 394, 27 L. Ed. 971.

**48. No federal question arises.**—*Willson v. Black-Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. Ed. 412; *Mississippi, etc., R. Co. v. Ward*, 2 Black 485, 17 L. Ed. 311; *The Passaic Bridges*, 3 Wall., appx., 782, 793; *Pound v. Turck*, 95 U. S. 459, 463, 24 L. Ed. 525; *Transportation Co. v. Chicago*, 99 U. S. 635, 643, 25 L. Ed. 336; *Hamilton v. Vicksburg, etc., Railroad*, 119 U. S. 280, 284, 30 L. Ed. 393; *Huse v. Glover*, 119 U. S. 543, 548, 30 L. Ed. 487; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 19, 31 L. Ed. 629; *Harman v. Chicago*, 147 U. S. 396, 411, 37 L. Ed. 216; *United States v. Bellingham Bay Boom Co.*, 176 U. S. 211, 218, 44 L. Ed. 437. See, also, post, "Jurisdiction; State and Federal Questions," IV, F, 2, b, et seq.

In the *Black Bird Creek Case*, the legislature of the state of Delaware had authorized the construction of a dam across a tidewater creek in that state for the purpose of reclaiming some marsh land and improving the health of its inhabitants. "But the measure authorized by this Act" said Chief Justice Marshall, "stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgement, unless it comes in conflict with the constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance." *Willson v. Black-Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. Ed. 412.

"Whether a bridge over the Passaic will injuriously affect the harbor of Newark is a question which the people of New Jersey can best determine, and have a right to determine for themselves. If the bridges be an inconvenience to sloops and schooners navigating their port, it is no more so to others than to them. I

see no reason why the state of New Jersey, in the exercise of her absolute sovereignty over the river, may not stop it up altogether, and establish the harbor and wharves of Newark at the mouth of the river." *The Passaic Bridges*, 3 Wall., appx., 782, 793.

In the case of *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. Ed. 96, the plaintiff was owner of a wharf on the Schuylkill River, in the city of Philadelphia, at a point where that river had been navigable for time immemorial by a large class of vessels. The state of Pennsylvania passed a law in 1857 authorizing the city to build a bridge across that stream just below plaintiff's wharf, and between it and the mouth of the river. There was no question that this bridge would wholly exclude a large part of the vessels which had theretofore navigated the Schuylkill up to plaintiff's wharf. He applied to the circuit court of the United States for an injunction, and that court dismissed his bill. On appeal to the federal supreme court, the decree was affirmed, on the express ground that in the absence of legislation by congress the act of the Pennsylvania legislature was not repugnant to the commerce clause of the constitution. *Pound v. Turck*, 95 U. S. 459, 463, 24 L. Ed. 525.

**49. Control of water power as between state and United States.**—*Green Bay, etc., Canal Co. v. Patten Paper Co.*, 172 U. S. 58, 43 L. Ed. 364; *S. C.*, 173 U. S. 179, 43 L. Ed. 658.

In the case of *Green Bay, etc., Canal Co. v. Patten Paper Co.*, 172 U. S. 58, 43 L. Ed. 364, the court, upon a consideration of the various statutes and conveyances and other facts contained in the record, reached the conclusion that the water power incidentally created by the erection and maintenance of the dam and canal for the purpose of improving the navigation of Fox River is subject to control and appropriation by the United States, and not by the state of Wisconsin; that the

dam and through the sluices, and have found their way into the unimproved bed of the stream, the rights and disputes of the riparian owners must be determined by the state courts.<sup>50</sup>

**F. Proceedings to Abate or Remove Obstructions**—1. **GENERALLY**.—See, generally, the title **NUISANCES**. As to proceedings to remove bridges, see, generally, the title **BRIDGES**, vol. 3, pp. 525, 526.

2. **CIVIL PROCEEDINGS**—a. *Who May Institute*—(1) *Private Persons*.—Although the right of navigation is a public right, open to all, yet a private party sustaining special damages by the unlawful obstruction of navigation may maintain an action at law against the party creating it to recover his damages; or, to prevent irreparable injury, file a bill in chancery for the purpose of removing the obstruction.<sup>51</sup>

**But Railroad Company Not to Appropriate Improvements without Compensation**.—But if a riparian proprietor improves his property with a view to its use in connection with the river, without complying with the acts of congress, a railroad company, under the power of eminent domain granted by the state, cannot appropriate his improvements to its own use without his consent and without making him compensation.<sup>52</sup>

**Right of Individual to Object Where Harbor Line Is Established in Violation of Federal Law**.—See ante, "Right to Construct and Maintain Wharves, Piers, etc.," III, C, 3.

(2) *States*.—Where a state has constructed canals and lines of railroads and other means of travel and transportation which will be injured by the obstruction created by a bridge over the river beyond its borders, it has a sufficient interest to give it a standing to institute proceedings looking to the abatement of the bridge.<sup>53</sup>

(3) *United States*.—See, generally, the title **BRIDGES**, vol. 3, p. 525. See, also, ante, "Powers of Congress," IV, A, et seq.

**Power to Act Through Secretary of War or Other Heads of Departments**.—See ante, "Delegation of Power to Improve, Obstruct or Remove Ob-

legal effect and import of the sale and conveyance by the canal company were to vest the absolute ownership of the improvement and appurtenances in the United States, which proprietary rights thereby became added to the jurisdiction and control that the United States possessed over the Fox River as a navigable water; that by virtue of the act of congress of June 10, 1872, consenting to that provision in the deed whereby the canal company reserved and retained to itself the water power and the lots appurtenant thereto, the United States, in effect, granted to the company the property so reserved, together with the right to continue in the possession and enjoyment thereof, and that said company became thereby possessed of whatever rights to the use of this water power that could be validly granted by the United States, subject, as to the mode and extent of its use and enjoyment, to the sole control of the United States, and not the control of the state of Wisconsin. *Green Bay, etc., Canal Co. v. Patten Paper Co.*, 173 U. S. 179, 43 L. Ed. 658.

50. **Same; after return of waters to stream**.—*Green Bay, etc., Canal Co. v. Patten Paper Co.*, 173 U. S. 179, 190, 43 L. Ed. 658.

51. **Civil proceedings; right of private**

**person to institute**.—*Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 14 L. Ed. 249; *S. C.*, 18 How. 421, 431, 15 L. Ed. 435; *Mississippi, etc., R. Co. v. Ward*, 2 Black 485, 17 L. Ed. 311.

52. **Railroad company not to appropriate improvements without compensation**.—*Railway Co. v. Renwick*, 102 U. S. 180, 182, 26 L. Ed. 51.

In such a case the court says: "The controversy is not between the public and the riparian owner as to his right to keep up his improvements. The public does not complain, but the railroad company wants the improvements. In the hands of the company they will be just as much a nuisance, so far as the public is concerned, as they can be if kept up by the owner. As between these two parties the improvements are the property of the riparian proprietor, and if the company wants them for its own use it must make compensation." *Railway Co. v. Renwick*, 102 U. S. 180, 182, 26 L. Ed. 51.

53. **State may institute civil proceeding**.—*Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 14 L. Ed. 249. See ante, "As between States of the United States," IV, B, 6. See, also, the titles **COURTS**, vol. 4, p. 1011; **NUISANCES**; **WATERS AND WATER-COURSES**.



structions, to Heads of Departments," IV, A, 5. See, also, the title BRIDGES, vol. 4, p. 525.

**Civil Proceeding by Attorney General.**—By the passage of the river and harbor bill of September 19, 1890, congress in the 10th section has acted upon the subject of obstruction, and has provided for the removal of any obstruction to a navigable river with the exceptions named in the section. When the attorney general, therefore, acts under the authority conferred by this statute, he has the right to call upon the court, upon proper proofs being made, to enjoin the continuance of any obstruction not authorized by the statute, and the court has jurisdiction, and it is its duty to decide the question whether the existing obstruction is or is not affirmatively authorized by law.<sup>54</sup>

b. *Jurisdiction; State and Federal Questions*—(1) *In Proceeding Instituted by Private Person.*—A proceeding against a bridge, as a nuisance, on the ground of a private and irreparable injury, may be sustained, at the instance of an individual or a corporation, either in the federal or state courts.<sup>55</sup> But whether bridges or other obstructions are conformable, or not conformable, to the state law relied on, is a state question, not a federal one. The failure of state functionaries to prosecute for breaches of the state law does not confer power upon United States functionaries to prosecute under a United States law, when there is no such law in existence.<sup>56</sup> So far as violations of state law are concerned, it is only where the litigant parties are citizens of different states, that the circuit courts of the United States may take jurisdiction.<sup>57</sup> And even where the suit is brought upon the ground that the obstruction complained of is being erected or maintained in violation of the federal statutes, the finding of the trial court, sustained by the state court of last resort, that the stream is nonnavigable, is a finding of fact, conclusive upon writ of error to the state court from the supreme court of the United States.<sup>58</sup>

**Territorial Jurisdiction.**—Upon a bill for the abatement of a nuisance, brought in the district court of the United States, that court can exercise no jurisdiction, territorially, beyond what a court of the state might have exercised.<sup>59</sup>

(2) *Proceeding Instituted by State.*—See, generally, the title COURTS, vol. 4, pp. 1009, 1010, 1011. And see footnote.<sup>60</sup>

(3) *Proceeding by the United States.*—Where, upon a bill in equity by

Quære, whether a state suing for the prevention of a nuisance in a navigable river, which is one of its boundaries, must not aver and show that she sustains some special and peculiar injury thereby, such as would enable a private person to maintain a similar action. *South Carolina v. Georgia*, 93 U. S. 4, 23 L. Ed. 782. See the title COURTS, vol. 4, p. 1009.

54. *Proceeding by United States through attorney general.*—*United States v. Bellingham Bay Boom Co.*, 176 U. S. 211, 217, 44 L. Ed. 437.

55. *Jurisdiction; of proceeding by private person.*—*Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 14 L. Ed. 249.

56. *Same; state and federal questions.*—*Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 9, 31 L. Ed. 629. *United States v. Bellingham Bay Boom Co.*, 176 U. S. 211, 218, 44 L. Ed. 437.

57. *Same; same.*—*Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8, 31 L. Ed. 629. See ante, "Adjustment of Conflicting Rights and Interests," IV, D, 3.

58. *Same; finding of fact by state court.*

—*Egan v. Hart*, 165 U. S. 188, 41 L. Ed. 680.

59. *Territorial jurisdiction.*—*Mississippi, etc., R. Co. v. Ward*, 2 Black 485, 17 L. Ed. 311. See, especially, the title BRIDGES, vol. 3, p. 526. And see the title NUISANCES.

The Mississippi River being a boundary between states throughout nearly its whole length, there are judicial difficulties in dealing with nuisances between its shores, which can only be removed by legislation. *Mississippi, etc., R. Co. v. Ward*, 2 Black 485, 17 L. Ed. 311. See the title BRIDGES, vol. 3, p. 526.

60. *Proceeding instituted by state.*—The state of Pennsylvania having constructed lines of canal and railroad and other means of travel and transportation, which would be injured in their revenues by the obstruction in the River Ohio, created by a bridge at Wheeling, has a sufficiently direct interest to sustain an application to the United States supreme court, in the exercise of original jurisdiction, for an injunction to remove the obstruction. The remedy at law would be incomplete. Penn-



the attorney general of the United States to effect the abatement of an obstruction which is being erected or maintained in violation of the federal statutes because "not affirmatively authorized by law," a defendant claims that the obstruction in the river was affirmatively authorized by an act of the state legislature, the federal court must look at that act for the purpose of determining the validity of the claim.<sup>61</sup> In such inquiry the court is bound to decide whether the boom or other structure, as existing, is authorized by any law of the state, when such law is claimed to be a justification for its creation or continuance. That question is not for the state alone, but must necessarily be decided by the federal court in the course of exercising the jurisdiction conferred upon it by the federal statute.<sup>62</sup> If there were no federal law in existence, then the question whether the boom was authorized by a state law or complied with its provisions, would be a state question. But the federal law having been passed, the question then is whether the structure is permitted by that law, and when that law says it may continue, if affirmatively authorized by a state law, the question whether it is so authorized becomes in effect a question whether the federal law does or does not permit it. If it is authorized by the state law, then the federal law provides that it may continue; and whether it is or is not, becomes a question for the federal court to decide.<sup>63</sup>

c. *Pleading and Procedure*.—See the title NUISANCES.

d. *Presumption and Proof of Nuisance*.—See ante, "Right to Construct and Maintain Wharves, Piers, etc.," III, C, 3. See, also, the titles BRIDGES, vol. 3, p. 526; NUISANCES.

e. *Judgment or Decree*.—**Generally**.—See the title NUISANCES.

**Abatement or Alteration of Bridge**.—See the titles BRIDGES, vol. 3, pp. 525, 526; NUISANCES.

**Comparison of Injuries and Benefits**.—See the title BRIDGES, vol. 3, p. 526.

**Where Only Part of Bridge Is within Jurisdiction of Court**.—See the title BRIDGES, vol. 3, p. 526.

**Power to Declare That Illegal Which Congress or the Legislature Has Authorized or Legalized**.—See ante, "Power to Improve Includes Power to Protect and to Prevent or Remove Obstructions," IV, A, 3; "Power of Congress Over Navigable Waters a Paramount Power," IV, A, 6; "Not Controllable by the Judiciary," IV, A, 7; "Judicial Control of State Action," IV, B, 4; "Adjustment of Conflicting Rights and Interests," IV, D, 3. See, also, the title NUISANCES.

3. CRIMINAL PROCEEDINGS—*a. Generally*.—At common law the obstruction of navigation upon a navigable stream, whether by the erection of a bridge or otherwise, is punishable unless authorized by law;<sup>64</sup> but where a bridge over a navigable stream is erected for public purposes and produces a public benefit, and is in a reasonable situation and leaves a reasonable space for the passage of vessels, it is not indictable.<sup>65</sup> But it is no defense to an indictment for erecting a wharf on the public property that it is a public benefit.<sup>66</sup>

*sylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 14 L. Ed. 249.

61. **Proceeding by United States; state and federal questions**.—*United States v. Bellingham Bay Boom Co.*, 176 U. S. 211, 216, 44 L. Ed. 437.

62. **Same; whether obstruction authorized by law**.—*United States v. Bellingham Bay Boom Co.*, 176 U. S. 211, 217, 44 L. Ed. 437.

63. **Same; same**.—*United States v. Bellingham Bay Boom Co.*, 176 U. S. 211, 218, 44 L. Ed. 437. See, also, ante, "Not Every Act of Congress That Operates to Supersede Power of States," IV, B, 2; "Adjustment of Conflicting Rights and Interests," IV, D, 3.

In this case it was held that the boom in question violated the statute under which it was built, because it did not allow free passage between the boom and the opposite shore for boats or vessels as provided for in the state law. *United States v. Bellingham Bay Boom Co.*, 176 U. S. 211, 218, 44 L. Ed. 437.

64. **Criminal proceeding; obstruction of navigation as an offense at common law**.—*Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 559, 9 L. Ed. 773.

65. **Same**.—*Mississippi, etc., R. Co. v. Ward*, 2 Black 485, 17 L. Ed. 311. See, generally, the title NUISANCES.

66. **Same; as to wharves**.—*Respublica v. Caldwell*, 1 Dall. 150, 1 L. Ed. 77.

b. *Not a Common-Law Offense against the United States.*—See ante, "Obstruction Not a Common-Law Offense against the United States," IV, A, 4.

c. *Indictment and Proceedings Thereunder.*—See, generally, the title NUISANCES.

**Prosecution under Federal Statute.**—See, generally, ante, "Not Every Act of Congress That Operates to Supersede Power of States," IV, B, 2.

**Same; Defenses.**—A person indicted for building a dam across a navigable stream of the United States without the authority of the Secretary of War is not deprived of the defense that the act was done under the order of the police jury, for the purpose of benefiting the health of the community, by reason of the failure of the order to recite that it was done in order to promote the public health.<sup>67</sup>

**Same; Questions of Law and Fact.**—The fact that it was left to the jury to determine whether a given stream was navigable does not render the decision of the jury binding upon the United States supreme court. They have a right to consider under what instructions and definitions given by the trial court the jury found their verdict.<sup>68</sup>

### V. Navigable Waters as Boundaries.

See the title BOUNDARIES, vol. 3, pp. 476, et seq.; 494, et seq. See, also, ante, "United States Has Not Undertaken to Grant Soils under Navigable Waters; Operation of Surveys and General Grants," II, B, 2, c; "Grants of Navigable Waters and Underlying Soils in the States," II, B, 4; "Same; Federal Grants; Extent and Incidents of Riparian Ownership Determined by State Law," II, D, 3, g.

**NAVIGATION.**—See the titles ADMIRALTY, vol. 1, p. 119; COLLISION, vol. 3, p. 870; SHIPS AND SHIPPING. See note 1.

**NAVY.**—See the title ARMY AND NAVY, vol. 2, p. 494. And see note 2.

**NEAR—NEAREST—NEARLY.**—The word "near" is relative in its signification. What would be near in one locality would not be in another. Each case must be governed by its special circumstances.<sup>3</sup>

**67. Prosecution under federal statute; defenses.**—*Leovy v. United States*, 177 U. S. 621, 636, 44 L. Ed. 914.

**68. Same; questions of law and fact.**—*Leovy v. United States*, 177 U. S. 621, 628, 44 L. Ed. 914.

**1. Accidents of navigation.**—Damage to sugar, attributable, not to a peril of the sea, but to the explosion of part of the cargo after the ship had ended her voyage, and had been finally and intentionally moored at the dock, there to remain until her cargo was taken out of her, cannot be considered as "occasioned by accidents of navigation." *The G. R. Booth*, 171 U. S. 450, 461, 43 L. Ed. 234.

**Free navigation.**—See FREE NAVIGATION, vol. 6, p. 533.

**Harter act.**—As to meaning of term navigation and management of a vessel as used in the Harter act, see MANAGEMENT, vol. 7, p. 1085. And see the title SHIPS AND SHIPPING.

**Inland navigation.**—See INLAND NAVIGATION, vol. 6, p. 1068.

**2. Navy.**—Under the joint resolution of congress, providing for the annexation of Texas to the United States, the officers of the navy of Texas did not pass into the naval service of the United States. The

transfer of the navy of Texas related exclusively to the ships of war and their armaments. The court said: "The argument in favor of including the officers of the navy of Texas in the transfer of the ships might be urged with equal force by the officers and hands in charge of the navy yard, or of those at the time in charge of the fortifications; for the term navy, in the connection in which it is used, no more includes, ex vi termini, the officers and crew on board, than the term 'navy yard' includes the officers and hands in charge of that part of the public property, or the term 'fortifications' includes the officers and soldiers of the republic engaged in manning them." *Brashear v. Mason*, 6 How. 92, 99, 12 L. Ed. 357.

The term "vessels of the navy" included for the purposes of the prize act of 1864 all armed vessels officered and manned by the United States, and under the control of the department of the navy. *United States v. Steever*, 113 U. S. 747, 753, 28 L. Ed. 1133. See, generally, the title PRIZE.

**3. Near.**—*Kirkbride v. Lafayette County*, 108 U. S. 208, 211, 27 L. Ed. 705. Towns were authorized to subscribe to railroad companies in building through or near the township. It was held that it could



**NEBRASKA.**—See the title **BOUNDARIES**, vol. 3, p. 494.

**NECESSARY—NECESSITY—NECESSARILY.**—The word “necessary” has not a fixed character, peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary.<sup>1</sup>

**NECESSARIES.**—As to liability of infant for, see the title **INFANTS**, vol. 6, p. 1013.

not be said as matter of law that a railroad nine miles distant from a township was not **near** such township. See, generally, the title **MUNICIPAL, COUNTY, STATE AND FEDERAL AID**, ante, p. 618.

**Near to.**—A statute provided that where property **near** to a street was injured by placing railroad tracks or structure upon the streets, the owner was entitled to compensation. It was held that that property was “**near to**” the street, so as to entitle the owner to avail himself of the remedy given by the statute, if the injury to it was the direct and necessary result of the occupancy of the street by the track or other structures of a railroad company. *Shepherd v. Baltimore, etc., R. Co.*, 130 U. S. 426, 432, 32 L. Ed. 970. See, generally, the titles **EMINENT DOMAIN**, vol. 5, p. 746; **RAILROADS; STREET RAILWAYS; STREETS AND HIGHWAYS**.

**Public lands.**—“Lands which are adjacent within the meaning of this act of 1875 (allowing railroad companies to take materials and timber from adjacent land to construct their roads,) must be lands in proximity, contiguous or **near** to, the line of the road. While ‘proximity’ or ‘nearness’ to an object is somewhat uncertain as a measure of distance, yet the use of such words as a definition, bring to the mind the idea that lands which are in fact far off, or distant, are not adjacent. And the question is, whether lands which are twenty miles off can reasonably be described as in proximity or **near** to a line of road a couple of hundred feet wide. In our belief no one in describing the locality of such lands would say they were adjacent to the railroad.” *United States v. St. Anthony R. Co.*, 192 U. S. 524, 537, 48 L. Ed. 548. See **ADJACENT**, vol. 1, p. 116.

**As near as may be.**—As to the nature of term “as **near** as may be” as used in the practice conformity act, see the title **COURTS**, vol. 4, p. 1127.

**Nearest of kin.**—See **NEXT OF KIN**.  
**Nearest kindred.**—See **NEXT OF KIN**.

**Nearly.**—See **ABOUT**, vol. 1, p. 49.

**1. Necessary.**—*McCulloch v. Maryland*, 4 Wheat. 316, 414, 4 L. Ed. 579.

**Courts-martial for militia.**—The act of the 18th of April, 1814, provides, that courts-martial, to be composed of militia officers only, for the trial of militia, drafted, detached and called forth for the service of the United States, shall, when **necessary**, be appointed, held and conducted in the manner prescribed by the rules and articles of war. The court said: “These words, ‘when **necessary**,’ have no definite meaning, if they are confined to the existence of cases for trial before the court. But if they be construed (as I think they ought to be), to apply to trials rendered **necessary** by the omission of the states to provide for state courts-martial to exercise a jurisdiction in the case, or of such courts to take cognizance of them, when so authorized, they have an important, and a useful meaning. If the state court-martial proceeds to take cognizance of the cases, it may not appear **necessary** to the proper officer in the service of the United States, to summon a court to try the same cases; if they do not, or for want of authority cannot try them, then it may be deemed **necessary** to convene a court-martial, under the articles of war, to take and to exercise the jurisdiction.” *Houston v. Moore*, 5 Wheat. 1, 29, 5 L. Ed. 19.

**Works of necessity—Sunday labor.**—See the title **SUNDAYS AND HOLIDAYS**.

**Necessarily implied.**—The words “**necessarily implied**” have been held to mean inevitably implied. *Detroit Citizens’ St. R. Co. v. Detroit Railway*, 171 U. S. 48, 54, 43 L. Ed. 67.

**Necessary and proper.**—As to the meaning of the phrase “**necessary and proper**” as used in constitution empowering congress to enact laws **necessary** and proper to the execution of its powers, see the title **CONSTITUTIONAL LAW**, vol. 4, pp. 261, 313.

**Necessary parties.**—See the title **PARTIES**.



## NE EXEAT.

### CROSS REFERENCES.

As to fraud on surety on ne exeat bond, see the title **PRINCIPAL AND SURETY**.

**Discharge of Writ.**—A person arrested upon a ne exeat may obtain a discharge of the writ upon giving bond, with surety, to be amenable to the orders and process of the court.<sup>1</sup>

**Injunction against Action on Ne Exeat Bond.**—Injunction is the proper remedy to relieve a surety on a ne exeat bond from liability where there has been fraud or mistake in its procurement.<sup>2</sup>

**NEGATIVE.**—As to averment of, see the title **PLEADING**. As to burden of proving negative, see the title **PRESUMPTIONS AND BURDEN OF PROOF**. As to weight of negative testimony, see the title **EVIDENCE**, vol. 5, p. 1047.

**NEGLECT.**—See the title **NEGLIGENCE**. "The word 'neglect' as sometimes used, imports an absence of care or attention in the doing or omission of a given act, or it may be used in the sense of an omission or failure to perform some act. To 'neglect' is not always synonymous with to 'omit.' Whether the use of the term is intended to express carelessness or lack of attention required by the circumstances, or to express merely a failure to do a given thing, depends upon the connection in which the term is used and the meaning intended to be expressed."<sup>3</sup>

1. *Griswold v. Hazard*, 141 U. S. 260, 282, 35 L. Ed. 678.

In *New York*, it seems to be the proper practice to discharge the writ of ne exeat upon the defendant's giving security to answer the plaintiff's bill, and to render himself amenable to the process of the court pending the litigation. *Griswold v. Hazard*, 141 U. S. 260, 291, 35 L. Ed. 678 (dissenting opinion).

2. **Relief from bond procured by fraud.**—Where after the death of the principal, the surety on a ne exeat bond instituted suit to have the bond canceled or reformed on the ground of fraud, it was held that the proper relief was a decree perpetually enjoining the prosecution of any proceeding to make him liable on said bond. *Griswold v. Hazard*, 141 U. S. 260, 288, 35 L. Ed. 678.

**Relief from bond procured through mistake.**—Where there was a mistake, on both sides, as to the legal import of the terms employed in a bond given to procure a discharge from a ne exeat, and there was a suit upon such bond, it was held that the suit could be enjoined. *Griswold v. Hazard*, 141 U. S. 260, 35 L. Ed. 678.

3. **Neglect.**—*Hackfeld v. United States*, 197 U. S. 442, 449, 49 L. Ed. 826.

**Different uses of the term.**—"In Webster's Dictionary the verb **neglect** is defined as meaning 'not to attend to with due care or attention; to forbear one's duty in regard to; to suffer to pass unimproved, unheeded, undone.' In the *Standard Dictionary* the word is defined as

meaning 'to fail to perform through carelessness.' And in the *Century Dictionary*: '1. To treat carelessly or heedlessly; forbear to attend to or treat with respect; be remiss in attention to or duty towards; 2. To overlook or omit; disregard. 3. To omit to do or perform; let slip; leave undone; fail through heedlessness to do or in doing (something).' As defined in the penal statutes of several of the states, the word **neglect** is said to import 'a want of such attention to the nature or probably consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns.' *Words and Phrases Judicially Defined*, vol. 5, p. 4940. While the term may be used as indicative of carelessness, it may also merely mean an omission or failure to do or perform a given act. This meaning finds illustration in the case of *Rosenplaenter v. Roessle*, 54 N. Y. 262, 266, in which a guest at a hotel who failed to deposit his valuables for safe-keeping as required by the statute, was held to have **neglected** to deposit within the meaning of the law, for having the opportunity so to do, he omitted to avail himself of this means of safe-keeping. An illustration of the meaning of the term when indicative of a want of care is found in *Watson v. Hall*, 46 Conn. 204, 206, in which case it was held that in a statute by which a grand juror is made subject to prosecution when he shall **neglect** to make reasonable complaint of a crime, the word **neglect** was construed to be used in the sense of omission from carelessness to do

something that can be done and that ought to be done, and the grand juror was held not to have **neglected** the complaint when, after investigation, he had become convinced that the offense should not be prosecuted." *Hackfeld v. United States*, 197 U. S. 442, 449, 49 L. Ed. 826.

**Neglect not always equivalent to "fail" or "omit."**—"It is the contention of the government that this statute (§ 10 of the act of March 3, 1891) requires of persons, situated as were the defendants, the absolute duty of returning to the place from whence they came, immigrants unlawfully brought into the ports of the United States; and that the word **neglect** as used in this statute is equivalent to the word 'fail' or 'omit,' and the return of the immigrants is required at all hazards, and the vessel owner will only be relieved when the default is the result of vis major or

inevitable accident. \* \* \* We think this statute was intended to secure, not the delivery of the immigrant, at all hazards, but to require good faith and full diligence to carry him back to the port from whence he came." *Hackfeld v. United States*, 197 U. S. 442, 448, 453, 49 L. Ed. 826. See the title **ALIENS**, vol. 2, p. 256.

**Wrongful act and neglect.**—"The two terms, therefore, wrongful act and **neglect**, imply alike the omission of some duty, and that duty must, as stated, be a duty owing to the decedent. It cannot be that, if the death was caused by a rightful act, or an unintentional act with no omission of duty owing to the decedent, it can be considered wrongful or negligent at the suit of the heirs of the decedent." *Northern Pac. R. Co. v. Adams*, 192 U. S. 440, 450, 48 L. Ed. 513.

# NEGLIGENCE.

BY FRANK MOORE.

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**XIII. Imputable Negligence, 892.****CROSS REFERENCES.**

See the titles ANIMALS, vol. 1, p. 316; ATTORNEY AND CLIENT, vol. 2, p. 703; BAILMENTS, vol. 2, p. 782; BANKS AND BANKING, vol. 3, p. 1; BILLS, NOTES AND CHECKS, vol. 3, p. 257; BRIDGES, vol. 3, p. 516; CARRIERS, vol. 3, p. 556; COLLISION, vol. 3, p. 870; CROSSINGS, vol. 5, p. 149; DAMAGES, vol. 5, p. 157; EVIDENCE, vol. 5, p. 1004; EXPERT AND OPINION EVIDENCE, vol. 6, p. 200; EXPRESS COMPANIES, vol. 6, p. 212; FELLOW SERVANTS, vol. 6, p. 245; FENCES, vol. 6, p. 274; FIRES, vol. 6, p. 287; INDEPENDENT CONTRACTORS, vol. 6, p. 904; INSPECTION AND PHYSICAL EXAMINATION, vol. 7, p. 14; INSTRUCTIONS, vol. 7, p. 26; MASTER AND SERVANT, ante, p. 275; MUNICIPAL CORPORATIONS, ante, p. 546; PHYSICIANS AND SURGEONS; PILOTS; RAILROADS; REMOVAL OF CAUSES; SHIPS AND SHIPPING; STREET RAILWAYS; STREETS AND HIGHWAYS; TORTS; TOWAGE, TUGS AND TOWS; WHARVES AND WHARFINGERS.

As to degree of care required of directors of corporations, see the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS. As to proximate cause in insurance, see the titles INSURANCE, vol. 7, p. 66; MARINE INSURANCE, ante, p. 149. As to gross negligence as element of equitable estoppel, see the title ESTOPPEL, vol. 5, p. 943. As to collateral evidence to show negligence, see the title EVIDENCE, vol. 5, p. 1016. As to subsequent repairs, see the title EVIDENCE, vol. 5, p. 1017. As to directing verdict in negligence cases, see the title VERDICT. As to care required of persons engaged in dangerous occupations, see the title MASTER AND SERVANT, ante, p. 275. As to whether an action for concurrent negligence is a separable controversy, see the title REMOVAL OF CAUSES. As to liability of railroad company for injuries to persons on or near right of way, see the title RAILROADS. As to negligence of trustees, see the title TRUSTS AND TRUSTEES. That the concurrent findings of the district court and circuit court of appeals will be accepted by the supreme court of the United States, see the title APPEAL AND ERROR, vol. 1, p. 1012. As to sufficiency of charge in drawing distinction between "sole" and "proximate" cause, see the title APPEAL AND ERROR, vol. 2, p. 100. As to right of state to regulate actions for negligence, see the title CONSTITUTIONAL LAW, vol. 4, p. 172. As to contribution between joint wrongdoers, see the title CONTRIBUTION AND EXONERATION, vol. 4, p. 596. For words and phrases related to this subject see NEGLECT, ante, p. 871.

**I. Scope of Title.**

The purpose of this title is to set out only the general principles related to this

subject. By consulting the table of cross references, the titles applying these principles may be found.

## II. Foundation of Law of Negligence.

The law of negligence may be said to be founded upon the maxim *sic utere tuo ut non alienum lædas*. It is a maxim of the law tested by the wisdom of centuries, and exacts of every person, in the enjoyment of his property, the duty of so using his own as not to injure the property of his neighbor.<sup>1</sup> This principle has been recognized and applied in cases of collisions at crossings of railroads and public highways, when injuries have occurred to persons necessarily passing upon and across railroad tracks in the use of an ordinary highway.<sup>2</sup> And the same principle has been applied in other cases than those of the actual coincidence, at crossings, of public highways.<sup>3</sup>

## III. Definitions, Distinctions and General Consideration.

**A. Definitions**—1. OF NEGLIGENCE.—Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion.<sup>4</sup> It must be determined in all cases by reference to the situation and

1. The law of negligence is founded upon maxim *sic utere tuo*, etc.—Hayes v. Michigan Cent. R. Co., 111 U. S. 228, 28 L. Ed. 410.

2. Injuries at crossings.—Hayes v. Michigan Cent. R. Co., 111 U. S. 228, 235, 28 L. Ed. 410. See the title CROSSINGS, vol. 5, p. 148.

Duty of railroads to fence tracks.—Consequently, in circumstances where the public safety requires such a precaution as a fence, to prevent danger from the ordinary operations of the railroad, to strangers not themselves in fault, the omission of it is negligence; and it is a question of fact for a jury, whether the circumstances exist which create such a duty. Hayes v. Michigan Cent. R. Co., 111 U. S. 228, 235, 28 L. Ed. 410.

3. Excavations by abutting owners in streets.—Hayes v. Michigan Cent. R. Co., 111 U. S. 228, 235, 28 L. Ed. 410.

The enforcement of this rule in regard to excavations made by proprietors of lots adjacent to streets and public grounds in cities and towns, in the prosecution of building enterprises, and in the construction of permanent areas for cellar ways, is universally recognized as an obvious and salutary exercise of the common police powers of municipal government; and the omission to provide barriers and signals, prescribed by ordinance in such cases for the safety of individuals in the use of thoroughfares, is a failure of duty, charged with all the consequences of negligence, including that of liability for personal injuries of which it is the responsible cause. Hayes v. Michigan Cent. R. Co., 111 U. S. 228, 236, 28 L. Ed. 410. See the title STREETS AND HIGHWAYS.

4. Negligence defined.—Railroad Co. v. Jones, 95 U. S. 439, 441, 24 L. Ed. 506; Union Pac. R. Co. v. McDonald, 152 U. S. 262, 273, 38 L. Ed. 434, citing Railroad Co.

v. Stout, 17 Wall. 657, 21 L. Ed. 745; Deserant v. Cerillos, etc., R. Co., 178 U. S. 409, 415, 44 L. Ed. 1127.

Other definitions of negligence.—Negligence is "the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do," provided, of course, that the party whose conduct is in question is already in a situation that brings him under the duty of taking care. The Nitro-Glycerine Case, 15 Wall. 524, 536, 21 L. Ed. 206; Northern Pac. R. Co. v. Adams, 192 U. S. 440, 450, 48 L. Ed. 513, citing Pollock on Torts, p. 355.

"Negligence has been defined to be 'the absence of care according to the circumstances,' and is always a question for the jury when there is reasonable doubt as to the facts, or as to the inferences to be drawn from them. When the measure of duty is ordinary and reasonable care, and the degree of care varies according to circumstances, the question of negligence is necessarily for the jury." Warner v. Baltimore, etc., R. Co., 168 U. S. 339, 348, 42 L. Ed. 491.

There is an obligation on all persons to take the care which under the special circumstances of the case a reasonable and prudent man would take, and the omission of that care constitutes negligence. Davidson Steamship Co. v. United States, 205 U. S. 187, 193, 51 L. Ed. 764.

If ordinary care is due from a party, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. Railroad Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627.

"Neglect" stands in the same category with wrongful act.—Both terms imply

knowledge of the parties and all the attendant circumstances.<sup>5</sup> In other words, negligence has always relation to the circumstances in which one is placed, and what an ordinarily prudent man would do or omit in such circumstances.<sup>6</sup> What would be extreme care under one condition of knowledge, and one state of circumstances, would be gross negligence with different knowledge and in changed circumstances. The law is reasonable in its judgments in this respect. It does not charge culpable negligence upon any one who takes the usual precautions against accident, which careful and prudent men are accustomed to take under similar circumstances.<sup>7</sup> But the law does not take any account of the personal equation of the man, as, for example, whether he was an expert or not.<sup>8</sup>

2. **OF GROSS NEGLIGENCE.**—Gross negligence is defined to consist of the omission of that care which even inattentive and thoughtless men never fail to take of their own property.<sup>9</sup> If very little care is due from a party, and he fails to bestow that little, it is called gross negligence.<sup>10</sup> It is also settled that if the occupation or employment be one requiring skill, the failure to exert that needful skill, either because it is not possessed, or from inattention, is gross negligence.<sup>11</sup>

3. **OF SLIGHT NEGLIGENCE.**—If very great care is due from a party, and he fails to come up to the mark required, it is called slight negligence.<sup>12</sup>

alike the omission of some duty, and that duty must be owing to the plaintiff. *Northern Pac. R. Co. v. Adams*, 192 U. S. 440, 48 L. Ed. 513.

**Simple negligence.**—In every case negligence is a failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate perhaps to call it simple negligence. *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627.

5. **Situation and knowledge of parties determines.**—*The Nitro-Glycerine Case*, 15 Wall. 524, 536, 21 L. Ed. 206.

6. *Charnock v. Texas, etc., R. Co.*, 194 U. S. 432, 437, 48 L. Ed. 1054.

7. *Sherman and Redfield*, § 6. *The Nitro-Glycerine Case*, 15 Wall. 524, 536, 21 L. Ed. 206.

8. **Personal equation of man immaterial.**—It is quite true that negligence must be determined upon the facts as they appeared at the time and not by a judgment from actual consequences which then were not to be apprehended by a prudent and competent man. This principle nowhere has been more fully recognized than by this court. *Lawrence v. Minturn*, 17 How. 100, 110, 15 L. Ed. 58; *Star of Hope*, 9 Wall. 203, 19 L. Ed. 638. But it is a mistake to say, as the petitioner does, that if the man on the spot, even an expert, does what his judgment approves, he cannot be found negligent. The standard of conduct, whether left to the jury or laid down by the court, is an external standard, and takes no account of the personal equation of the man concerned. The notion that it "should be coextensive with the judgment of each individual," as exploded, if it needed exploding, by Chief Justice Tindal, in *Vaughan v. Menlove*, 3 Bing. N. C. 468, 475. And since then, at least, there should have been no doubt about the law. *Commonwealth v. Pierce*, 138 Massachusetts, 165, 176. *Pollock, Torts*, 7th Ed., 432. *The Germanic*, 196 U. S. 589, 595, 49 L. Ed. 610.

9. **Gross negligence defined.**—*Goodman v. Simonds*, 20 How. 343, 367, 15 L. Ed. 934.

"If the law furnishes no definition of the terms gross negligence, or ordinary negligence, which can be applied in practice, but leaves it to the jury to determine, in each case, what the duty was, and what omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty, had better be abandoned." *Steamboat New World v. King*, 16 How. 469, 473, 14 L. Ed. 1019, distinguished in *Northern Pac. R. Co. v. Adams*, 192 U. S. 440, 452, 48 L. Ed. 513. See *Milwaukee, etc., R. Co. v. Arms*, 91 U. S. 489, 494, 23 L. Ed. 374.

**Gross negligence is a relative term.** It is doubtless to be understood as meaning a greater want of care than is implied by the term "ordinary negligence," but, after all, it means the absence of the care that is necessary under the circumstances. *Milwaukee, etc., R. Co. v. Arms*, 91 U. S. 489, 23 L. Ed. 374.

**Lord Cranworth said** that gross negligence is ordinary negligence with a vituperative epithet. Approved in *Milwaukee, etc., R. Co. v. Arms*, 91 U. S. 489, 23 L. Ed. 374.

**The words of the Nebraska statute exempting railroad companies from liability**, where the injury done arose from the criminal negligence of the persons injured, were defined to mean gross negligence, such negligence as would amount to a flagrant and reckless disregard by the passenger of his own safety, and amount to a willful indifference to the injury liable to follow. *Chicago, etc., R. Co. v. Zernecke*, 183 U. S. 582, 46 L. Ed. 339.

10. *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627.

11. *Steamboat New World v. King*, 16 How. 469, 475, 14 L. Ed. 1019.

12. **Slight negligence defined.**—*Railroad*



**B. Distinction between Negligence and Assumption of Risk.**—Assumption of risk in the broad sense obviously shades into negligence as commonly understood. Negligence consists in conduct which common experience or the special knowledge of the actor shows to be so likely to produce the result complained of, under the circumstances known to the actor, that he is held answerable for that result, although it was not certain, intended, or foreseen. He is held to assume the risk upon the same ground.<sup>13</sup> The practical difference of the two ideas is in the degree of their proximity to the particular harm. The preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by assumption of the risk. The act more immediately leading to a specific accident is called negligent. But the difference between the two is one of degree rather than of kind.<sup>14</sup>

**C. Liability for Unavoidable Accidents.**—The mere fact that injury has been caused is not sufficient to hold a defendant liable. "No one is responsible for injuries resulting from unavoidable accident, whilst engaged in a lawful business. A party charging negligence as a ground of action must prove it. He must show that the defendant, by his act or by his omission, has violated some duty incumbent upon him, which has caused the injury complained of."<sup>15</sup> And the principle is not changed whether the injury complained of follows directly or remotely from the act or conduct of the party. The direct or remote consequences of the act or conduct may determine the form of the action, whether it shall be case or trespass, where the forms of the common law are in use, but cannot alter the principle upon which liability is enforced or avoided.<sup>16</sup> This principle is recognized and affirmed in a great variety of cases—in cases where fire originating in one man's building has extended to and destroyed the property of others; in cases where injuries have been caused by fire ignited by sparks from steamboats or locomotives, or caused by horses running away, or by blasting rocks, and in numerous other cases which will readily occur to every one.<sup>17</sup> The consequences of all such accidents must be borne by the sufferer as his misfortune.<sup>18</sup>

The rule deducible from the cases is, that the measure of care against accident, which one must take to avoid responsibility, is that which a person of ordinary prudence and caution would use if his own interests were to be affected, and the whole risk were his own.<sup>19</sup>

#### IV. Degrees of Care or Diligence.

**A. In General.**—It is a principle of law, as well as of natural justice, that greater consideration and care are due to persons known to be unable to take care of themselves, than to those who are fully able to do so. The driver of a team, seeing a child or a woman, or a person of known feeble intellect, in the street, is bound to exercise greater care and diligence to avoid doing them harm, than would be obligatory if it was a grown and capable man.<sup>20</sup>

Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627.

**13. Distinction between negligence and assumption of risk.**—Choctaw, etc., R. Co. v. McDade, 191 U. S. 64, 68, 48 L. Ed. 96; Schlemmer v. Buffalo, etc., R. Co., 205 U. S. 1, 12, 51 L. Ed. 681. See the title MASTER AND SERVANT, ante, p. 275.

**14. Schlemmer v. Buffalo, etc., R. Co.,** 205 U. S. 1, 12, 51 L. Ed. 681.

**15. Unavoidable accidents.**—The Nitro-Glycerine Case, 15 Wall. 524, 537, 21 L. Ed. 206.

"No case or principle can be found," said Mr. Justice Nelson, in denying a new trial, "or, if found, can be maintained, subjecting an individual to liability for an act

done without fault on his part." The Nitro-Glycerine Case, 15 Wall. 524, 539, 21 L. Ed. 206.

**Liability of express companies carrying explosives.**—See the title CARRIERS, vol. 3, p. 617.

**16. Remoteness of result of negligent act immaterial.**—The Nitro-Glycerine Case, 15 Wall. 524, 538, 21 L. Ed. 206.

**17. Cases applying rule as to unavoidable accident.**—The Nitro-Glycerine Case, 15 Wall. 524, 538, 21 L. Ed. 206.

**18. The Nitro-Glycerine Case,** 15 Wall. 524, 538, 21 L. Ed. 206.

**19. Measure of care to avoid accidents.**—The Nitro-Glycerine Case, 15 Wall. 524, 538, 21 L. Ed. 206.

**20. Degrees of care or diligence.**—

**B. Ordinary Care**—1. **STATEMENT OF GENERAL RULE**.—The measure of care against accidents, which one must take ordinarily to avoid responsibility, is that which a person of ordinary prudence and caution would use if his own interests were to be affected and the whole risk were his own.<sup>21</sup>

2. **DEFINITION OF ORDINARY CARE**.—And ordinary diligence or care is such care as a man of ordinary prudence and intelligence will ordinarily use under like circumstances.<sup>22</sup>

**C. Gross Negligence**.—"How much care will, in a given case, relieve a party from the imputation of gross negligence, or what omission will amount to the charge, is necessarily a question of fact, depending on a great variety of circumstances which the law cannot exactly define." Mr. Justice Story (*Bailments*, § 11), says: "Indeed, what is common or ordinary diligence is more a matter of fact than of law."<sup>23</sup>

**D. Rule in Federal Courts as to Degrees of Diligence**.—It may be safely stated that the classification of negligence into slight, ordinary and gross is no longer sanctioned by the federal supreme court.<sup>24</sup> In other words there is

*Graffam v. Burgess*, 117 U. S. 180, 185, 29 L. Ed. 839.

21. *The Nitro-Glycerine Case*, 15 Wall. 524, 21 L. Ed. 206.

22. **Ordinary care defined**.—*Continental Imp. Co. v. Stead*, 95 U. S. 161, 24 L. Ed. 403; *Texas, etc., R. Co. v. Behymer*, 189 U. S. 468, 47 L. Ed. 905; *Union Ins. Co. v. Smith*, 124 U. S. 405, 412, 31 L. Ed. 497.

**Ordinary care is a relative term**.—The rule was thus expounded by Mr. Justice Lamar in *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 417, 36 L. Ed. 485: "There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case, may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court." Approved in *Baltimore, etc., R. Co. v. Griffith*, 159 U. S. 603, 611, 40 L. Ed. 274.

Ordinary diligence, like most other human qualifications or characteristics, is a relative term, to be judged of by the nature of the subject to which it is directed.

It would not be any want of ordinary care or diligence to intrust the shoeing of a horse to a common blacksmith, but it would be gross negligence to intrust to such a person the cleaning or repair of a watch. A man who would be perfectly competent to perform the duties of an express messenger now, on the Union Pacific Railroad, with a commodious express car at his service, might have been a very unfit and incompetent agent in 1865, when nothing but a mail coach traversed the prairie, and roving bands of hostile Indians infested the route. *Holladay v. Kennard*, 12 Wall. 254, 258, 20 L. Ed. 390.

**Ordinary care in children**.—Ordinary care must mean that degree of care which may reasonably be expected from a person in the plaintiff's situation; and this would evidently be very small indeed in a young child. *Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 271, 38 L. Ed. 434; *Texas, etc., R. Co. v. Cody*, 166 U. S. 606, 41 L. Ed. 1132; *Texas, etc., R. Co. v. Barrett*, 166 U. S. 617, 41 L. Ed. 1136.

**Master and servant**.—What is ordinary negligence depends on the character of the employment. Where skill and capacity are required to accomplish an undertaking, it would be negligence not to employ persons having those qualifications. *Holladay v. Kennard*, 12 Wall. 254, 20 L. Ed. 390. See the title **MASTER AND SERVANT**, ante, p. 275.

Ordinary care implies the exercise of reasonable diligence, and reasonable diligence implies, as between the employer and employee, such watchfulness, caution, and foresight as, under all the circumstances of the particular service, careful, prudent men ought to exercise. *Wabash R. Co. v. McDaniels*, 107 U. S. 454, 460, 27 L. Ed. 605. See the title **MASTER AND SERVANT**, ante, p. 275.

23. **Gross negligence**.—*Steamboat New World v. King*, 16 How. 469, 474, 14 L. Ed. 1019.

24. **Degrees in negligence repudiated by federal supreme court**.—*Milwaukee, etc., R. Co. v. Arms*, 91 U. S. 489, 23 L. Ed. 374,



not only no intelligible distinction between ordinary and gross negligence, but the creation of such a distinction can serve no practical purpose.<sup>25</sup> It may be added that some of the ablest commentators on the Roman law, and on the civil code of France, have wholly repudiated this theory of three degrees of diligence, as unfounded in principles of natural justice, useless in practice, and presenting inextricable embarrassments and difficulties.<sup>26</sup>

### V. Violation of Statute or Ordinance.

It has been held in many cases that the running of railroad trains within the limits of a city at a rate of speed greater than is allowed by an ordinance of such city is negligence, *per se*.<sup>27</sup> But perhaps the better and more generally accepted rule is that such an act on the part of the railroad company is always to be considered by the jury as at least a circumstance from which negligence may be inferred in determining whether the company was or was not guilty of negligence.<sup>28</sup>

approving *Steamboat New World v. King*, 16 How. 469, 14 L. Ed. 1019.

"We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party and which he fails to perform, than of the amount of inattention, carelessness, or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great care is due, and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case, the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate perhaps to call it simply 'negligence.' And this seems to be the tendency of modern authorities. If they mean more than this, and seek to abolish the distinction of degrees of care, skill, and diligence required in the performance of various duties and the fulfillment of various contracts, we think they go too far; since the requirement of different degrees of care in different situations is too firmly settled and fixed in the law to be ignored or changed." *Railroad Co. v. Lockwood*, 17 Wall. 357, 382, 21 L. Ed. 627, quoted with approval in *Briggs v. Spaulding*, 141 U. S. 151, 35 L. Ed. 662. See *Philadelphia, etc., R. Co. v. Derby*, 14 How. 468, 486, 14 L. Ed. 502; *Steamboat New World v. King*, 16 How. 469, 474, 14 L. Ed. 1019.

**Case contra.**—In *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, the court expressly recognized the distinction between the various degrees of care, skill, and diligence required in the performance of various duties and the fulfillment of various contracts, saying that the requirement of different degrees of care in different situations is too firmly settled and

fixed in the law to be ignored or changed.

**25.** *Steamboat New World v. King*, 16 How. 469, 474, 14 L. Ed. 1019; *Milwaukee, etc., R. Co. v. Arms*, 91 U. S. 489, 23 L. Ed. 374.

**26. No degrees of negligence in Roman and civil law.**—*Steamboat New World v. King*, 16 How. 469, 475, 14 L. Ed. 1019, citing *Toullier's Droit Civil*, 6th vol., p. 239; *Makeldej, Man. Du Droit Romain*, 191.

The theory that there are three degrees of negligence, described by the terms slight, ordinary, and gross, has been introduced into the common law from some of the commentators on the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree, thus described, not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the courts have been forced to yield, until there are so many real exceptions that the rules themselves can scarcely be said to have a general operation. *Steamboat New World v. King*, 16 How. 469, 474, 14 L. Ed. 1019, approved in *Milwaukee, etc., R. Co. v. Arms*, 91 U. S. 489, 494, 23 L. Ed. 374.

**27. Violation of statutory duty as constituting negligence per se.**—*Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 418, 36 L. Ed. 485.

**28. By better rule violation of statute or ordinance is merely evidence for the jury.**—*Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 418, 36 L. Ed. 485.

The mere violation of a statute or ordinance does not of itself amount to negligence, independent of any other fact or circumstance that might excuse or justify such violation. The question is, was it *causa sine qua non*, a cause which if it had not existed, the injury would not have taken place, an occasional cause? And that is a question of fact, unless the causal connection is evidently not proximate. *Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228, 28 L. Ed. 410, citing *Milwaukee*,



## VI. Liability Dependent upon Duty and Relationship.

**A. In General.**—When one has been injured by the wrongful act of another, to which he has in no respect contributed, he should be entitled to compensation in damages from the wrongdoer, unless a contributory cause of the injury has been the negligence or fault of some person towards whom he sustains the relation of superior or master, in which case the negligence is imputed to him, though he may not have personally participated in or had knowledge of it; and he must bear the consequences. The doctrine may also be subject to other exceptions growing out of the relation of parent and child, or guardian and ward, and the like.<sup>29</sup>

**B. Measure of Duty Owed to Licensees.**—The owner or occupant of land who, by invitation, express or implied, induces or leads others to come upon his premises, for any lawful purpose, is liable in damages to such persons—they using due care—for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist, without timely notice to the public, or to those who were likely to act upon such invitation.<sup>30</sup> But it is sometimes difficult to determine whether the circumstances make a case of invitation, in the technical sense of that word, as used in a large number of adjudged cases, or only a case of mere license. "The principle," says Mr. Campbell, in his treatise on Negligence, "appears to be that invitation is inferred where there is a common in-

etc., *R. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256.

**Nonperformance by railroad company of statutory duty to fence.**—The nonperformance by the railroad company of the duty imposed by statute, of putting a fence around its slack pit, was a breach of its duty to the public, and, therefore, evidence of negligence, for which it was liable in this case, if the injuries in question were, in a substantial sense, the result of such violation of duty. *Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 283, 38 L. Ed. 434, citing *Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228, 28 L. Ed. 410.

The only question that could arise upon this part of the case is whether the court should have instructed the jury—as, in effect, it did—that the failure of the company to put a fence around the slack pit, as required by the statute of Colorado, was negligence, of which the plaintiff could complain in this action for personal injuries sustained by him. Primarily, that statute was intended for the protection of cattle and horses. But it was not, for that reason, wholly inapplicable to the present case upon the issue as to negligence. In *Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228, 240, 28 L. Ed. 410, which was an action by an infant for personal injuries sustained by the alleged negligence of a railroad company in not properly guarding its line within the limits of the city of Chicago, this court, speaking by Mr. Justice Matthews, said: "In the analogous case of fences required by the statute, as a protection for animals, an action is given to the owners for the loss caused by the breach of the duty. And although in the case of injury to persons by reason of the same default, the failure to fence is not, as in the case of animals, conclusive

of the liability, irrespective of negligence, yet an action will lie for the personal injury, and this breach of duty will be evidence of negligence. The duty is due, not to the city as a municipal body, but to the public, considered as composed of individual persons; and each person specially injured by the breach of the obligation is entitled to his individual compensation, and to an action for its recovery." *Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 282, 38 L. Ed. 434.

**Where a company operating a coal mine fails to comply with the statute** (*Act. Colo. May 3, 1877*), which provides, "that the owner or operators of coal mines from which fine or slack coal is taken and piled upon the surface of the ground, in such quantities as to produce spontaneous combustion, shall fence said ground in such manner as to prevent loose cattle or horses from having access to such slack piles," it is guilty of negligence, and liable in damages for injuries sustained by their neglect. *Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 38 L. Ed. 434.

**29. Liability dependent upon duty and relationship.**—*Little v. Hackett*, 116 U. S. 366, 371, 29 L. Ed. 652.

**30. Measure of duty owed to licensees.**—*Railroad Co. v. Hanning*, 15 Wall. 649, 21 L. Ed. 220; *Bennett v. Railroad Co.*, 102 U. S. 577, 580, 26 L. Ed. 235, approved in *Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 38 L. Ed. 434.

**Cooley** says that when one "expressly or by implication invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe

terest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it."<sup>31</sup>

**C. Measure of Duty Owed to Strangers.**—While a railway company is not bound to the same degree of care in regard to mere strangers who are even unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts.<sup>32</sup>

## VII. Proximate Cause.

**A. Definition of Proximate Cause.**—The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster.<sup>33</sup>

**B. Statement of General Rule.**—It is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.<sup>34</sup> And this rule is applied to contracts of insurance,<sup>35</sup> and contracts of common carriers<sup>36</sup> as well as in other cases.

**C. Nearness in Time or Place to Catastrophe.**—The question is not what cause was nearest in time or place to the catastrophe. That is not the meaning of the maxim *causa proxima, non remota spectatur*.<sup>37</sup>

**D. Doctrine of Last Clear Chance.**—Although the rule is that, even if the defendant be shown to have been guilty of negligence, the plaintiff cannot recover if he himself be shown to have been guilty of contributory negligence which may have had something to do in causing the accident, yet contributory negligence on his part will not exonerate the defendant, and disentitle the plaintiff from recovering, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence.<sup>38</sup>

**E. Intervening Causes**—1. IN GENERAL.—The question always is, was

for the visit." Approved in *Bennett v. Railroad Co.*, 102 U. S. 577, 580, 26 L. Ed. 235.

31. **Proof of invitation.**—*Bennett v. Railroad Co.*, 102 U. S. 577, 584, 26 L. Ed. 235.

32. **Measure of duty owed to strangers.**—*Railroad Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745.

"We have referred quite fully to the case of *Lynch v. Nurdin*, because it was cited in *Railroad Co. v. Stout*, 17 Wall. 657, 661, 21 L. Ed. 745, in connection with other cases in support of the rule, laid down in that case, that while a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such injuries arising from its negligence or from its tortious acts." *Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 272, 38 L. Ed. 434.

33. **Definition of proximate cause.**—*Insurance Co. v. Boon*, 95 U. S. 117, 130, 24 L. Ed. 395.

34. **General rule as to proximate cause.**—*Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 469, 475, 24 L. Ed. 256.

35. **Contracts of insurance.**—*Waters v. Merchants', etc., Ins. Co.*, 11 Pet. 213, 223, 9 L. Ed. 691. See the title INSURANCE, vol. 7, p. 134.

36. **Contracts of common carriers.**—*Railroad Co. v. Reeves*, 10 Wall. 176, 191, 19 L. Ed. 909. See the title CARRIERS, vol. 3, p. 579.

37. **Nearness in time or physical sequence.**—*Insurance Co. v. Boon*, 95 U. S. 117, 130, 24 L. Ed. 395.

38. **Doctrine of last clear chance.**—*Inland, etc., Coasting Co. v. Tolson*, 139 U. S. 551, 558, 35 L. Ed. 270; *Washington, etc., R. Co. v. Harmon*, 147 U. S. 571, 582, 37 L. Ed. 284.

The generally accepted and most reasonable rule of law applicable to actions in which the defense is contributory negligence may be thus stated: Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate



there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?<sup>39</sup> But the primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place.<sup>40</sup> Hence the efficient cause, the one that sets others in motion, is the cause to which the loss is to be attributed, though the other causes may follow it and operate more immediately in producing the disaster.<sup>41</sup> In other words, when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury.<sup>42</sup> This inquiry must be answered in accordance with common understanding. In a succession of dependent events an interval may always be seen by an acute mind between a cause and its effect, though it may be so imperceptible as to be overlooked by a common mind. Thus, if a building be set on fire by negligence, and an adjoining building be destroyed without any negligence of the occupants of the first, no one would doubt that the destruction of the second was due to the negligence that caused the burning of the first. Yet in truth, in a very legitimate sense, the immediate cause of the burning of the second was the burning of the first. The same might be said of the burning of the furniture in the first. Such refinements are too minute for rules of social conduct. In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dis severed by new and independent agencies, and this must be determined in view of the circumstances existing at

cause of the injury can be traced to the want of ordinary care and caution in the person injured; subject to this qualification, which has grown up in recent years (having been first enunciated in *Davies v. Mann*, 10 M. & W. 546); that the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence. *Inland, etc., Coasting Co. v. Tolson*, 139 U. S. 551, 558, 35 L. Ed. 270; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 429, 36 L. Ed. 485.

**39. Doctrine of intervening causes.**—*Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 469, 475, 24 L. Ed. 256.

**40. Intervening cause must be an efficient cause to break the causal connection.**—*Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 469, 474, 24 L. Ed. 256.

**41. Efficient cause is proximate cause.**—*Insurance Co. v. Boon*, 95 U. S. 117, 131, 24 L. Ed. 395, following *Insurance Co. v. Tweed*, 7 Wall. 44, 19 L. Ed. 65.

**Intervening negligence of gateman at crossing.**—In an action for damages for injuries sustained through the negligence of a driver of a horse car, the evidence discloses that plaintiff was a passenger

upon said car, which was a summer car and greatly crowded, and that upon their approach to a railroad crossing the gateman lowered the gates, but at once raised them, whereupon the driver attempted to cross in front of an approaching train when the gates were again lowered between the horses and the car, leaving the car upon the railroad track, thereby causing the passengers to become greatly frightened, and in their commotion they shoved the plaintiff from the car greatly injuring her. The gates were again raised and the car crossed without injury. It was held (affirming the principles laid down in *Insurance Co. v. Tweed*, 7 Wall. 44, 19 L. Ed. 65), that although the negligence of the gateman by lowering the gate between the horses and the car did assist in producing the injury, it is not sufficient cause to relieve the horse car company from liability, because the intervening negligence of the gateman was too remote. *Washington, etc., R. Co. v. Hickey*, 166 U. S. 521, 41 L. Ed. 1101. See the title **CROSSINGS**, vol. 5, p. 148.

**Actions on insurance policies.**—See the title **INSURANCE**, vol. 7, p. 137.

**42. Milwaukee, etc., R. Co. v. Kellogg**, 94 U. S. 469, 475, 24 L. Ed. 256.



the time.<sup>43</sup> But in case of the intervention of other and sufficient causes for the injury sustained, and where the original actions of the defendant were too remote to be regarded as causes of such injury, the defendant's negligence will, in general, be held too remote to warrant a recovery against him.<sup>44</sup>

2. **DISTINCTION BETWEEN CONDITIONS AND CAUSES.**—In a consideration of this subject it is important to note well the distinction between conditions and causes. If the intervening act upon which the defendant relies is a mere condition or occasion and not an efficient cause, he will be held liable. Hence, it matters not how many causes may have intervened; if the defendant's act is still the efficient cause, he is liable for the injury.<sup>45</sup> The test is: Was it a new and

**43. Negligent fires—Intervening acts.**—*Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 469, 475, 24 L. Ed. 256. See the title **FIRES**, vol. 6, p. 287.

In an action against a railway company to recover compensation for the destruction by fire of the plaintiff's sawmill and a quantity of lumber, it appeared that the fire was negligently communicated from the defendants' steamboat to an elevator of pine lumber, 120 feet high, also owned by the defendants, and from the elevator to the plaintiff's sawmill and lumber piles, while an unusually strong wind was blowing from the elevator towards the mill and lumber. On the trial it was admitted that the mill was 538 feet from the elevator, and that the nearest of plaintiff's piles of lumber was 388 feet distant from it. It was held that the court correctly submitted to the jury to find whether the burning of the mill and lumber was a result naturally and reasonably to be expected from the burning of the elevator, under the circumstances, and whether it was the result of the continued influence or effect of the sparks from the boat, without the aid or concurrence of other causes not reasonably to have been expected. And a finding by the jury that the burning of the mill and lumber was caused by the negligent burning of the elevator, and that it was the unavoidable consequence of that burning, is in effect a finding that there was no intervening and independent cause between the negligent conduct of the defendants and the injury to the plaintiff. *Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256.

**44. Intervening efficient causes will bar a recovery.**—*Washington, etc., R. Co. v. Hickey*, 166 U. S. 521, 41 L. Ed. 1101.

The rule laid down in *Insurance Co. v. Tweed*, 7 Wall. 44, 19 L. Ed. 65, that when a new force or cause of injury intervenes between the original cause and the accident, the former is the proximate cause, was held not applicable in *Insurance Co. v. Seaver*, 19 Wall. 531, 22 L. Ed. 155.

**One of the most valuable of the criteria** is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote. *Insurance Co. v. Tweed*, 7 Wall. 44, 52, 19 L. Ed. 65.

**Action on insurance policy.**—See the title **INSURANCE**, vol. 7, p. 136.

**Carriers of passengers—Upsetting train.**

—In an action against a carrier of passengers the injury was caused by the upsetting of the train by a gust of wind. The negligence of the company consisted in being behind time. If the train had been on time it would have escaped the tempest. It was held that the negligence was too remote as a cause, and the company exonerated from liability. *Chicago, etc., R. Co. v. Zernecke*, 183 U. S. 582, 46 L. Ed. 339.

**Suicide as result of accident.**—In *Scheffer v. Railroad Co.*, 105 U. S. 249, 26 L. Ed. 1070, the plaintiff's executor brought an action to recover from the defendant railroad company damages for his death, which they alleged resulted from the negligence of the company while carrying him on its road. But the evidence shows that the immediate cause of his death was suicide committed eight months after the accident. It was held that the suicide of the plaintiff was not a result naturally and reasonably to be expected from the injury received on the train, but that the proximate cause of his death was his own act of self-destruction. "His insanity, as a cause of his final destruction, was as little the natural or probable result of the negligence of the railway officials, as his suicide, and each of these are casual or unexpected causes, intervening between the act which injured him, and his death." *Following Insurance Co. v. Tweed*, 7 Wall. 44, 19 L. Ed. 65; *Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256. This case is approved in *Washington, etc., R. Co. v. Hickey*, 166 U. S. 521, 528, 41 L. Ed. 1101.

**45. Distinction between cause and condition.**—Where an engine, not equipped with brakes, is derailed by an obstacle on the tracks and injures a person, and it appears the accident would not have occurred had there been brakes on the engine, the obstacle only causes the necessity for the use of brakes and it is the neglect of the company in not furnishing brakes that constitutes the immediate and proximate cause of the accident. *Choctaw, etc., R. Co. v. Holloway*, 191 U. S. 334, 340, 48 L. Ed. 207.

**Fires.**—In *St. Louis, etc., R. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 35 L. Ed. 154, the defendant railway com-

independent force, acting in and of itself in causing the injury and superseding the original wrong complained of so as to make it remote in the chain of causation; although it may have remotely contributed to the injury as an occasion or a condition thereof?<sup>46</sup>

**F. Questions of Law and Fact.**—The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it.<sup>47</sup>

### VIII. Contributory Negligence.

See post, "Presumptions and Burden of Proof," XII, A.

**A. Statement of General Rule.**—That one cannot recover damages for an injury to the commission of which he has directly contributed is a rule of established law and a principle of common justice.<sup>48</sup> And it matters not whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties which, if performed, would have prevented it. If his fault, whether of omission or commission, has been the proximate cause of the injury, he is without remedy against one also in the wrong.<sup>49</sup> But where the defendant has been guilty of negligence also, in the same connection, the result depends upon the facts. The question in such cases is: 1. Whether the damage was occasioned entirely by the negligence or improper conduct of the defendant; or, 2. Whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution, that but for such negligence or want of care and caution on his part the misfortune would not have happened. In the former case, the plaintiff is entitled to recover. In the latter, he is not.<sup>50</sup>

pany had made an oral agreement with a compress company to receive and transfer all cotton in bales brought by its owners to the sheds of the compress company; and broke this engagement by neglecting to furnish transportation. By reason of this neglect of the railway company to furnish transportation, and the consequent accumulation of cotton in the sheds of the compress company, a large mass of cotton delivered by its owners to the compress company, was piled and kept by that company in a public street adjoining its sheds, and while there, was destroyed by fire from an unknown cause. Held: "The delay of the defendant railway company to furnish transportation according to its contract with the compress company was in no legal sense a cause of the destruction of the cotton. It was simply one of a series of antecedent events without which the loss could not have happened, for, if the cotton had not been there, it would not have been burned. The cause of the loss was the fire, kindled by some unknown means, and in no way arising from or connected with the neglect of the defendant to furnish transportation. Upon principle and authority, that neglect was not the direct and proximate cause of the loss by fire, and did not make the defendant responsible for that loss to the owners of the cotton or to their insurers. *Railroad Co. v. Reeves*, 10 Wall. 176, 19 L. Ed. 909."

**46. A test.**—*Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 469, 54 L. Ed. 526; *Insur-*

*ance Co. v. Tweed*, 7 Wall. 44, 19 L. Ed. 62.

**47. Proximate cause a question for the jury.**—*Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 469, 474, 24 L. Ed. 256. See post, "Questions of Law and Fact," XII, B.

**48. Contributory negligence of plaintiff a bar to recovery.**—*Little v. Hackett*, 116 U. S. 366, 371, 29 L. Ed. 652; *Washington, etc., R. Co. v. Harmon*, 147 U. S. 571, 583, 37 L. Ed. 284.

**Accidents at crossings.**—The neglect of the engineer of a locomotive of a railroad train to sound its whistle or ring its bell on nearing a street crossing does not relieve a traveller on the street from the necessity of taking ordinary precautions for his safety. Before attempting to cross the railroad track, he is bound to use his senses—to listen and to look—in order to avoid any possible accident from an approaching train. If he omits to use them, and walks thoughtlessly upon the track, or if, using them, he sees the train coming, and, instead of waiting for it to pass, undertakes to cross the track, and in either case receives any injury, he so far contributes to it as to deprive him of any right to complain. If one chooses in such a position to take risks, he must suffer the consequences. They cannot be visited upon the railroad company. *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542. See the title CROSSINGS, vol. 5, p. 151.

**49.** *Little v. Hackett*, 116 U. S. 366, 371, 29 L. Ed. 652.

**50.** *Railroad Co. v. Jones*, 95 U. S. 439, 442, 24 L. Ed. 506.



**B. Determination of Contributory Negligence.**—In determining the fact of contributory negligence, regard must always be had to the exigencies of his position; indeed to all the circumstances of the particular occasion.<sup>51</sup>

**C. Danger Incurred to Save Life.**—Where human life or personal safety is involved, and the issue is one of negligence, the law will not lightly impute negligence to an effort, made in good faith, to preserve the one or to secure the other, unless the circumstances, under which that effort was made, show recklessness or rashness.<sup>52</sup>

**D. Choice of Risks under Stress of Another's Negligence.**—When a person without his fault is placed in a situation of danger, he is not to be held to the exercise of the same care and circumspection that prudent persons would exercise where no danger is present; nor can it be said that, as matter of law, he is guilty of contributory negligence because he fails to make the most judicious choice between hazards presented, or would have escaped injury if he had chosen differently. The question in such case is not what a careful person would do under ordinary circumstances, but what would he be likely to do, or might reasonably be expected to do in the presence of such existing peril, and is one of fact for the jury.<sup>53</sup> And so persons in sudden emergencies, and called to act under peculiar circumstances, are not held to the exercise of the same degree of caution as in other cases.<sup>54</sup>

**E. Standard of Care**—1. **IN GENERAL.**—While a person who seeks to recover for a personal injury, sustained by another's negligence, must not himself be guilty of negligence that substantially contributed to the result, the law discriminates between children and adults, the feeble and the strong, and only requires of each the exercise of that degree of care to be reasonably expected in view of his age and condition.<sup>55</sup> To an adult, in full possession of his mental and physical powers, one standard may be applied; to a boy, particularly if he

**51. Determination of contributory negligence.**—*Charnock v. Texas, etc., R. Co.*, 194 U. S. 432, 48 L. Ed. 1054.

"The defense of contributory negligence is one which admits, or at least presupposes, negligence on the part of the defendant, and the party in fault thereby seeks to cast upon the plaintiff the consequence of his own failure to observe the precautions which the circumstances of the case demanded. In determining the existence of such negligence, we are not to hold the plaintiff liable for faults which arise from inherent physical or mental defects, or want of capacity to appreciate what is and what is not negligence, but only to hold him to the exercise of such faculties and capacities as he is endowed with by nature for the avoidance of danger. The defendant is primarily liable for his own negligence, and can only escape liability for a nonobservance of such precautions as his observation or the experience of others teaches him to be necessary, by proving that the accident would not have occurred if the plaintiff had taken such precautions as his own observation and experience had taught him to be necessary. Hence the plaintiff is liable only for the proper use of his own faculties, and what may be justly held to be contributory negligence in one is not necessarily such in another. There is no hard and fast rule applicable to every one under like circumstances." *Baltimore, etc., R. Co. v. Cumberland*, 176 U. S. 232, 238, 44 L. Ed. 447.

Even in the case of an employee of a railroad company, claiming to have been injured as the result of the company's negligence, the federal supreme court has said that in determining whether he has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might be reasonably expected, regard must always be had to the exigencies of his position, indeed, to all the circumstances of the particular occasion. *Kane v. Northern Cent. R. Co.*, 128 U. S. 91, 95, 32 L. Ed. 339; *Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 281, 38 L. Ed. 434. See the title MASTER AND SERVANT, ante, p. 275.

In determining whether the deceased was guilty of contributory negligence the jury are bound to consider all the facts and circumstances bearing upon that question, and not select one particular prominent fact or circumstance as controlling the case to the exclusion of all the others. *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 433, 36 L. Ed. 485.

**52. Danger incurred to save life.**—*Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 282, 38 L. Ed. 434.

**53. Choice of risks under stress of another's negligence.**—*Stokes v. Saltonstall*, 13 Pet. 181, 10 L. Ed. 115.

**54.** *Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 281, 38 L. Ed. 434.

**55. Standard of care varies with age, capacity and physical ability.**—*Railroad Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745;



be of limited intelligence, another standard; and to an infant not sui juris and totally ignorant of danger, still another.<sup>56</sup> Indeed in the last case the only contributory negligence with which he is chargeable is that of his parent or custodian who permits him to stroll into a place of danger.<sup>57</sup>

2. IN THE CASE OF CHILDREN OF TENDER YEARS—*a. In General.*—It is well settled that the conduct of an infant of tender years is not to be judged by the same rule which governs that of an adult. While it is the general rule in regard to an adult, that to entitle him to recover damages for an injury resulting from the fault or negligence of another, he must himself have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case.<sup>58</sup>

*b. Objects and Appliances Likely to Attract Children.*—(1) *Turntables.*—A railroad company is liable for injuries sustained by a child while playing upon an unguarded, unfastened turntable, on the ground that such objects are naturally attractive to very young children, although the plaintiff is a technical tres-

Union Pac. R. Co. v. McDonald, 152 U. S. 262, 281, 38 L. Ed. 434.

56. Railroad Co. v. Gladmon, 15 Wall. 401, 21 L. Ed. 114; Railroad Co. v. Stout, 17 Wall. 657, 21 L. Ed. 745; Union Pac. R. Co. v. McDonald, 152 U. S. 262, 281, 38 L. Ed. 434; Baltimore, etc., R. Co. v. Cumberland, 176 U. S. 232, 238, 44 L. Ed. 447.

**Child of 12 years of dull comprehension.**—In Baltimore, etc., R. Co. v. Cumberland, 176 U. S. 232, 44 L. Ed. 447, it appeared that the plaintiff was a boy of 12 years of age, apparently dull for his age, as he had attended school four or five years without having learned to read or write. There was testimony tending to show that he had only the capacity of a child of 6 or 7. Certain answers given by him upon his examination indicated that his powers of observation were limited or his memory defective. Held, that in such case he could not be expected to use the same degree of diligence that a man of mature age and average intelligence should use.

57. Baltimore, etc., R. Co. v. Cumberland, 176 U. S. 232, 239, 44 L. Ed. 447.

58. **Contributory negligence of infants.**—Railroad Co. v. Gladmon, 15 Wall. 401, 21 L. Ed. 114; Railroad Co. v. Stout, 17 Wall. 657, 660, 21 L. Ed. 745.

The federal supreme court in Union Pac. R. Co. v. McDonald, 152 U. S. 262, 277, 38 L. Ed. 434, quoted approvingly from Judge Cooley in a Michigan case: "Children, wherever they go, must be expected to act upon childish instincts and impulses; and others who are chargeable with a duty of care and caution towards them must calculate upon this, and take precautions accordingly." This view is supported by other well-considered cases. McDermott v. Severe, 202 U. S. 600, 609, 50 L. Ed. 1162.

**Unguarded slack pit near coal mine.**—A railroad company owned and operated a coal mine within a few hundred yards of a village, and leading thereto was a narrow, rough, uneven footpath extending from the depot to the coal mine over the rail-

road track and close to a slack pit or trench in which the employees of the company had deposited large quantities of coal slack in such a manner as to generate heat, and to take fire underneath by spontaneous combustion, the top of which was on a level with the surface, the path being a slight degree above the fire which had burned continuously for a long time prior to the injury. A few inches below the surface was a bed of burning coal which was concealed from view by a covering of ashes. All persons were allowed to visit the mine, and children frequently visited and played near the premises. Held, that the railroad company being well aware of the dangerous character of the said slack pit and the inviting conditions of a coal mine to attract children, is guilty of negligence, and liable in damages to a boy twelve years old who fell into the slack pit while visiting the coal mine, who was not negligent, and who had not been warned as to the danger of the pit. Union Pac. R. Co. v. McDonald, 152 U. S. 262, 38 L. Ed. 434.

A boy who had gone to a coal mine to visit it through curiosity to see it operate, was frightened by five or six boys who came from the coal pit with dirty looking faces and lamps on their hats, one yelling, "let's grease him," another "let's burn him," starting towards him, whereupon he ran along a small path that skirted a slack pit which was the only path leading from the mouth of the pit to the depot and the village, and in attempting to pass some persons who were on the bank near the pit, slipped and fell into the burning slack. Held, that negligence is not imputed to the boy, because he ran along this narrow path and fell into the pit. Union Pac. R. Co. v. McDonald, 152 U. S. 262, 38 L. Ed. 434.

And although the mother of the boy had consented to his visiting the coal mine with a "trapper" boy of the town with whom he had become acquainted, yet it was held that the boy is not chargeable with negligence, since neither he nor

passer and the turntable a lawful erection.<sup>59</sup> And knowledge on the part of the railroad that the turntable was an attractive and dangerous plaything to children of tender years may be shown by evidence that children had been at play on the turntable on other occasions, and within the observation and to the knowledge of the employees of the defendant.<sup>60</sup>

(2) *Extension of Doctrine of Turntable Cases.*—But the doctrine of the turntable cases has been much extended and enlarged, and has been applied by analogy to many other instrumentalities likely to attract the young and unwary.<sup>61</sup>

c. *Questions of Law and Fact.*—See post, "Questions of Law and Fact," XII, B. The question of negligence upon the part of an infant must be determined with reference to his age and to the situation in which, at the time of the injury, the circumstances placed him.<sup>62</sup>

### IX. Joint and Several Liability.

The rule is, that when property is injured by two co-operating causes, though the persons producing them may not be in intentional concert, the owner is entitled to compensation from either or both, according to the circumstances.<sup>63</sup> Especially is the injured party entitled to recover from that one of the two who has undertaken to convey the property with care and skill to a place of destination, but has failed to do so.<sup>64</sup>

### X. Privity.

It is not every one who suffers a loss from the negligence of another that can maintain a suit on such grounds. On the contrary, the limit of the doctrine relating to actionable negligence, says Beasley, C. J., is, that the person occasioning the loss must owe a duty, arising from contract or otherwise, to the person sustaining such loss. Such a restriction on the right to sue for a want of care in the exercise of employments or the transaction of business is plainly necessary to restrain the remedy from being pushed to an impracticable extreme. There would be no bounds to actions and litigious intricacies if the ill effects of the negligence of men may be followed down the chain of results to the final effect.<sup>65</sup> Accordingly the rule is that in an action for damages for negligence, where there is fraud or collusion, the party will be held liable, even though there is no privity of contract; but where there is neither fraud or collusion nor privity of contract, the party will not be held liable, unless the act is one imminently dangerous to the lives of others, or is an act performed in pursuance of some legal duty.<sup>66</sup>

his mother had any knowledge of this slack pit. *Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 38 L. Ed. 434.

59. *Doctrine of the turntable cases in the federal courts.*—*Railroad Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745, approved in *Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 272, 38 L. Ed. 434. This is a leading American case on the subject of liability of railroads for injuries to children sustained on unguarded, unsecured turntables. The doctrine of this case has been followed in most jurisdictions, but repudiated in a number of others.

60. *How knowledge of railroad's employee shown.*—*Railroad Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745.

61. *Other dangerous appliances attractive to children.*—*Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 38 L. Ed. 434 (unguarded slack pit near coal mine), expressly approving and reaffirming *Railroad Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745.

62. *Contributory negligence of infant a question of fact.*—*Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 281, 38 L. Ed. 434.

63. *Joint and several liability.*—*The Steamer New Philadelphia*, 1 Black 62, 17 L. Ed. 84.

64. *The Steamer New Philadelphia*, 1 Black. 62, 17 L. Ed. 84.

65. *Necessity for privity in actions for negligence.*—*Savings Bank v. Ward*, 100 U. S. 195, 202, 25 L. Ed. 621, citing *Kahl v. Love*, 37 N. J. L. 5, 8, approved in *Harshman v. Winterbottom*, 123 U. S. 215, 222, 31 L. Ed. 124.

66. *Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621.

*Unskillful examination of title by attorney at law.*—A., an attorney at law, employed and paid solely by B. to examine and report on the title of the latter to a certain lot of ground, gave over his signature this certificate, "B.'s title to the lot"



## XI. Pleading.

**A. Variance.**<sup>67</sup>—An immaterial variance between the pleadings and proof in actions for negligence will not justify a reversal, especially when it is not of such a character as to mislead the defendant at the trial.<sup>68</sup>

**B. Striking Out Pleadings.**—A motion may be made to strike out counts in the declaration, where no evidence has been introduced tending to establish the commission of the particular acts of negligence charged in those counts.<sup>69</sup>

(describing it) "is good, and the property is unincumbered." C., with whom A. had no contract or communication, relied upon this certificate as true, and loaned money to B., upon the latter executing by way of security therefor a deed of trust for the lot. B., before employing A., had transferred the lot in fee by a duly recorded conveyance, a fact which A., on examining the records, could have ascertained, had he exercised a reasonable degree of care. The money loaned was not paid, and B. is insolvent. Held: 1. That there being neither fraud, collusion, nor falsehood by A., nor privity of contract between him and C., he is not liable to the latter for any loss sustained by reason of the certificate. *Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621.

"Injury was received by the driver of a mail coach which broke down from defects in its construction. He brought suit against the constructor of the coach who sold the same to the owner of the line in whose employment the plaintiff was engaged when the accident happened. Held, by the whole court, that the action would not lie, as there is no privity of contract between the parties. Unless we confine the operation of such contracts as this to the parties who entered into them, said Lord Abinger, the most absurd consequences, to which no limit can be seen, will ensue; and Baron Alderson remarked, if we hold that the plaintiff can sue in such a case, there is no point at which such actions will stop. The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty." *Winterbottom v. Wright*, 10 Mee. & W. 109, 115, expressly approved in *Savings Bank v. Ward*, 100 U. S. 195, 203, 25 L. Ed. 621.

**Rule where act is imminently dangerous to human life.**—Pharmacists or apothecaries who compound or sell medicines, if they carelessly label a poison as a harmless medicine, and send it so labelled into the market, are liable to all persons who, without fault on their part, are injured by using it as such medicine, in consequences of the false label; the rule being that the liability in such a case arises not out of any contract or direct privity between the wrongdoer and the person injured, but out of the duty which the law imposes on him to avoid acts in their nature dangerous to the lives of others. He is liable, therefore, though the poisonous drug with the

label may have passed through many intermediate sales before it reached the hands of the person injured. *Thomas v. Winchester*, 2 Seld. 397, 410. Such an act of negligence being imminently dangerous to the lives of others, the wrongdoer is liable to the injured party, whether there be any contract between them or not. Where the wrongful act is not immediately dangerous to the lives of others, the negligent party, unless he be a public agent in the performance of some duty, is in general liable only to the party with whom he contracted, and on the ground that negligence is a breach of the contract. *Savings Bank v. Ward*, 100 U. S. 195, 204, 25 L. Ed. 621.

67. See, generally, the title VARIANCE.

**68. Instances of immaterial variances.**—In a case where the declaration alleged that plaintiff was injured by being pushed and shoved from her seat in a horse car at a railroad crossing by the commotion of the passengers caused by an approaching train, and there being proof that plaintiff was injured by jumping from the car, it was held (affirming the case of *Nash v. Towne*, 5 Wall. 689, 18 L. Ed. 527) that the variance is not material, because it was not so much the manner of plaintiff's leaving the car as it was the exciting cause and imminent danger that operated upon her, and forced plaintiff from the car. A variance is never material unless it has a tendency to mislead the defendant at the trial. *Washington, etc., R. Co. v. Hickey*, 166 U. S. 521, 41 L. Ed. 1101.

In an action to recover damages against a railroad company for personal injuries inflicted upon the plaintiff by the alleged negligence of the defendant company, it was held that an averment in a declaration that there was no light upon the engine of the defendant, is satisfied by proof that there was no such light as was required by law, because an insufficient light is, from a legal point of view, no light at all. Moreover, such variance between the declaration and the proof is not of a character to mislead the defendant at the trial. *Robbins v. Chicago*, 4 Wall. 657, 18 L. Ed. 427; *Grayson v. Lynch*, 163 U. S. 468, 41 L. Ed. 230; *Baltimore, etc., R. Co. v. Cumberland*, 176 U. S. 232, 44 L. Ed. 447, citing *Nash v. Towne*, 5 Wall. 689, 18 L. Ed. 527.

**69. Striking out counts.**—Where there is no evidence introduced to establish the commission of the particular acts of negligence claimed in certain counts of the



## XII. Evidence.

**A. Presumptions and Burden of Proof.**—1. **PRESUMPTION OF NEGLIGENCE**—*a. In General.*—Although there is no express finding of negligence or fault as matter of fact, but only as an inference from the facts found, yet it is sufficient if the facts found furnish such conclusive proof of negligence that it may be regarded as properly found amongst the conclusions of law as a legal inference from those facts.<sup>70</sup> But the negligence of a defendant cannot be inferred from a presumption of care on the part of the person killed. A presumption in the performance of duty attends the defendant as well as the person killed. It must be overcome by direct evidence. One presumption cannot be built upon another.<sup>71</sup>

*b. Res Ipsa Loquitur.*—A presumption of negligence from the simple occurrence of an accident seldom arises, except where the accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, and for the management or construction of which he is responsible.<sup>72</sup>

*c. Presumption as to Contributory Negligence.*—See ante, "Contributory Negligence," VIII. A plaintiff in the first instance must show negligence on the part of the defendant. Having done this, he need not go farther in those jurisdictions where the burden of proof is on the defendant to show contributory negligence. In other words, if there is no evidence which speaks one way or the other with reference to contributory negligence of the person killed, then it is presumed that there was no such negligence.<sup>73</sup> And since the absence of any fault on the part of a plaintiff may be inferred from circumstances, the disposition of persons to take care of themselves and to keep out of difficulty may properly be taken into consideration.<sup>74</sup>

2. **BURDEN OF PROOF.**—The federal supreme court has held repeatedly that the burden of proving contributory negligence rests on the defendant;<sup>75</sup> hence, it need not be negated or disproved by the plaintiff.<sup>76</sup> And this general rule is not changed because the presumption that the plaintiff was not in fault is overcome by the plaintiff's own evidence, although such negligence may be established

declaration, it is prejudicial error for the court to refuse to strike out these counts and give an instruction that there could be no recovery under any of these counts, and § 57 of the Illinois Practice Act does not support the contention that such errors are not prejudicial. *Wilmington Star Min. Co. v. Fulton*, 205 U. S. 60, 78, 79, 51 L. Ed. 708. See the title PLEADING.

70. **Presumption of negligence.**—The *Belgenland*, 114 U. S. 355, 29 L. Ed. 152, citing *United States v. Pugh*, 99 U. S. 265, 25 L. Ed. 322.

71. **One presumption cannot be founded on another.**—*Looney v. Metropolitan R. Co.*, 200 U. S. 480, 488, 50 L. Ed. 564.

72. **Res ipsa loquitur.**—*Transportation Co. v. Downer*, 11 Wall. 129, 20 L. Ed. 160.

73. **Presumption as to contributory negligence.**—*Thompson on the Law of Negligence*, § 401; *Texas, etc., R. Co. v. Gentry*, 163 U. S. 353, 41 L. Ed. 186; *Baltimore, etc., R. Co. v. Landrigan*, 191 U. S. 461, 48 L. Ed. 262; *Looney v. Metropolitan R. Co.*, 200 U. S. 480, 487, 50 L. Ed. 564.

74. **Presumption as to love of life and avoidance of danger.**—*Railroad Co. v. Gladmon*, 15 Wall. 401, 21 L. Ed. 114; *Bal-*

*timore, etc., R. Co. v. Griffith*, 159 U. S. 603, 610, 40 L. Ed. 274.

75. **Burden of proving contributory negligence is on defendant.**—*Railroad Co. v. Gladmon*, 15 Wall. 401, 21 L. Ed. 114; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898; *Union Pac. R. Co. v. O'Brien*, 161 U. S. 451, 456, 40 L. Ed. 766.

76. **Contributory negligence need not be negated by plaintiff.**—*Inland, etc., Coasting Co. v. Tolson*, 139 U. S. 551, 557, 35 L. Ed. 270; *Texas, etc., R. Co. v. Volk*, 151 U. S. 73, 77, 38 L. Ed. 78.

**Assumption of risk by servants.**—If the servant of a railroad company who has knowledge of defects in machinery gives notice thereof to the proper officer, and is promised that they shall be remedied, his subsequent use of it, in the well-grounded belief that it will be put in proper condition within a reasonable time, does not necessarily, or as matter of law, make him guilty of contributory negligence. It is a question for the jury whether, in relying upon such promise, and using the machinery after he knew its defective or insufficient condition, he was in the exercise of due care. The burden of proof, in such a case, is upon the company

by the plaintiff's evidence, and it is not necessary that such proof should come exclusively from the party on whom rested the burden of proof.<sup>77</sup>

**B. Questions of Law and Fact.**—See ante, "Proximate Cause," VII; "Contributory Negligence," VIII.<sup>78</sup>

1. **MIXED QUESTIONS OF LAW AND FACT.**—It has recently been decided by the House of Lords, upon a careful consideration of the previous cases in England, that it is for the judge to say whether any facts have been established by sufficient evidence, from which negligence can be reasonably and legitimately inferred; and it is for the jury to say whether from those facts when submitted to them, negligence ought to be inferred.<sup>79</sup>

2. **WHEN A QUESTION OF LAW FOR THE COURT.**—Where but one inference can reasonably be drawn from the evidence, the question of negligence or no negligence is one of law for the court.<sup>80</sup> But it is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court.<sup>81</sup>

3. **WHEN A QUESTION OF FACT FOR THE JURY.**—Where the state of facts is such that reasonable minds may fairly differ upon the question as to whether there was negligence or not, its determination is a matter of fact for the jury to de-

to show contributory negligence. *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612.

While it is true that in a suit by an adult against a street railway company for injuries done to him while he was crossing the track of the company, the absence of reasonable care and caution on his part will prevent a recovery, it is not correct to say that it is incumbent upon him to prove such care and caution. The want of it, or, as it is termed, "contributory negligence," is a defense to be proved by the other side. *Railroad Co. v. Gladmon*, 15 Wall. 401, 21 L. Ed. 114.

An instruction that the burden of proof in actions for damages for negligence is upon the defendant to show that the plaintiff was negligent, and that his negligence contributed to the injury, is in accord with the uniform decisions of the federal supreme court. *Inland, etc., Coasting Co. v. Tolson*, 139 U. S. 551, 35 L. Ed. 270, citing *Railroad Co. v. Gladmon*, 15 Wall. 401, 21 L. Ed. 114; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898; *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612; *Northern Pac. R. Co. v. Mares*, 123 U. S. 710, 31 L. Ed. 296.

77. *Washington, etc., R. Co. v. Harmon*, 147 U. S. 571, 37 L. Ed. 284, following *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898.

78. See the title EVIDENCE, vol. 5, p. 1055.

79. **When a mixed question of law and fact.**—*Randall v. Baltimore, etc., R. Co.*, 109 U. S. 478, 482, 27 L. Ed. 1003.

80. **When a question of law for the court.**—*Northern Pac. R. Co. v. Freeman*, 174 U. S. 379, 384, 43 L. Ed. 1014; *District of Columbia v. Moulton*, 182 U. S. 576, 579, 45 L. Ed. 1237; *Hackfeldt & Co. v. United States*, 197 U. S. 442, 447, 49 L. Ed. 826.

It is true that questions of negligence and contributory negligence are, ordi-

narily, questions of fact to be passed upon by a jury; yet, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury, and direct a verdict. *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542; *Schofield v. Chicago, etc., R. Co.*, 114 U. S. 615, 29 L. Ed. 224; *Delaware, etc., R. Co. v. Converse*, 139 U. S. 469, 35 L. Ed. 213; *Aerkfetz v. Humphreys*, 145 U. S. 418, 36 L. Ed. 758; *Elliott v. Chicago, etc., R. Co.*, 150 U. S. 245, 246, 37 L. Ed. 1068.

81. *Railroad Co. v. Pollard*, 22 Wall. 341, 22 L. Ed. 877; *Delaware, etc., R. Co. v. Converse*, 139 U. S. 469, 35 L. Ed. 213; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 417, 36 L. Ed. 485.

The question of negligence is one of law for the court only where the facts are such that all reasonable men must draw the same conclusion from them, or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish. *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 417, 36 L. Ed. 485; *Texas, etc., R. Co. v. Cox*, 145 U. S. 593, 606, 36 L. Ed. 829; *Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349, 361, 37 L. Ed. 1107.

Negligence only becomes a question of law to be taken from the jury when the facts are such that fair-minded men can only draw from them the inference that there was no negligence. If fair-minded men, from the facts admitted, or conflicting testimony, may honestly draw different conclusions as to the negligence charged, the question is not one of law but of fact, and to be settled by the jury under proper instructions. *Richmond, etc., R. Co. v. Powers*, 149 U. S. 43, 37 L. Ed. 642; *North-*



cide.<sup>82</sup> It is only where the evidence is such that reasonable men may fairly differ as to the deductions to be drawn therefrom, that the determination of the fact of negligence should be submitted to a jury.<sup>83</sup>

4. **RULE WHERE EVIDENCE IS CONFLICTING AND WHERE FACTS ARE UNDISPUTED.**—There can be no doubt where the evidence is conflicting that it is the province of the jury to determine, from such evidence, the proof which constitutes negligence. There is also no doubt, where the facts are undisputed or clearly preponderant, that the question of negligence is one of law.<sup>84</sup> But although the facts are undisputed it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence.<sup>85</sup>

5. **CONTRIBUTORY NEGLIGENCE.**—As a general rule, the question of contributory negligence is one for the jury, under proper instructions by the court, especially where the facts are in dispute, and the evidence in relation to them is

ern Pac. R. Co. *v.* Everett, 152 U. S. 107, 38 L. Ed. 373; *McDermott v. Severe*, 202 U. S. 600, 604, 50 L. Ed. 1162.

82. **When negligence a question of fact for the jury.**—*Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 417, 36 L. Ed. 485; *Richmond, etc., R. Co. v. Powers*, 149 U. S. 43, 37 L. Ed. 642; *Baltimore, etc., R. Co. v. Griffith*, 159 U. S. 603, 611, 40 L. Ed. 274; *Texas, etc., R. Co. v. Gentry*, 163 U. S. 353, 368, 41 L. Ed. 186; *Warner v. Baltimore, etc., R. Co.*, 168 U. S. 339, 348, 42 L. Ed. 491; *Patton v. Texas, etc., R. Co.*, 179 U. S. 658, 660, 45 L. Ed. 361; *Marande v. Texas, etc., R. Co.*, 184 U. S. 173, 192, 46 L. Ed. 487; *Hackfeld & Co. v. United States*, 197 U. S. 442, 446, 49 L. Ed. 826.

The settled rule is that where negligence is a mere question of fact, and nothing appears which is negligence per se, the determination of the question is peculiarly the province of a jury, and its conclusions will not be disturbed unless it is entirely clear that they were erroneous. Courts do not approach the question as an original one and consider whether, in their judgment, the testimony does or does not prove negligence, but accept the determination of the jury, if there is any evidence upon which it can be rested. This is the general rule in respect to all mere questions of fact. *Railroad Co. v. Fraloff*, 100 U. S. 24, 31, 25 L. Ed. 531; *Kane v. Northern Cent. R. Co.*, 128 U. S. 91, 32 L. Ed. 339; *Jones v. East Tennessee, etc., R. Co.*, 128 U. S. 443, 32 L. Ed. 478; *Dunlap v. Northeastern R. Co.*, 130 U. S. 649, 32 L. Ed. 1058; *Washington, etc., R. Co. v. McDade*, 135 U. S. 554, 34 L. Ed. 235; *Delaware, etc., R. Co. v. Converse*, 139 U. S. 469, 35 L. Ed. 213; *Richmond, etc., R. Co. v. Powers*, 149 U. S. 43, 45, 37 L. Ed. 642; *Davidson Steamship Co. v. United States*, 205 U. S. 187, 190, 51 L. Ed. 764, citing *Railroad Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745.

**Sufficiency of signal lantern.**—Where the regulations of a municipality required railroad companies to carry at night a headlight, or other equivalent reflecting lantern to give warning to persons, etc., it was held that it was a question for the jury whether a signal lantern hanging on a hook on the rear or advancing end of the

tender was substantially such a one as was required by the regulations. *Baltimore, etc., R. Co. v. Cumberland*, 176 U. S. 232, 44 L. Ed. 447.

**Actions against common carriers.**—“And in *Richmond, etc., R. Co. v. Powers*, 149 U. S. 43, 37 L. Ed. 642, we said that where in an action against a common carrier to recover damages for injuries there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because the facts, being undisputed, fair-minded men will honestly draw different conclusions from them.” *Northern Pac. R. Co. v. Everett*, 152 U. S. 107, 113, 38 L. Ed. 373.

83. *Warner v. Baltimore, etc., R. Co.*, 168 U. S. 339, 348, 42 L. Ed. 491; *District of Columbia v. Moulton*, 182 U. S. 576, 579, 45 L. Ed. 1237.

84. **Rule where evidence is conflicting and where facts are undisputed.**—*Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 283, 38 L. Ed. 434; *Southern Pac. Co. v. Pool*, 160 U. S. 438, 440, 40 L. Ed. 485.

It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them. *Railroad Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745; *Washington, etc., R. Co. v. McDade*, 135 U. S. 554, 34 L. Ed. 235; *Delaware, etc., R. Co. v. Converse*, 139 U. S. 469, 35 L. Ed. 213; *Richmond, etc., R. Co. v. Powers*, 149 U. S. 43, 45, 37 L. Ed. 642.

**In *Redfield on the Law of Railways***, vol. 2, p. 231, it is said: “And what is proper care will be often a question of law, where there is no controversy about the facts. But ordinarily, we apprehend, where there is any testimony tending to show negligence, it is a question for the jury.” *Railroad Co. v. Stout*, 17 Wall. 657, 664, 21 L. Ed. 745.

85. *Railroad Co. v. Stout*, 17 Wall. 657, 664, 21 L. Ed. 745.



that from which fair-minded men may draw different inferences.<sup>86</sup> Hence it is not error to leave the question of contributory negligence to the jury, where the evidence of contributory negligence is not of such a conclusive character that the court would be obliged in the exercise of a sound judicial discretion to set aside the verdict.<sup>87</sup>

### XIII. Imputable Negligence.

The negligence of the driver of a hack cannot be imputed to those who hire the hack, if they exercise no control over him further than to indicate the route they wish to travel or the places to which they wish to go. In other words the responsibility cannot, within any recognized rules of law, be fastened upon one who has in no way interfered with and controlled in the matter causing the injury. From the simple fact of hiring the carriage or riding in it, no such liability can arise. The party hiring or riding must in some way have co-operated in producing the injury complained of before he incurs any liability for it. And there is no distinction in principle whether the passengers be on a public conveyance like a railroad train or an omnibus, or be on a hack hired from a public stand in the street for a drive.<sup>88</sup>

**NEGOTIATE — NEGOTIABLE — NEGOTIABILITY.** — "Negotiability is a technical term derived from the usage of merchants and bankers, in transferring, primarily bills of exchange and, afterwards, promissory notes. At common law no contract was assignable, so as to give to an assignee a right to enforce it by suit in his own name. To this rule bills of exchange and promissory notes, payable to order or bearer, have been admitted exceptions, made such by the adoption of the law merchant. They may be transferred by indorsement and delivery, and such a transfer is called negotiation. It is a mercantile business transaction, and the capacity of being transferred, so as to give to the indorsee a right to sue on the contract in his own name, is what constitutes negotiability. The term 'negotiable' expresses, at least primarily, this mode and effect of a transfer."<sup>1</sup>

**NEGROES.**—See the titles *CIVIL RIGHTS*, vol. 3, p. 816, and references given; *SLAVERY AND INVOLUNTARY SERVITUDE*.

**86. Contributory negligence a question for the jury.**—*Railroad Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745; *Washington, etc., R. Co. v. McDade*, 135 U. S. 554, 571, 34 L. Ed. 235; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 428, 36 L. Ed. 485; *Grayson v. Lynch*, 163 U. S. 468, 41 L. Ed. 230.

"In the case of *Dunlap v. Northeastern R. Co.*, 130 U. S. 649, 652, 32 L. Ed. 1058, we held that the circuit court erred in not submitting the question of contributory negligence to the jury, as the conclusion did not follow, as matter of law, that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish." *Northern Pac. R. Co. v. Everett*, 152 U. S. 107, 113, 38 L. Ed. 373.

The determination of what was such contributory negligence on the part of the deceased as would defeat this action, or, perhaps, more accurately speaking, the question of whether the deceased, at the time of the fatal accident, was, under all the circumstances of the case, in the exercise of such due care and diligence as would be expected of a reasonably prudent

and careful person, under similar circumstances, was no more a question of law for the court than was the question of negligence on the part of the defendant. There is no more of an absolute standard of ordinary care and diligence in the one instance than in the other. *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 429, 36 L. Ed. 485.

**87.** *Washington, etc., R. Co. v. Harmon*, 147 U. S. 571, 37 L. Ed. 284.

**88. Imputable negligence.**—*Little v. Hackett*, 116 U. S. 366, 29 L. Ed. 652, repudiating the doctrine of *Thorogood v. Bryan*, 8 C. B. 115, 65 E. C. T. 115.

**1. Negotiability.**—*Shaw v. Railroad Co.*, 101 U. S. 557, 562, 29 L. Ed. 892. See, generally, the title *BILLS, NOTES AND CHECKS*, vol. 3, p. 257.

**Negotiate.**—As to meaning of the term *negotiate*, see the title *BILLS, NOTES AND CHECKS*, vol. 3, p. 292.

**Negotiable paper.**—As to what is *negotiable* paper in the sense of the law merchant, see the title *BILLS, NOTES AND CHECKS*, vol. 3, pp. 269, 270.

**NEMO ALLEGANS SUAM, ETC.**—The maxim of the Roman law, that no one alleging his own turpitude shall be heard (*nemo allegans suam turpitudinem est audiendus*), is not a rule of evidence, but a rule applicable to parties seeking to enforce rights founded upon illegal or criminal considerations. The meaning of the maxim is, that no one shall be heard in a court of justice to allege his own turpitude as a foundation of a claim or right; it does not import that a man shall not be heard who testifies to his own turpitude or criminality, however much his testimony may be discredited by his character.<sup>1</sup>

**NET.**—"The lexical definition of net is 'clear of all charges and deductions.' Webster. 'That which remains after the deduction of all charges or outlay, as net profit.' Worcester. The popular acceptance of the term is the same."<sup>2</sup>

**NET EARNINGS.**—"As a general proposition, net earnings are the excess of the gross earnings over the expenditures defrayed in producing them, aside from, and exclusive of, the expenditure of capital laid out in constructing and equipping the works themselves."<sup>3</sup>

1. **Nemo allegans, etc.**—*Davis v. Brown*, 94 U. S. 423, 425, 24 L. Ed. 204. See, generally, the titles **ILLEGAL CONTRACTS**, vol. 6, p. 737; **WITNESSES**.

2. **Net.**—*St. John v. Erie R. Co.*, 22 Wall. 136, 148, 22 L. Ed. 743.

3. **Net earnings.**—*Union Pac. R. Co. v. United States*, 99 U. S. 402, 420, 25 L. Ed. 274.

"The net earnings of corporations out of which profits are distributable in dividends are thus defined in *St. John v. Erie Railway Co.*, 10 Blatchford 279; '**Net earnings** are properly the gross receipts less the expenses of operating the road to earn such receipts. Interest on debts is paid out of what thus remains—that is, out of the **net earnings**. Many other liabilities are paid out of the **net earnings**. When all liabilities are paid, either out of the gross receipts or out of the **net earnings**, the remainder is the profit of the shareholders, to go toward dividends, which, in that way, are paid out of the **net earnings**.' This case was affirmed by this court. *St. John v. Erie R. Co.*, 22 Wall. 136, 22 L. Ed. 743." *Mobile, etc., R. Co. v. Tennessee*, 153 U. S. 486, 497, 38 L. Ed. 793.

**Railroad companies.**—An act provided that in return for loans and grants of land made to a railroad company, that "after said road is completed until said bonds and interest are paid, at least five per centum of the **net earnings** of said road shall also be annually applied to the payment thereof." Held: 1. That the "earnings" of the road include all the receipts arising from the company's operations as a railroad company, but not those

from the public lands granted, nor fictitious receipts for the transportation of its own property **net earnings**, within the meaning of the law, are ascertained by deducting from the gross earnings all the ordinary expenses of organization and of operating the road, and expenses made bona fide in improvements, and paid out of earnings, and not by the issue of bonds or stock; but not deducting interest paid on any of the bonded debt of the company. *Union Pac. R. Co. v. United States*, 99 U. S. 402, 25 L. Ed. 274.

Preferred stock issued by a railroad company contained the following clause: "Such preferred stock shall be entitled to preferred dividends out of the **net earnings** of said road (if earned in the current year, but not otherwise), not to exceed seven per cent, in any one year, payable semi-annually, after payment of mortgage interest and delayed coupons in full." A "preferred stockholder" filed a bill to have full payment of his dividends from the **net earnings**, prior to any payment on account of the new leases or additionally borrowed money; his view being that his rights were to be determined by the state of things which existed when his stock was issued, and were not affected by the leases taken and the money borrowed afterwards. Held, that this was not a true view of the case; and that the clause above, "after payment of mortgage interest and delayed coupons in full," was controlled by the previous word "net," which meant "that which remained as net profit after the deduction of all charges or outlay." *St. John v. Erie R. Co.*, 22 Wall. 136, 22 L. Ed. 743.

# NEUTRALITY.

BY JOHN D. PARKER.

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## CROSS REFERENCES.

See the titles AMBASSADORS AND CONSULS, vol. 1, p. 273; BLOCKADE, vol. 3, p. 364; CONTRACTS, vol. 4, p. 552; WAR.

### I. Definition.

Neutrality, strictly speaking, consists in abstinence from any participation in a public, private or civil war, and in impartiality of conduct towards both parties, but the maintenance unbroken of peaceful relations between two powers when the domestic peace of one of them is disturbed is not neutrality in the sense in which the word is used when the disturbance has acquired such head as to have demanded the recognition of belligerency. And, as mere matter of municipal



administration, no nation can permit unauthorized acts of war within its territory in infraction of its sovereignty, while good faith towards friendly nations requires their prevention.<sup>1</sup>

## II. Rights of Neutrals.

**A. Neutral Leaving Belligerent Country.**—A neutral leaving a belligerent country, in which he was domiciled at the commencement of the war, is entitled to the rights of a neutral in his person and property, as soon as he sails from the hostile port.<sup>2</sup>

**B. Trade.**—1. **IN GENERAL.**—The trade of neutrals with belligerents in articles not contraband is absolutely free unless interrupted by blockade.<sup>3</sup>

2. **TRADING BETWEEN NEUTRAL PORTS.**—Goods of every description may be conveyed to neutral ports from neutral ports, if intended for actual discharge at a neutral port, and to be brought into the common stock of merchandise of such port;<sup>4</sup> and no trade honestly carried on between neutral ports, whether of the same or different nations, can be lawfully interrupted by belligerents.<sup>5</sup> But good faith must preside over such commerce; enemy commerce under neutral disguises has no claim to neutral immunity,<sup>6</sup> and voyages from neutral ports intended for belligerent ports are not protected in respect to seizure, either of ship or cargo, by an intention, real or pretended, to touch at intermediate neutral ports.<sup>7</sup>

1. **Definition.**—The Three Friends, 166 U. S. 1, 52, 41 L. Ed. 837.

2. **Neutral leaving belligerent country.**—United States v. Guillem, 11 How. 47, 13 L. Ed. 599. See the title **BLOCKADE**, vol. 3, p. 375.

3. **Freedom of trade.**—The Peterhoff, 5 Wall. 28, 18 L. Ed. 564; The Bermuda, 3 Wall. 514, 18 L. Ed. 200.

Neutrals may establish themselves, for the purposes of trade, in ports convenient to either belligerent; and may sell or transport to either such articles as either may wish to buy, subject to risks of capture for violation of blockade or for the conveyance of contraband to belligerent ports. The Bermuda, 3 Wall. 514, 18 L. Ed. 200.

4. **Goods intended for neutral port.**—The Bermuda, 3 Wall. 514, 18 L. Ed. 200. See, also, The Peterhoff, 5 Wall. 28, 18 L. Ed. 564.

5. **Trade honestly carried on.**—The Bermuda, 3 Wall. 514, 18 L. Ed. 200.

A cargo shipped from a neutral country by neutrals resident there, and destined ostensibly to a neutral port, restored with costs after capture in a suspicious region, and where the vessel on its outward voyage had violated a blockade; there having been nothing to fix on the neutrals themselves any connection with the ownership or outward voyage of the vessel (which was itself condemned), nor anything to prove that their purposes were not lawful. The Flying Scud, 6 Wall. 263, 18 L. Ed. 755.

Where several witnesses stated facts which tended to prove that a vessel was in the employment of an enemy government; and that part, at least, of her return cargo was in fact enemy property; while the statements of others made it probable that the vessel was in truth what she professed to be, a merchant steamer,

belonging to neutrals, and nothing more; that her outward cargo was consigned in good faith by neutral owners for lawful sale; that the return cargo was purchased by neutrals, and on neutral account, with the proceeds of the cargo or other money; the court directed restitution, without costs or expenses to either party as against the other. The Sir William Peel, 5 Wall. 517, 18 L. Ed. 696. See the title **PRIZE**.

6. **Good faith.**—The Bermuda, 3 Wall. 514, 18 L. Ed. 200.

Where the bulk of a cargo shipped from a neutral country by neutrals resident there and destined ostensibly to a neutral port was restored, a part of it which had been shipped like the rest, except that the shipper was a merchant residing and doing business in the enemies' country, was distinguished from such residue and condemned. The Flying Scud, 6 Wall. 263, 18 L. Ed. 755.

The facts that the master declared himself ignorant as to what a part of his cargo, of which invoices were not on board (having been sent by mail to the port of destination), consisted—such part having been contraband; and also declared himself ignorant of the cause of capture, when his mate, boatswain and steward all testified that they understood it to be the vessel's having contraband on board—held not sufficient, of themselves, to infer guilt to the owners of the vessel, in no way compromised with the cargo. But the misrepresentation of the master as to his knowledge of the ground of capture, held, to deprive the owners of costs on restoration. The Springbok, 5 Wall. 1, 18 L. Ed. 480.

7. **Intention to touch at neutral port.**—The Bermuda, 3 Wall. 514, 18 L. Ed. 200. See the title **BLOCKADE**, vol. 3, pp. 374, 375.

3. **RIGHTS OF NEUTRALS TO BUY OR SELL IN THEIR OWN COUNTRY.**—Neutrals in their own country may sell to belligerents whatever belligerents choose to buy.<sup>8</sup> The principal exceptions to this rule are, that neutrals must not sell to one belligerent what they refuse to sell to the other, and must not furnish soldiers or sailors to either; nor prepare, nor suffer to be prepared within their territory, armed ships or military or naval expeditions against either.<sup>9</sup> A bona fide purchase for a commercial purpose by a neutral, in his own home port, of a ship of war of a belligerent that had fled to such port in order to escape from enemy vessels in pursuit, but which was bona fide dismantled prior to the sale and afterwards fitted up for the merchant service, does not pass a title above the right of capture by the other belligerent.<sup>10</sup>

4. **EXCEPTIONS TO THE RIGHT TO TRADE.**—There are two exceptions to the rule of free trade by neutrals with belligerents; the first is that there must be no violation of blockade or seige;<sup>11</sup> and the second, that there must be no conveyance of contraband to either belligerent.<sup>12</sup> Thus, vessels conveying contraband cargo to belligerent ports not under blockade, under circumstances of fraud or bad faith, or cargo of any description to belligerent ports under blockade, are liable to seizure and condemnation from the commencement to the end of the voyage.<sup>13</sup> Contraband of war is always subject to seizure when being conveyed to a belligerent destination,<sup>14</sup> whether the voyage be direct or indirect; such seizure, however, is restricted to actual contraband, and does not extend to the ship or other cargo, except in cases of fraud or bad faith on the part of the owners, or of the master with the sanction of the owners.<sup>15</sup>

5. **TRANSPORTATION OF NEUTRAL GOODS IN BELLIGERENT SHIPS.**—A neutral has a perfect right to transport his goods in a belligerent vessel,<sup>16</sup> and may employ an armed belligerent vessel for such purpose;<sup>17</sup> nor does the stipulation in a treaty, "that free ships shall make free goods," imply the converse proposition,

8. **In country of neutral.**—The Bermuda, 3 Wall. 514, 551, 18 L. Ed. 200.

9. **Exceptions.**—The Bermuda, 3 Wall. 514, 551, 18 L. Ed. 200.

10. **Ship of war.**—The Georgia, 7 Wall. 32, 19 L. Ed. 122. See, also, post, "Sale of Vessels to Be Used as Ships of War," III, B.

11. **Violation of blockade or seige.**—The Peterhoff, 5 Wall. 28, 56, 18 L. Ed. 564. See, generally, the titles BLOCKADE, vol. 3, p. 364.

12. **Contraband.**—The Peterhoff, 5 Wall. 28, 56, 18 L. Ed. 564. See the title WAR.

13. The Bermuda, 3 Wall. 514, 515, 18 L. Ed. 200.

14. The Bermuda, 3 Wall. 514, 18 L. Ed. 200; The Peterhoff, 5 Wall. 28, 18 L. Ed. 564.

15. **Destination of vessel.**—The Bermuda, 5 Wall. 514, 18 L. Ed. 200.

A voyage from a neutral to a belligerent port is one and the same voyage, whether the destination be ulterior or direct, and whether with or without the interposition of one or more intermediate ports; and whether to be performed by one vessel or several employed in the same transaction and in the accomplishment of the same purpose. The Bermuda, 3 Wall. 514, 515, 18 L. Ed. 200.

Destination alone justifies seizure and condemnation of ship and cargo in voyage to ports under blockade; and such destination justifies equally seizure of contraband

in voyage to ports not under blockade; but, in the last case, ship and cargo not contraband are free from seizure, except in cases of fraud or bad faith. The Bermuda, 3 Wall. 514, 515, 18 L. Ed. 200.

"We have already held in the case of the Bermuda, where goods, destined ultimately for a belligerent port, are being conveyed between two neutral ports by a neutral ship, under a charter made in good faith for that voyage, and without any fraudulent connection on the part of her owners with the ulterior destination of the goods, that the ship, though liable to seizure in order to confiscation of the goods, is not liable to condemnation as prize." The Springbok, 5 Wall. 1, 21, 18 L. Ed. 480. See post, "When Seizure and Condemnation of Neutral Ships and Cargoes Is Justified," II, B, 7.

16. **Transportation in belligerent ship.**—The Nereide, 9 Cranch 388, 426, 3 L. Ed. 769.

17. **Employment of armed vessels.**—A neutral may lawfully employ an armed belligerent vessel, to transport his goods; and such goods do not lose their neutral character by the armament, nor by the resistance made by such vessel, provided the neutral do not aid in such armament or resistance, although he charter the whole vessel, and be on board at the time of the resistance. The Nereide, 9 Cranch 388, 3 L. Ed. 769.



that "enemy ships shall make enemy goods."<sup>18</sup>

6. **TRANSPORTATION OF ENEMY GOODS IN NEUTRAL SHIPS.**—The privilege of the neutral flag of protecting enemy's property, whether conferred by treaty or by the ordinances of belligerent powers, cannot extend to a fraudulent use of the flag, to cover enemy's property in the ship as well as the cargo.<sup>19</sup> Where a neutral ship owner lends his name to cover a fraud with regard to the cargo, this circumstance will subject the ship to condemnation.<sup>20</sup> When enemy's property is fraudulently blended in the same claim with neutral property, the latter is liable to share the facts of the former.<sup>21</sup>

7. **WHEN SEIZURE AND CONDEMNATION OF NEUTRAL SHIPS AND CARGOES IS JUSTIFIED.**—When a neutral ship owner lends his name to cover a fraud in reference to the cargo, this circumstance will subject the ship to condemnation.<sup>22</sup> The acceptance and use of the enemy's license, on a voyage to a neutral port, prosecuted in furtherance of the enemy's avowed objects, is illegal, and subjects vessel and cargo to confiscation. It is not necessary, in order to subject the property to condemnation, that the person granting the license should be duly authorized to grant it, provided the person receiving it takes it with the expectation that it will protect his property from the enemy.<sup>23</sup> Sailing, with an intention to further the views of the enemy, is sufficient to condemn the property, although that intention be frustrated by capture.<sup>24</sup> Neutrals who place their vessels under belligerent control, and engage them in belligerent trade;<sup>25</sup> or permit them to be sent with contraband cargoes, under cover of false destination, to neutral ports, while the real destination is to belligerent ports; impress upon them the character of the belligerent in whose service they are employed, and the vessels may be seized and condemned as enemy property.<sup>26</sup> Circumstances, such as selection of master, control in lading and destination, instructions for conduct of voyage, and other like acts of ownership by an enemy, may repel, in the absence of charter party or other explanation, presumptions of ownership in a neutral arising from registry or other documents, and will war-

18. **Treaty.**—The treaty with Spain did not contain, either expressly or by implication, a stipulation that enemy ships shall make enemy goods. *The Nereide*, 9 Cranch 388, 3 L. Ed. 769. See, also, *The Pizarro*, 2 Wheat. 227, 228, 4 L. Ed. 226.

19. **Use of neutral flag to cover enemy's property in ship and cargo.**—*The Pizarro*, 2 Wheat. 227, 228, 247, 4 L. Ed. 226.

20. **Fraud in regard to the cargo.**—*The Fortuna*, 3 Wheat. 236, 4 L. Ed. 379.

21. **Where property is blended.**—*The St. Nicholas*, 1 Wheat. 417, 4 L. Ed. 125.

22. **Fraud in reference to cargo.**—*The Fortuna*, 3 Wheat. 236, 4 L. Ed. 379.

23. **Enemy's license.**—*The Aurora*, 8 Cranch 203, 3 L. Ed. 536.

24. **Sailing with intention to further views of enemy.**—*The Aurora*, 8 Cranch 203, 3 L. Ed. 536.

25. **Engaging in belligerent trade.**—*The Hart*, 3 Wall. 559, 18 L. Ed. 220. See, also, *The Baigorri*, 2 Wall. 474, 17 L. Ed. 880.

26. **False destination.**—*The Hart*, 3 Wall. 559, 18 L. Ed. 220. See post, "Exceptions to the Right to Trade," II, B, 4.

**Suspicious circumstances.**—A vessel and cargo condemned as enemy property, under circumstances of suspicion—spoliation of papers in the moment of capture being one of them as regarded the cargo, and a former enemy owner remaining in possession as master of the vessel through a

whole year, and through two alleged sales to neutrals, being another, as respected the vessel—the alleged neutral owners moreover, who resided near the place where the vessel and cargo were libelled, handing the whole matter of claim and defense over to such former owner as their agent, and giving themselves but slight actual pains to repel the inference raised *prima facie* by the facts. *The Andromeda*, 2 Wall. 481, 17 L. Ed. 849. See, also, *The Bermuda*, 3 Wall. 514, 515, 18 L. Ed. 200.

The cargo was shipped by the charterers of the vessel for neutral owners, and consigned to neutrals at Matamoras, but had not been discharged at the time of capture. It consisted in part of bales of Confederate uniform cloth, of the same mark and of corresponding numbers with like goods found on the *Science*; but there is no proof of unlawful destination. The brig, however, anchored in Texan waters, near the coast, and remained there until captured. This circumstance alone did not warrant condemnation, though, in connection with the character of the cargo, it justified capture. *The Volant*, 5 Wall. 179, 180, 18 L. Ed. 626.

A vessel and cargo, even when perhaps owned by neutrals, may be condemned as enemy property, because of the employment of the vessel in enemy trade, and



rant condemnation of a ship captured in the employment of enemies as enemy property.<sup>27</sup>

**Seizure for Forfeiture or Breach of United States Laws.**—At common law, any person may, at his peril, seize for a forfeiture to the government, and if the government adopt his seizure, and the property is condemned, he is justified. By the act of the 18th of February, 1793, § 27, officers of the revenue are authorized to make seizures of any ship or goods, for any breach of the laws of the United States.<sup>28</sup>

### III. Duties of Neutrals.

**A. Neutral Powers.**—"The law of nations requires every national government to use 'due diligence' to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof."<sup>29</sup> If two nations are at war, a neutral power shall not do any act, in favor of the commercial or military operations of one of them.<sup>30</sup> It shall not, by treaty, afford a succor or grant a privilege which was not stipulated for, previous to the commencement of hostilities.<sup>31</sup>

**B. Subjects of Neutral Powers.**—The subjects of a neutral nation cannot, consistently with neutrality, take a decided part with the enemy.<sup>32</sup>

### IV. Offenses against United States Neutrality Laws.

**A. Sale of Contraband.**—No neutral state is bound to prohibit the exportation of contraband articles, and the United States have not prohibited it.<sup>33</sup>

**B. Sale of Vessels to Be Used as Ships of War.**—The sending of armed vessels, from a neutral country to a belligerent port, for sale, as articles of commerce, is unlawful, only as it subjects the property to confiscation, or capture by the other belligerent.<sup>34</sup> Where a vessel was sold to a subject of a belligerent power but subsequently armed, equipped and commissioned as a privateer in his own country it was held to be not a violation of the neutrality laws of the United States although the vessel was suitable for such purpose.<sup>35</sup>

**C. Augumentation.**—A federal statute prohibits augmenting, within the United States, the force of a foreign vessel of war serving against a friendly sovereign.<sup>36</sup>

because of an attempt to violate a blockade, and to elude visitation and search. *The Baigorry*, 2 Wall. 474, 17 L. Ed. 880.

**27. Presumption of ownership in neutral.**—*The Bermuda*, 3 Wall. 514, 515, 18 L. Ed. 200. See the title **BLOCKADE**, vol. 3, p. 378.

**28. Seizure for forfeitures or breach of United States laws.**—*Gelston v. Hoyt*, 3 Wheat. 246, 4 L. Ed. 381.

**29. Due diligence.**—*United States v. Arjona*, 120 U. S. 479, 484, 30 L. Ed. 728. See, also, *The Three Friends*, 166 U. S. 1, 52, 41 L. Ed. 837.

**30. Commercial or military operations.**—*Vasse v. Ball*, 2 Dall. 270, 275, 1 L. Ed. 377.

**Existence of civil war.**—If the government remains neutral, but recognizes the existence of a civil war, the courts of the Union cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy. *United States v. Palmer*, 3 Wheat. 610, 4 L. Ed. 471; *The Divina Pastora*, 4 Wheat. 52, 4 L. Ed. 512. See, generally, the title **INTERNATIONAL LAW**, vol. 7, p. 239.

**31. Treaty.**—*Vasse v. Ball*, 2 Dall. 270, 275, 1 L. Ed. 377.

**32. Taking decided part with the enemy.**—*The Erstern*, 2 Dall. 34, 1 L. Ed. 277.

**Furnishing supplies.**—While the government of the United States acknowledged its treaty of limits and of amity and friendship with Mexico as still substituting and obligatory, no citizen of the United States could lawfully furnish supplies to Texas to enable it to carry on the war against Mexico. *Kennett v. Chambers*, 14 How. 38, 14 L. Ed. 316.

**During existence of blockade.**—*The Dashing Wave*, 5 Wall. 170, 18 L. Ed. 622. See the title **BLOCKADE**, vol. 3, p. 376.

**33. Exportation of contraband.**—*The Santissima Trinidad*, 7 Wheat. 283, 5 L. Ed. 454. See the title **WAR**.

"It is legal to export articles which are contraband of war; but the articles and the ship which carries them are subject to the risk of capture and forfeiture." *Northern Pac. R. Co. v. American Trading Co.*, 195 U. S. 439, 465, 49 L. Ed. 269, citing *The Santissima Trinidad*, 7 Wheat. 283, 340, 5 L. Ed. 454.

**34. Armed vessel.**—*The Santissima Trinidad*, 7 Wheat. 283, 5 L. Ed. 454.

**35. Privateer.**—*The Alfred*, 3 Dall. 307, 1 L. Ed. 614.

**36. Augumentation.**—Section 5285, Rev.

**D. Fitting Out Vessels**—1. **FOR WHOSE USE VESSEL TO BE FITTED OUT OR ARMED.**—Under the early statute prohibiting the fitting out of ships, etc., to cruise against the subjects of a country with which the United States was at peace, the crime was not complete unless the ships were to be used in the service of a foreign prince or state, and this naturally implied that such foreign prince or state must have been recognized by the United States.<sup>37</sup> But § 5283 of the Revised Statutes prohibits such acts when the vessel is to be employed in the service of any foreign prince, state, colony, district or people, and it has been held that in order for the crime to be made out it is not necessary that the people for whose use the vessel is fitted out should have been previously recognized as belligerents, where the existence of an actual conflict of arms in resistance of the authority of a government with which the United States are at peace has been recognized by the political department.<sup>38</sup> The word people as there used covers any insurgent or insurrectionary "body of people acting together, undertaking and conducting hostilities," although its belligerency has not been recognized.<sup>39</sup>

2. **WHAT CONSTITUTES A FITTING OUT.**—Converting a merchant ship into a vessel of war within the United States with the intent to commit hostilities against a foreign nation with which the United States is at peace is "an original outfit" and a violation of the statute.<sup>40</sup>

3. **NECESSITY FOR FIXED INTENTION TO COMMIT HOSTILITIES.**—There must be a fixed intention to commit hostilities in order to bring the acts within the prohibition of the federal statutes in reference to fitting out vessels,<sup>41</sup> but it is not

Stats., *Wiborg v. United States*, 163 U. S. 632, 646, 41 L. Ed. 289. See post, "Enlistment or Acceptance of Commission in Foreign Service," III, F.

**Replacement.**—The substitution of new for old gun carriages is a mere replacement, not an augmentation of force. *Den Onzeker*, 3 Dall. 285, 1 L. Ed. 605.

By the treaty with France vessels, whether public and of war or private and of merchants, may on any urgent necessity enter our ports and be supplied with all things needful for repairs. And the mere replacement of the force of a privateer is not an augmentation. *The Phoebe Anne*, 3 Dall. 319, 1 L. Ed. 618.

**Effect on capture.**—An augmentation of force, or illegal outfit, does not effect any capture made after the original cruise, for which such augmentation or outfit was made, is terminated. *The Santissima Trinidad*, 7 Wheat. 283, 5 L. Ed. 454. See the title PRIZE.

**37. Under the earlier statutes.**—*Gelston v. Hoyt*, 3 Wheat. 246, 4 L. Ed. 381.

The statute of 1794, § 3, prohibiting the fitting out any ship, etc., for the service of any foreign prince or states, to cruise against the subjects, etc., of any other foreign prince or state, did not apply to any new government, unless it had been acknowledged by the United States, or by the government of the country to which such new state belonged. *Gelston v. Hoyt*, 3 Wheat. 246, 4 L. Ed. 381.

**38. Under the Revised Statutes.**—*The Three Friends*, 166 U. S. 1, 41 L. Ed. 837; *Wiborg v. United States*, 163 U. S. 632, 41 L. Ed. 289.

The statute was undoubtedly designed in general to secure neutrality in wars be-

tween two other nations, or between contending parties recognized as belligerents, but its operation is not necessarily dependent on the existence of such state of belligerency. *Wiborg v. United States*, 163 U. S. 632, 41 L. Ed. 289; *The Three Friends*, 166 U. S. 1, 51, 41 L. Ed. 837.

Where the political department of the United States had not recognized the existence of a de facto belligerent power in the Island of Cuba engaged in hostility with Spain, but it had recognized the existence of insurrectionary warfare, it was held that fitting out a vessel for the use of the people of Cuba against Spain was within the statute. *The Three Friends*, 166 U. S. 1, 63, 41 L. Ed. 837.

**39. Meaning of people.**—*The Three Friends*, 166 U. S. 1, 62, 41 L. Ed. 837.

While the word "people" may mean the entire body of the inhabitants of a state; or the state or nation collectively in its political capacity, or the ruling power of the country, its meaning in § 5283 of the Revised Statutes, taken in connection with the words "colony" and "district," is as stated in the text. *The Three Friends*, 166 U. S. 1, 62, 41 L. Ed. 837.

**40. Original outfit.**—*United States v. Guinet*, 2 Dall. 321, 1 L. Ed. 398.

**41. Fixed intention.**—*United States v. Quincy*, 6 Pet. 445, 8 L. Ed. 458.

The preparations to commit hostilities according to the very terms of the act, must be made within the limits of the United States; and it is equally necessary that the intention with respect to the employment of the vessel should be formed before she leaves the United States. This must be a fixed intention—not conditional or contingent, depending on some future



necessary that such intention should be carried into effect.<sup>42</sup>

4. **NECESSITY FOR ARMING.**—It has been held an offense against the federal statutes to be knowingly concerned in the fitting out of a vessel in a port of the United States with the intent to employ her in the service of a foreign sovereign against the subjects of a nation with whom the United States is at peace. It is not necessary for the defendant to be concerned in both the fitting out and arming. Either will constitute the offense.<sup>43</sup> Though it is true, that with respect to the chief actors, the law would seem to make it necessary that they should be charged with fitting out "and" arming; the words may require that both shall concur, and the vessel be put in a condition to commit hostilities, in order to bring her within the law; but an attempt to fit out "and" arm, is made an offense; this is certainly doing something short of a complete fitting out and arming.<sup>44</sup>

5. **DETENTION BY COLLECTORS AND SECURITY.**—The collectors are not authorized to detain vessels, although manifestly built for warlike purposes, and about to depart from the United States, unless circumstances shall render it probable that such vessels are intended to be employed, by the owners, to commit hostilities against some foreign power, at peace with the United States; all the latitude, therefore, necessary for commercial purposes, is given to the citizens of the United State, and they are restrained only from such acts as are calculated to involve the country in war.<sup>45</sup> The law does not prohibit armed vessels, belonging to citizens of the United States, from sailing out of our ports; it only requires the owners to give security that such vessels shall not be employed by them, to commit hostilities against foreign powers at peace with the United States.<sup>46</sup>

6. **FORFEITURES.**—Under § 5283, of the Revised Statutes, which prohibits the fitting out of any vessel to be employed in foreign service against countries with which the United States is at peace and provides that the vessel shall be forfeited for a violation thereof, it is not necessary that there shall be a conviction of a person or persons for doing the acts denounced.<sup>47</sup> The suit is a civil suit

arrangement. This intention is a question belonging exclusively to the jury to decide; it is the material point, on which the legality or criminality of the act must turn; and decides whether the adventure is of a commercial or a warlike character. *United States v. Quincy*, 6 Pet. 445, 8 L. Ed. 458.

42. **Where intention is defeated.**—*United States v. Quincy*, 6 Pet. 445, 8 L. Ed. 458.

If the defendant was knowingly concerned in fitting out the vessel, within the United States, with intent that she should be employed to commit hostilities against a state or prince or people, at peace with the United States; that intention being defeated by what might afterwards take place in the West Indies, would not purge the offense, which was previously consummated; it is not necessary that the design or intention should be carried into execution, in order to constitute the offense. *United States v. Quincy*, 6 Pet. 445, 8 L. Ed. 458.

43. **Necessity for arming.**—*United States v. Quincy*, 6 Pet. 445, 8 L. Ed. 458.

The defendant was charged with knowingly being concerned in the fitting out of a vessel which went from Baltimore to St. Thomas and was there armed. It was held that it was not necessary that the vessel, when she left Baltimore for St. Thomas, and during the voyage from Baltimore to St. Thomas, was armed, or in

a condition to commit hostilities, in order to find the defendant guilty of the offense charged in the indictment. *United States v. Quincy*, 6 Pet. 445, 8 L. Ed. 458.

44. **Attempt to fit out and arm.**—*United States v. Quincy*, 6 Pet. 445, 8 L. Ed. 458.

45. **Detention.**—*United States v. Quincy*, 6 Pet. 445, 8 L. Ed. 458.

46. **Security.**—*United States v. Quincy*, 6 Pet. 445, 8 L. Ed. 458.

Section 941 provides for giving bond in admiralty cases and in reference thereto it is said: "But in § 941 of the Revised Statutes the exception was introduced of 'cases of seizure for forfeiture under any law of the United States.' And it seems obvious that the release on bond of a vessel charged with liability to forfeiture under § 5283, before answer or hearing, and against the objection of the United States, could not have been contemplated. However, as this application was not based upon absolute right, but addressed to the sound discretion of the court, it is enough to hold that, under the circumstances of this case, the vessel should not have been released as it was, and should be recalled on the ground that the order of release was improvidently made. *United States v. Ames*, 99 U. S. 35, 39, 41, 43, 25 L. Ed. 295." *The Three Friends*, 166 U. S. 1, 68, 41 L. Ed. 837.

47. **Conviction of person.**—*The Three Friends*, 166 U. S. 1, 49, 41 L. Ed. 837.



in rem for the condemnation of the vessel only, and is not a criminal prosecution. The two proceedings are wholly independent and pursued in different courts, and the result in each might be different. Indeed, forfeiture might be decreed if the proof showed the prohibited acts were committed though lacking as to the indemnity of the particular person by whom they were committed.<sup>48</sup>

**The proviso in the repealing clause of the neutrality act** of the 20th of April, 1818, did not authorize a forfeiture, under the act of the 3d of March, 1817 (which was included in the repeal), after the time when that act would have expired by its own limitation.<sup>49</sup>

7. **INDICTMENT.**—An indictment which used the words “in the service of a foreign people” has been held sufficient when they had been recognized as an independent nation.<sup>50</sup> And likewise an indictment which charged defendant with being concerned in fitting out a vessel, etc., the words of the act being in the disjunctive “fitting out or arming.”<sup>51</sup>

8. **PLEA.**—As the statute of 1794, § 3, prohibiting the fitting out of any ship, etc., for the service of any foreign prince or state, to cruise against the subjects, etc., of any other foreign prince or state, did not apply to any new government unless it had been recognized by the United States or by the government of the country to which such new state belonged, a plea which sets up a forfeiture under that act in fitting out a ship to cruise against such a new state, must aver such recognition or it was bad.<sup>52</sup> A plea, justifying a seizure under this statute, need not state the particular prince or state, by name, against whom the ship was intended to cruise.<sup>53</sup>

**E. Military Expeditions**—1. **IN GENERAL.**—It is made unlawful by a federal statute to begin or set on foot a military expedition within the United States, to be carried on from thence, against a power with which the United States is at peace.<sup>54</sup> The statute was undoubtedly designed in general to secure neutrality in wars between two other nations, or between contending parties recognized as belligerents, but its operation is not necessarily dependent on the existence of such state of belligerency;<sup>55</sup> and although a penal one it is to

48. *The Palmyra*, 12 Wheat. 1, 14, 6 L. Ed. 531; *The Ambrose Light*, 25 Fed. Rep. 408; *The Three Friends*, 166 U. S. 1, 49, 41 L. Ed. 837.

49. *The Irresistible*, 7 Wheat. 551, 5 L. Ed. 520.

50. **People.**—*United States v. Quincy*, 6 Pet. 445, 446, 8 L. Ed. 458.

“The indictment charged that the defendant was concerned in fitting out the Bolivar, with intent that she should be employed in the service of a foreign people, that is to say, in the service of the United Provinces of Rio de la Plata; it was in evidence, that the United Provinces of Rio de la Plata had been regularly acknowledged as an independent nation, by the executive department of the government of the United States, before the year 1827; it was argued, that the word ‘people’ was not applicable to that nation or power. The objection is one purely technical, and we think not well founded; the word ‘people,’ as here used, is merely descriptive of the power in whose service the vessel was intended to be employed; and it is one of the denominations applied by the act of congress to a foreign power.” *United States v. Quincy*, 6 Pet. 445, 446, 8 L. Ed. 458. See ante, “For Whose Use Vessel to Be Fitted Out or Armed,” III, D, 1.

51. Indictment under the third section

of the act for the punishment of certain crimes against the United States, etc., passed April 20th, 1818. The indictment charged the defendant with being knowingly concerned in the fitting out, in the port of Baltimore, of a vessel, with intent to employ her in the service of a foreign “people,” the United Provinces of Buenos Ayres, against the subjects of the Emperor of Brazil, with whom the United States were at peace. The vessel went from Baltimore to St. Thomas, and was there fully armed; she afterwards cruised under the Buenos Ayrean flag. To bring the defendant within the words of the act, it is not necessary to charge him with being concerned in fitting out and arming the vessel; the words of the act are “fitting out or arming;” either will constitute the offense. It is sufficient, if the indictment charge the offense in the words of the act. *United States v. Quincy*, 6 Pet. 445, 8 L. Ed. 458.

52. **Averment of recognition.**—*Gelston v. Hoyt*, 3 Wheat. 246, 4 L. Ed. 381.

53. **Name of prince or state.**—*Gelston v. Hoyt*, 3 Wheat. 246, 247, 4 L. Ed. 381.

54. **Section 5286, Rev. Stats.**—*Wiborg v. United States*, 163 U. S. 632, 647, 41 L. Ed. 289.

55. **Existence of belligerency.**—*Wiborg v. United States*, 163 U. S. 632, 647, 41 L. Ed. 289.

be reasonably construed.<sup>56</sup>

2. **WHAT CONSTITUTES**—a. *Definitions*.—A military expedition is a journey or voyage by a company or body of persons, having the position or character of soldiers, for a specific warlike purpose; also the body and its outfit; and a military enterprise is a martial undertaking, involving the idea of a bold, arduous and hazardous attempt. The word "enterprise" is somewhat broader than the word "expedition;" and although the words are synonymously used, it would seem that under the rule that its every word should be presumed to have some force and effect, the word "enterprise" was employed to give a slightly wider scope to the statute.<sup>57</sup> A hostile expedition dispatched from our ports is within the words "carried on from thence," employed in § 5286 of the Revised Statutes prohibiting and punishing the raising and providing of military expeditions within the United States, to be carried on from thence, against a foreign country with which the United States is at peace.<sup>58</sup>

b. *Transportation of Persons and Munitions of War*.—While providing or preparing the means of transportation for military expedition or enterprise is within the prohibition of § 5286 of the Revised Statutes,<sup>59</sup> it is not an offense against the laws of the United States to transport arms, ammunition and munitions of war from this country to any foreign country, whether they were to be used in war or not.<sup>60</sup> Nor is it an offense against the laws of the United States to transport persons intending to enlist in foreign armies and munitions of war on the same trip.<sup>61</sup>

3. **INDICTMENT**.—**Duplicity**.—Section 5286 of the Revised Statutes provides for the punishment of every person who begins, or sets on foot, provides, or

**56. Reasonable construction.**—*Wiborg v. United States*, 163 U. S. 632, 647, 41 L. Ed. 289.

**57. Definitions.**—*Wiborg v. United States*, 163 U. S. 632, 650, 41 L. Ed. 289.

In *Wiborg v. United States*, 163 U. S. 632, 648, 41 L. Ed. 289, the court set out the definitions of many of the authorities on international law.

"It is sufficient to say that any combination of men organized here to go to Cuba to make war upon its government, provided with arms and ammunition, we being at peace with Cuba, constitutes a military expedition. It is not necessary that the men shall be drilled, put in uniform, or prepared for efficient service, nor that they shall have been organized as or according to the tactics or rules which relate to what is known as infantry, artillery or cavalry. It is sufficient that they shall have combined and organized here to go there and make war on a foreign government, and to have provided themselves with the means of doing so. I say 'provided themselves with the means of doing so,' because the evidence here shows that the men were so provided. Whether such provision, as by arming, and so forth, is necessary need not be decided in this case." *Wiborg v. United States*, 163 U. S. 632, 653, 41 L. Ed. 289.

**58. Carried on from thence.**—*Wiborg v. United States*, 163 U. S. 632, 41 L. Ed. 289.

**59. Providing or preparing means of transportation.**—*Wiborg v. United States*, 163 U. S. 632, 41 L. Ed. 289.

If persons had combined and organized in this country to go to Cuba and there make war on the government, and intended when they reached Cuba to join the insurgent army and thus enlist in its service, and the arms were taken along for their use, that would constitute a military expedition, and the transporting of such a body from this country for such a purpose would be an offense against the statute. *Wiborg v. United States*, 163 U. S. 632, 653, 41 L. Ed. 289.

**Knowledge of object of expedition.**—Where, on a prosecution for a breach of the neutrality laws by aiding a military expedition or enterprise against a foreign country with which the United States was at peace, the court charged the jury that the defendants were not guilty unless the jury should be satisfied beyond a reasonable doubt that when the defendants left this country they had knowledge of the expedition and its objects and had arranged and provided for its transportation, it was held that the defendants had no adequate grounds of complaint on this branch of the case. *Wiborg v. United States*, 163 U. S. 632, 41 L. Ed. 289.

**60. Transportation of arms, etc.**—*Wiborg v. United States*; 163 U. S. 632, 653, 41 L. Ed. 289.

**61. Transportation of persons intending to enlist.**—*Wiborg v. United States*, 163 U. S. 632, 653, 41 L. Ed. 289.

Where men go without combination and organization to enlist as individuals in a foreign army, they do not constitute such military expedition, and the fact that the vessel carrying them might carry arms as



prepares the means for, any military expedition or enterprise to be carried on from this country against another with which the United States are at peace. An indictment charged that the defendants did begin, set on foot and provide and prepare the means for a certain military expedition and enterprise, thus making use of the conjunctive where the statute is in the disjunctive. The defendants did not seek to compel an election nor otherwise raise the question of duplicity, nor object upon this ground. The court charged that the evidence would not justify a conviction of anything more than providing the means for or aiding such expedition by furnishing transportation for their men, arms, baggage, etc. It was held that under these circumstances the verdict could not be disturbed on the ground that more than one offense was included in the same count of the indictment, but that it must be applied to the offense to which the jury were confined by the court.<sup>62</sup>

4. EVIDENCE.—Assuming a secret combination between the party and the captain or officers of a vessel have been proven, then on the question whether such combination is lawful or not, the motive and intention, declarations of those engaged in it explanatory of acts done in furtherance of its object come within the general rule that where two or more persons are associated together for the same illegal purpose any act or declaration of one of the parties in reference to the common object and forming a part of the *res gestæ* may be given in evidence against the others. The declarations must be in furtherance of the common object, or must constitute a part of the *res gestæ* of acts done in such furtherance.<sup>63</sup>

**Sufficiency of Evidence.**—A body of men went on board a tug loaded with arms, were taken by it thirty or forty miles out to sea, where they met a steamer which they boarded, with the arms, opened the boxes and distributed the arms among themselves, were drilled and officered, and then, as preconcerted, disembarked to effect an armed landing on the coast of Cuba. It was held that the jury had a right to find that this was a military expedition or enterprise under the statute.<sup>64</sup>

**Observations of the Court.**—In a prosecution for fitting out a military expedition against a foreign country with which the United States was at peace, the court said that the question of the existence of the military expedition "would seem to the court to be free from doubt," but went on and said that this was a question for the jury to determine upon the evidence. It was held that the observation of the court thus guarded did not trespass on the province of the jury so as to constitute reversible error.<sup>65</sup> A statement of the court that defendants were armed, having rifles and cannon, and were provided with ammunition and other supplies, based on uncontradicted testimony and occurring in a recapitulation of the evidence, is not objectionable.<sup>66</sup>

**F. Enlistment or Acceptance of Commission in Foreign Service.**—The federal statutes prohibit any person from enlisting in this country as a soldier in the service of any foreign power and from hiring or retaining any other person to enlist or to go abroad for the purpose of enlisting.<sup>67</sup> But it is not a crime

merchandise would not be important. *Wiborg v. United States*, 163 U. S. 632, 653, 41 L. Ed. 289.

62. *Wiborg v. United States*, 163 U. S. 632, 41 L. Ed. 289.

63. **Declarations.**—*Wiborg v. United States*, 163 U. S. 632, 658, 41 L. Ed. 289; *St. Clair v. United States*, 154 U. S. 134, 38 L. Ed. 936; *People v. Davis*, 56 N. Y. 95, 102; *Lincoln v. Claflin*, 7 Wall. 132, 139, 19 L. Ed. 106; 1 Greenl. Ev., § 111; *Starkie Ev.*, 466.

64. **Sufficiency of evidence.**—*Wiborg v. United States*, 163 U. S. 632, 654, 41 L. Ed. 289.

65. **Existence of military expeditions.**—*Wiborg v. United States*, 163 U. S. 632, 41 L. Ed. 289.

66. **Statement that defendants were armed, etc.**—*Wiborg v. United States*, 163 U. S. 632, 41 L. Ed. 289.

67. **Enlisting.**—*Wiborg v. United States*, 163 U. S. 632, 646, 41 L. Ed. 289. And see § 5282, Rev. Stat., U. S.

No part of the act of the 5th of June, 1794, which made it penal, among other things, for any one, within the jurisdiction of the United States, to enlist in the service of any foreign prince or state, as a soldier, marine or seamen, on board of



or offense against the United States under the neutrality laws of this country for individuals to leave the country with intent to enlist in foreign military service, nor is it an offense against the United States to transport persons out of this country and to land them in foreign countries when such persons had an intent to enlist in foreign armies.<sup>68</sup> Nor are the statutes construed to extend to foreigners transiently within the United States.<sup>69</sup>

**Acceptance of Commissions.**—The federal statutes also prohibit the acceptance of commissions from a foreign power by citizens of the United States within our territory to serve against any sovereign with whom we are at peace.<sup>70</sup>

**G. Fitting Out Vessels for Use against Citizens of the United States.**—Section 5284 of the Revised Statutes prohibits citizens from the fitting out or arming, without the United States, of vessels to cruise against citizens of the United States.<sup>71</sup>

**NE VARIETUR.**—See the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 276.

**NEW HAMPSHIRE.**—See the title **COMMON LAW**, vol. 3, p. 962.

**NEW JERSEY.**—See the title **BOUNDARIES**, vol. 3, p. 494.

**NEWLY-DISCOVERED EVIDENCE.**—See the titles **APPEAL AND ERROR**, vol. 2, p. 363; **BILL OF REVIEW**, vol. 3, p. 249; **NEW TRIALS**; **REHEARING**.

**NEW MEXICO.**—As to appellate jurisdiction of court of appeals, see the title **APPEAL AND ERROR**, vol. 1, p. 525. As to scope of review, see the title **APPEAL AND ERROR**, vol. 1, p. 535. As to remedy for review of cases from, see the title **EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL**, vol. 6, p. 23. As to rule in New Mexico with respect to verbal transfers of land, see the title **FRAUDS, STATUTE OF**, vol. 6, p. 455. As to judicial notice of topography of, see the title **JUDICIAL NOTICE**, vol. 7, p. 682. As to judicial notice of Spanish occupation, see the title **JUDICIAL NOTICE**, vol. 7, p. 684.

**NEW—NEWLY.**—"The term 'new,' in its ordinary acceptation, when applied to the same subject or object, is the opposite of old."<sup>1</sup>

any vessel of war, letter of marque or privateer, is repealed by the act of the 3d of March, 1817; the act of 1794 remained in force, until the act of the 20th of April, 1818, by which all the provisions respecting our neutral relations were embraced, and all former laws on the same subject were repealed. *The Estrella*, 4 Wheat. 298, 309, 4 L. Ed. 574.

In the case of *The Gran Para*, 7 Wheat. 471, 488, 5 L. Ed. 501, it was held that there was a clear intent to violate the provision of the act of June, 1794, c. 296, which declared that "if any person shall, within the territory or jurisdiction of the United States," "hire or retain another person to go beyond the limits or jurisdiction of the United States, with intent to be enlisted or entered in the service of any foreign prince or state as a soldier, or as a mariner or seaman, on board of any vessel of war, letter of marque or privateer, every person so offending, shall be guilty of a high misdemeanor, etc.," although the men were enlisted in form as for a common mercantile voyage.

**68. Enlistment or transportation of person intending to enlist.**—*Wiborg v. United States*, 163 U. S. 632, 653, 41 L. Ed. 289.

**69. Transients.**—Rev. Stat., § 5291.

In the case of an illegal augmentation of the force of a belligerent cruiser, in our ports, by enlisting men, the onus probandi

is thrown on a claimant to show that the persons enlisted were subjects of the belligerent state or belonging to its service, and then transiently within the United States. *The Santissima Trinidad*, 7 Wheat. 283, 5 L. Ed. 454.

Where restitution of captured property is claimed, upon the ground that the force of the cruiser making the capture has been augmented within the United States, by enlisting men, the burden of proving such enlistment is thrown upon the claimant; and that fact being proved by him, it is incumbent upon the captors to show, by proof, that the persons so enlisted were subjects or citizens of the prince or state under whose flag the cruiser sails, transiently within the United States, in order to bring the case within the proviso of the 2d section of the act of June 5th, 1794, and of the act of the 20th of April, 1818. *The Estrella*, 4 Wheat. 298, 4 L. Ed. 574.

**70. Wiborg v. United States**, 163 U. S. 632, 646, 41 L. Ed. 289. And see § 5281, Rev. Stats. U. S.

**71. Wiborg v. United States**, 163 U. S. 632, 646, 41 L. Ed. 289.

**1. New.**—*Pollard v. Kibbe*, 14 Pet. 353, 364, 10 L. Ed. 490.

**New articles—Patent laws.**—"A distinction must be observed between a new article of commerce and a new article which,

**NEW ORLEANS.**—As to judicial notice of situation of, see the title JUDICIAL NOTICE, vol. 7, p. 683.

**NEW PROMISE.**—See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 1030.

as such, is patentable. Any change in form from a previous condition may render the article **new** in commerce; as powdered sugar is a different article in commerce from loaf sugar, and ground coffee is a different article in commerce from coffee in the berry. But to render the article **new** in the sense of the patent law, it must be more or less efficacious, or possess new properties by a combination with other ingredients; not from a mere change of form produced by a mechanical division. It is only where one of these results follows that the product of the compound can be treated as the result of invention or discovery, and be regarded as a **new** and useful article." *Glue Co. v. Upton*, 97 U. S. 3, 6, 24 L. Ed. 985.

The mere change in form of a soluble article of commerce, by reducing it to small particles so that its solution is accelerated and it is rendered more ready for immediate use, convenient for handling, and, by its improved appearance, more merchantable, does not make it a **new** article, within the sense of the patent law. See the title PATENTS.

**New manufacture—Patent laws.**—Articles of manufacture may be **new** in the commercial sense when they are not **new** in the sense of the patent law. New articles of commerce are not patentable as **new** manufactures unless it appears in the given case that the production of the **new** article involved the exercise of invention or discovery beyond what was necessary to construct the apparatus for its manufacture. It appearing that the collars made by Evans, apart from the paper composing them, were identical in form, structure, and arrangement with collars, previously made of linen paper of different quality, and of other fabrics, and that Evans did not invent the special paper used by him, nor the process by which it was obtained, held, that he was not entitled to a patent for the collars as a new manufacture. *Collar Company v. Van Dusen*, 23 Wall. 530, 23 L. Ed. 128.

**New grants.**—The term "new grants," in its ordinary acceptation, when applied to the same subject or object, is the opposite of "old;" but such cannot be its meaning in the act of congress of 1824, giving to those who had improved them, the lots in Mobile, known under the Spanish government as "water lots," except when the lots so improved had been alien-

ated, and except lots of which the Spanish government had made "new grants," or orders of survey, during the time the Spanish government had "power" to grant the same; in which case, the lot was to belong to the alienee or the grantee. The term was doubtless used in relation to the existing condition of the territory in which such grants were made; the territory had been ceded to the United States by the Louisiana treaty; but, in consequence of a dispute with Spain about the boundary line, had remained in the possession of Spain; during this time, Spain continued to issue evidences of titles to lands within the territory in dispute. The term **new** was very appropriately used, as applicable to grants and orders of survey of this description, as contradistinguished from those issued before the cession. *Pollard v. Kibbe*, 14 Pet. 353, 10 L. Ed. 490. See the title PUBLIC LANDS.

**New matters.**—In *Powder Co. v. Powder Works*, 98 U. S. 126, 138, 25 L. Ed. 77, a case involving the doctrine that the specification of a reissued letters-patent may be amended so as to make it more clear and distinct, but the invention must be the same, the court said: "So particular is the law on this subject, that it is declared that 'no **new** matter shall be introduced into the specification.' This prohibition is general, relating to all patents; and by '**new** matter' we suppose to be meant **new** substantive matter, such as would have the effect of changing the invention, or of introducing what might be the subject of another application for a patent." See the title PATENTS.

**Newly invented machine, etc.—Patent laws.**—The words "newly invented machine, manufacture, or composition of matter," and the words "such invention," in the first clause of the 7th section of the act of 1839, providing that every person or corporation who has, or shall have, purchased or constructed any **newly** invented machine, manufacture, or composition of matter, prior to the application of the inventor or discoverer for a patent, shall be held to possess the right to use, and vend to others to be used, the specific machine, manufacture, or composition of matter so made or purchased, meant the invention patented. *Andrews v. Hovey*, 124 U. S. 694, 703, 31 L. Ed. 557. *McClurg v. Kingsland*, 1 How. 202, 210, 11 L. Ed. 102. See the title PATENTS.

## NEWSPAPER.

### CROSS REFERENCES.

As to admissibility of newspapers in evidence, see the title DOCUMENTARY EVIDENCE, vol. 5, p. 448. As to newspaper reports of judicial proceedings as being privileged, see the title LIBEL AND SLANDER, vol. 7, p. 857. As to whether a change in the name of a paper will vitiate a notice of sale published therein, see the title MORTGAGES AND DEEDS OF TRUST, ante, p. 452. As to whether the trustees of a newspaper corporation are charged with notice of the power usually exercised by the editor in the collection of news, see the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS. As to refusal of a postmaster to deliver a newspaper except upon the payment of additional postage, see the title POSTAL LAWS. As to whether publication in a newspaper is necessary to make a proclamation of the president operative, see the title PRESIDENT OF THE UNITED STATES. As to service of process by publication in newspaper, see the title SUMMONS AND PROCESS. As to publication of notice in newspapers, see the title SUMMONS AND PROCESS.

**Proof of Identity of Newspaper.**—The identity of a newspaper is proved by the production of a copy of the paper.<sup>1</sup>

**1. Identity.**—In *Dunlop v. United States*, 165 U. S. 486, 492, 41 L. Ed. 799, it is said: "It is difficult to see how the identity of the paper, called the Chicago Dispatch, which the indictment averred that the defendant deposited in the postoffice for

mailing, could have been more conclusively proved than by the production of a newspaper called the Dispatch, and purporting to be the official paper of the city of Chicago. In that particular the paper proved itself."



# NEW TRIAL.

BY H. H. THURLOW.

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## CROSS REFERENCES.

See the titles ADMIRALTY, vol. 1, p. 119; APPEAL AND ERROR, vol. 1, p. 333; BILL OF REVIEW, vol. 3, p. 244; CONSTITUTIONAL LAW, vol. 4, p. 1; COURTS, vol. 4, p. 861; CRIMINAL LAW, vol. 5, p. 43; DAMAGES, vol. 5, p. 157; EJECTMENT, vol. 5, p. 695; EQUITY, vol. 5, p. 803; EVIDENCE, vol. 5, p. 1004; INSTRUCTIONS, vol. 7, p. 26; JURY, vol. 7, p. 748; MANDATE AND PROCEEDINGS THEREON, ante, p. 97; REHEARING; REMITTITUR; REMOVAL OF CAUSES; DEPLEADER; SUPERSEDEAS AND STAY OF PROCEEDINGS; TRIAL; VERDICT.

As to set-off under special act, see the title ABANDONED AND CAPTURED PROP-

ERTY, vol. 1, p. 10. As to affidavits of party to support motion for new trial, see the title AFFIDAVITS, vol. 1, p. 200. As to review in admiralty, see the titles ADMIRALTY, vol. 1, p. 182; APPEAL AND ERROR, vol. 2, p. 283. As to necessity for exceptions in awarding venire de novo, see the titles APPEAL AND ERROR, vol. 2, p. 83; EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL, vol. 6, p. 1. As to reviewing judgment of territorial courts, see the title APPEAL AND ERROR, vol. 1, p. 522. As to setting up federal question at new trial, see the title APPEAL AND ERROR, vol. 1, p. 621. As to appeal pending determination of motion for new trial, see the title APPEAL AND ERROR, vol. 1, p. 936. As to review of motions for new trial or rehearing, see the title APPEAL AND ERROR, vol. 1, pp. 997, 1003. As to review of questions of fact generally, see the title APPEAL AND ERROR, vol. 1, p. 1005. As to review of findings of fact by the court, see the title APPEAL AND ERROR, vol. 1, p. 1023. As to review of findings of fact by referee, see the title APPEAL AND ERROR, vol. 1, p. 1062. As to necessity for venire de novo where findings of fact are incomplete, see the title APPEAL AND ERROR, vol. 1, p. 1032. As to certificate of opinion on motion for new trial, see the title APPEAL AND ERROR, vol. 2, p. 34. As to waiver of writ of error by motion for new trial, see the title APPEAL AND ERROR, vol. 2, p. 83. As to waiver of exceptions by motion for new trial, see the title APPEAL AND ERROR, vol. 2, p. 119. As to harmless errors, see the title APPEAL AND ERROR, vol. 2, p. 334. As to issuance of execution pending motion for new trial, see the title APPEAL AND ERROR, vol. 2, p. 335. As to continuances pending motion for new trial, see the title APPEAL AND ERROR, vol. 2, p. 360. As to appellate court sending case back for rehearing after appeal is decided, see the title APPEAL AND ERROR, vol. 2, p. 363. As to granting new trial to part or all of joint parties, see the title APPEAL AND ERROR, vol. 2, p. 382. As to reviewing judgment awarding venire de novo, after new trial in pursuance thereof, see the title APPEAL AND ERROR, vol. 2, p. 412. As to acts of congress and rules of supreme court relating to new trials, see the title COURTS, vol. 4, p. 1135. As to constitutionality of new trial under the seventh amendment, see the title DUE PROCESS OF LAW, vol. 5, p. 661. As to constitutionality of statutes limiting number of new trials, see the title DUE PROCESS OF LAW, vol. 5, p. 662. As to new trials in condemnation proceedings, see the title EMINENT DOMAIN, vol. 5, p. 793. As to state provisions for new trials as impairing contract obligations, see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 758. As to motions in arrest of judgment, see the title JUDGMENTS AND DECREES, vol. 7, p. 544. As to compelling the court to decide motion on merits, see the title MANDAMUS, ante, p. 1. As to the appellate court directing judgment, after setting aside verdict, see the titles MANDAMUS, ante, p. 1; MANDATE AND PROCEEDINGS THEREON, ante, p. 97. As to amendments to the record, see the title RECORDS. As to affidavits on new trial as part of record, see the title RECORDS. As to petition for removal after case remanded for new trial, see the title REMOVAL OF CAUSES.

### I. Authority, Scope and Effect.

Section 17 of the judiciary act of 1789 provided that "all the courts of the United States" should "have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law;" and that provision, so far as regards actions at law, has since remained in force, almost uninterruptedly, and has been re-enacted in § 726 of the Revised Statutes.<sup>1</sup>

**1. What courts may grant.**—Capital Traction Co. *v.* Hof, 174 U. S. 1, 10, 43 L. Ed. 873; Kingman *v.* Western Mfg. Co., 170 U. S. 875, 677, 42 L. Ed. 1192.

**By court in general term.**—The supreme court of the District of Columbia sitting at special term and the supreme court

sitting in general term is still the supreme court; and the judgment of the general term setting aside a verdict and judgment at law, and ordering a new trial, is equivalent to remanding the cause to the special term for a new trial. Hume *v.* Bowie, 148 U. S. 245, 254, 37 L. Ed. 438.

**Scope and Distinctions.**—Repeated decisions of the supreme court have affirmed the doctrine, which is but a repetition of the constitutional provision upon the subject, that no fact tried by a jury shall be otherwise re-examinable in any court of the United States than according to the rules of the common law; and it is well known that the only modes known to the common law of re-examining the facts of a case, after they have been found by a jury, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or by the award of a *venire facias de novo* by an appellate court, for some error of law which intervened in the proceedings.<sup>2</sup>

**Effect.**—It is quite clear that the order granting a new trial has the effect of

**2. New trials in general.**—*Barreda v. Silsbee*, 21 How. 146, 166, 16 L. Ed. 86; *Justices v. Murray*, 9 Wall. 274, 277, 19 L. Ed. 658; *Miller v. Life Ins. Co.*, 12 Wall. 285, 300, 20 L. Ed. 398; *Insurance Co. v. Folsom*, 18 Wall. 237, 249, 21 L. Ed. 827; *Parsons v. Bedford*, 3 Pet. 433, 448, 7 L. Ed. 732; *Insurance Co. v. Comstock*, 16 Wall. 258, 269, 21 L. Ed. 493; *Crim v. Handley*, 94 U. S. 652, 657, 24 L. Ed. 216; *Insurance Co. v. Boon*, 95 U. S. 117, 134, 24 L. Ed. 395; *Railroad Co. v. Fraloff*, 100 U. S. 24, 31, 25 L. Ed. 531; *Martinton v. Fairbanks*, 112 U. S. 670, 674, 28 L. Ed. 862; *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 226, 246, 41 L. Ed. 979; *Lincoln v. Power*, 151 U. S. 436, 438, 38 L. Ed. 224; *Capital Traction Co. v. Hof*, 174 U. S. 1, 3, 43 L. Ed. 873. See the title APPEAL AND ERROR, vol. 1, p. 1010.

**Rule applies to territories.**—This article of the constitution is in full force in Montana, as in all other organized territories of the United States. Act of May 26, 1864, c. 95, § 13, 13 Stat. 91; Rev. Stat., § 1891; *Webster v. Reid*, 11 How. 437, 13 L. Ed. 761; *Kennon v. Gilmer*, 131 U. S. 22, 28, 33 L. Ed. 110.

**No interference with the jury.**—The power of the court to grant a new trial if in its judgment the jury have misinterpreted the instructions as to the rules of law or misapplied them is unquestioned, as also when it appears that there was no real evidence in support of any essential fact. These things obtained at the common law; they do not trespass upon the prerogative of the jury to determine all questions of fact, and no one today doubts that such is the legitimate duty and function of the court, notwithstanding the terms of the constitutional guarantee of right of trial by jury. *Walker v. New Mexico, etc., R. Co.*, 165 U. S. 593, 596, 41 L. Ed. 837. See the title JURY, vol. 7, p. 748.

**Substantial justice sufficient.**—If, upon the whole case, justice has been done between the parties, and the verdict is substantially right, no new trial will be granted, although there may have been some mistake committed at the trial. The reason is, that the application is not matter of absolute right in the party, but rests in the discretion of the court, and is to be granted only when it is in furtherance of substantial justice. The case is far dif-

ferent, upon a writ of error, bringing the proceedings at the trial, by a bill of exceptions, to the cognizance of the appellate court. The directions of the court must then stand or fall, upon their own intrinsic propriety, as matters of law. *McLanahan v. Universal Ins. Co.*, 1 Pet. 170, 183, 7 L. Ed. 98.

**Venire de novo.**—"Without going into the doctrine, in what cases, or for what causes, a *venire de novo* will be directed, it is sufficient for us to say, though it is frequently awarded by a court of error, upon a bill of exceptions, to enable parties to amend, and though amendments may, in the sound discretion of the court, upon a new trial, be permitted, the *venire de novo* is, in no instance, anything more than an order for a new trial, in a cause in which the verdict or judgment is erroneous in matters of law; and is never 'equivalent to a new suit.'" No statute of the United States alters the law in this regard. *United States v. Hawkins*, 10 Pet. 125, 131, 9 L. Ed. 369.

**When awarded.**—The supreme court has no right to order a new trial because they may believe that the jury erred in their verdict on the facts. If the court below has given proper instructions on the questions of law, and submitted the facts to the jury, there is no further remedy in the supreme court for any supposed mistake of the jury. *Mills v. Smith*, 8 Wall. 27, 32, 19 L. Ed. 346.

**In England.**—Where the matter appears to deserve a re-examination, the English courts have frequently ordered a new trial. *Steinmetz v. Currey*, 1 Dall. 234, 1 L. Ed. 115.

**Order in effect a venire de novo.**—An order or judgment quashing an inquisition where the law authorizes the court, "at its discretion, as often as may be necessary, to direct another inquisition to be taken," is in the nature of an order setting aside a verdict, for the purpose of awarding a *venire facias de novo*. *Chesapeake, etc., Canal Co. v. Union Bank*, 8 Pet. 259, 8 L. Ed. 937.

**Necessity for jurisdiction.**—A *venire facias de novo*, in effect, directs the exercise of jurisdiction, and ought not to issue where the court has no jurisdiction. *Bingham v. Cabot*, 3 Dall. 19, 42, 1 L. Ed. 491.

**Necessity for exceptions.**—But such errors of law must be excepted to at the



vacating the former judgment, rendering it null and void, and the parties are left in the same situation as if no trial had ever taken place in the cause. This is the legal effect of a new trial by a court competent to grant it.<sup>3</sup>

**Not a Constitutional Right.**—It may be questioned whether there would be any constitutional objection to a law making the original judgment final and doing away with new trials altogether.<sup>4</sup>

## II. New Trial as of Right.

Undoubtedly, in ordinary cases, a new trial cannot be granted except for good cause, and in the sound discretion of the court, but this rule does not apply where the party is entitled by the law of the state in which the action arose to a new trial as a matter of right.<sup>5</sup>

## III. Motion or Application.

**A. Discretion of Court.**—Motions for new trial are addressed to the sound discretion of the trial court.<sup>6</sup>

proper time, and brought up by bill of exceptions. See the titles *APPEAL AND ERROR*, vol. 2, p. 83; *EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL*, vol. 6, p. 1.

**3. Vacates former judgment.**—*United States v. Ayres*, 9 Wall. 608, 610, 19 L. Ed. 625. See the title *JUDGMENTS AND DECREES*, vol. 7, p. 544.

**Appeal pending.**—The court of claims, by granting a new trial after rendering judgment, and while an appeal therefrom is pending here, vacates the judgment, and resumes control of the case and the parties. *United States v. Young*, 94 U. S. 258, 24 L. Ed. 153, citing *Latham's and Deming's Appeals*, 9 Wall. 145, 19 L. Ed. 771; *United States v. Ayres*, 9 Wall. 608, 610, 19 L. Ed. 625; *United States v. Crusell*, 12 Wall. 175, 20 L. Ed. 384; *Ex parte Russell*, 13 Wall. 664, 20 L. Ed. 632; *Ex parte United States*, 16 Wall. 699, 21 L. Ed. 507.

**4. Statute limiting or denying new trials.**—"It is said that the right to grant new trials was a well recognized incident of common-law jurisdiction, and that it cannot be taken away or cut down by a territorial legislature. In view of the provision in § 1866, that the jurisdiction given by § 1908 'shall be limited by law,' and indeed apart from it, we should hesitate to say that the territorial legislature was prevented by the grant of common-law jurisdiction, in general words, from doing away with new trials altogether. A rule of practice like this does not touch jurisdiction in any proper sense." *James v. Appel*, 192 U. S. 129, 137, 48 L. Ed. 377. See the title *DUE PROCESS OF LAW*, vol. 5, p. 662.

**5. In general.**—*Smale v. Mitchell*, 143 U. S. 99, 109, 36 L. Ed. 90.

**In actions at law.**—An application under the Arkansas statute, within the time prescribed, for a new trial in an action at law, upon grounds discovered after the term at which the verdict or decision was rendered, is a matter of right, and does not require the leave of any court—the application constituting, on appeal, a new ac-

tion, in which summons or process would regularly issue against the adverse party, and which must be heard and determined by the court upon evidence adduced by the parties. This statute was also made applicable to the Indian Territory by act of congress of May 2d, 1890. *Fuller v. United States*, 182 U. S. 562, 576, 45 L. Ed. 1230.

**District of Columbia.**—The supreme court of the District of Columbia had power to prescribe a rule that whenever the judge was unable to settle the bill of exceptions, and counsel could not settle it by agreement, a new trial followed as matter of course. *Hume v. Bowie*, 148 U. S. 245, 253, 37 L. Ed. 438.

**In ejectment proceedings.**—While the statutory actions of ejectment are not the same in all the states, it is believed that almost all of them which have abolished the common-law action have made provisions for one or more new trials as a matter of right. *Smale v. Mitchell*, 143 U. S. 99, 109, 36 L. Ed. 90; *Equator Co. v. Hall*, 106 U. S. 86, 87, 27 L. Ed. 114. And see post, "New Trials in Ejectment," VIII.

**Colorado.**—*Equator Co. v. Hall*, 106 U. S. 86, 88, 27 L. Ed. 114.

**Illinois.**—*Mansfield v. Excelsior Ref. Co.*, 135 U. S. 326, 327, 34 L. Ed. 162; *Smale v. Mitchell*, 143 U. S. 99, 105, 36 L. Ed. 90.

**Iowa.**—*Ex parte Dubuque, etc., Railroad*, 1 Wall. 69, 17 L. Ed. 514.

**South Carolina.**—*Henderson v. Griffin*, 5 Pet. 151, 8 L. Ed. 79.

**State practice followed.**—And it is the duty of the federal courts to follow the state practice under these ejectment laws. *Equator Co. v. Hall*, 106 U. S. 86, 88, 27 L. Ed. 114; *Smale v. Mitchell*, 143 U. S. 99, 107, 36 L. Ed. 90. See the title *COURTS*, vol. 4, p. 1148.

**6. Addressed to trial court.**—The granting and refusing of new trials is a matter so peculiarly addressed to the sound discretion of the courts of original jurisdiction as to be fit for their decision only, under their rules and modes of practice; and the supreme court has always declined interfering in such cases. *Woods v.*

**B. Time of Motion—1. IN GENERAL.**—A motion for a new trial should not be made, after a motion in arrest of judgment, unless in cases where the party had no knowledge of the fact at the time of moving in arrest of judgment; such motion tacitly admits the verdict is good. This is also settled by the 32d printed rule of the supreme court, by which it is ordered that no motion for new trial shall be made after a motion in arrest of judgment.<sup>7</sup> At common law motions for new trial were made before judgment, but under the statutes of many of the states judgment is entered at once on the return of the verdict, and the motion for new trial made afterwards.<sup>8</sup> Such a motion is ordinarily made at the same term,<sup>9</sup> and may be made after judgment has been suspended by supersedeas, and appeal is pending,<sup>10</sup> but not after a mandate has issued from the supreme court.<sup>11</sup>

**2. UNDER STATUTORY PROVISIONS.**—But federal and state statutes have made many changes in the time during which the application for new trial must be made, and such statutes will of course prevail.<sup>12</sup>

Young, 4 Cranch 237, 2 L. Ed. 607. See the title **APPEAL AND ERROR**, vol. 1, p. 997.

**When discretion to be exercised.**—Mr. Justice Story, while admitting that the exercise of the discretion of the court to disturb the verdict of the jury was full of delicacy and difficulty, recognized it to be a duty to interfere, when it clearly appeared that the jury had committed a gross error, or acted from improper motives, or had given damages that were excessive in relation either to the person or the injury. *Arkansas, etc., Cattle Co. v. Mann*, 130 U. S. 69, 73, 32 L. Ed. 854.

**Exercise by successor to office.**—But the district judge is mistaken, in supposing that no one but the judge who renders the judgment can grant a new trial. He, as the successor of his predecessor, can exercise the same powers, and has a right to act on every case that remains undecided upon the docket, as fully as his predecessor could have done. The court remains the same, and the change of the incumbents cannot and ought not, in any respect, to injure the rights of litigant parties. *Life, etc., Ins. Co. v. Wilson*, 8 Pet. 291, 303, 8 L. Ed. 949, followed in *Hume v. Bowie*, 148 U. S. 245, 253, 37 L. Ed. 438.

**Independent of state practice.**—In regard to motions for new trial, the courts are independent of any statute or practice prevailing in the courts of the states. See the titles **APPEAL AND ERROR**, vol. 1, p. 1000; **COURTS**, vol. 4, p. 1135.

**7. Before motion in arrest of judgment.**—*Republica v. Lacaze*, 2 Dall. 118, 121, 1 L. Ed. 313.

**8. Before judgment in absence of statute.**—*Kingman v. Western Mfg. Co.*, 170 U. S. 675, 678, 42 L. Ed. 1192.

**9. Same term in absence of statute.**—There is ordinarily no power in the court to grant a new trial at a term subsequent to that at which judgment was entered. But this is often changed by statute. *Belknap v. United States*, 150 U. S. 588, 590, 37 L. Ed. 1191.

**Rule extends to all judgments, decrees or orders.**—Unquestionably it is the general rule that after the expiration of the

term all final judgments, decrees or other final orders of the court thereat rendered and entered of record, pass beyond its control unless steps be taken during that term by motion or otherwise, to set aside, modify or correct them. *Kingman v. Western Mfg. Co.*, 170 U. S. 675, 680, 42 L. Ed. 1192, citing *Hickman v. Fort Scott*, 141 U. S. 415, 35 L. Ed. 775. See the title **JUDGMENTS AND DECREES**, vol. 7, p. 544.

**Continued on account of death.**—Some other judge must act on a motion for new trial by reason of inability created by death, and the presiding judge may order the motion to be heard at a term subsequent to that at which the judgment was rendered, where the matter was kept within the control of the court by an order of prolongation. *Hume v. Bowie*, 148 U. S. 245, 254, 37 L. Ed. 438. See the title **CONTINUANCES**, vol. 4, p. 543.

**10. After supersedeas and pending appeal.**—Where it appears that the operation of the original judgment was suspended by a supersedeas, but the statute, reasonably construed, does not declare that the right to apply for a new trial upon newly discovered evidence after the term shall be any the less when the original judgment is superseded, nor that a new trial of an action at law shall not be applied for or granted while the case is pending in the appellate court, the granting of such trial is proper. *Fuller v. United States*, 182 U. S. 562, 575, 45 L. Ed. 1230. See the title **SUPERSEDEAS AND STAY OF PROCEEDINGS**.

**11. After mandate has issued.**—After the supreme court has issued a mandate to the court below to enter judgment for one of the parties, such court cannot, after entering the judgment, hear affidavits or testimony and grant a rule for a new trial. *Ex parte Dubuque, etc., Railroad*, 1 Wall. 69, 17 L. Ed. 514; *Smale v. Mitchell*, 143 U. S. 99, 109, 36 L. Ed. 90. See the title **MANDATE AND PROCEEDINGS THEREON**, ante, p. 97.

**12. Time changed by statutes.**—*Belknap v. United States*, 150 U. S. 588, 590, 37 L. Ed. 1191.

**Federal statutes.**—By § 987 of the Re-



3. COURT OF CLAIMS.—Under § 1088 of the Revised Statutes, the court of claims, at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon evidence of fraud, wrong or injustice against the United States.<sup>13</sup>

4. WHEN TOO LATE.—When the alleged motion for a new trial had not been made, and no notice of intention to make it given, within the time allowed by law

vised Statutes provision is made where judgment had been entered on a verdict, or a finding of the court on the facts, for stay of execution for forty-two days, on motion for time to file a petition for a new trial, and if such petition should be filed by leave within that time, execution was further stayed as of course; and "if a new trial be granted, the former judgment shall thereby be rendered void." *Kingman v. Western Mfg. Co.*, 170 U. S. 675, 677, 42 L. Ed. 1192.

**Oklahoma and Indian Territory.**—The act of congress of May 2, 1890, providing a temporary government for the territory of Oklahoma and enlarging the jurisdiction of the United States court in the Indian Territory and for other purposes, provided for new trial for various causes, the application to be made at same term and within three days after verdict, except where the grounds for new trial are discovered after the term at which the verdict or decision was rendered, when the application may be made by petition filed with the clerk not later than the second term after the discovery. *Fuller v. United States*, 182 U. S. 562, 566, 45 L. Ed. 1230.

**Nebraska.**—By § 5889 of the compiled statutes of Nebraska applications for new trial must be made at the term when the verdict is rendered (except on the ground of newly-discovered evidence), and within three days after verdict unless unavoidably prevented. *Kingman v. Western Mfg. Co.*, 170 U. S. 675, 678, 42 L. Ed. 1192.

**Louisiana.**—After the rendition of the judgment, three days are allowed by the law of Louisiana, within which to move for a new trial; but it may be in the power of a judge, under this law, in the state court, where the judgment has not been signed, to grant a new trial after the lapse of a much longer time. *Life, etc., Ins., Co. v. Wilson*, 8 Pet. 291, 303, 8 L. Ed. 949.

**Texas.**—Article 1373, Revised Statutes of Texas, providing that "a new trial may be granted by the court upon the application of the defendant, for good cause shown, supported by affidavit, filed within two years after the rendition of a judgment," applies only to cases in which judgment has been rendered upon service of process by publication. *Societe Fonciere v. Milliken*, 135 U. S. 304, 305, 34 L. Ed. 208.

**Where reduction of verdict accepted.**—Where the contention is that, under the practice in Florida, the court had no power

to grant a new trial upon a motion made more than four days after a verdict, such question need not be considered two years after a reduction of the verdict has been accepted by the plaintiff in preference to a new trial. *Lewis v. Wilson*, 151 U. S. 551, 554, 38 L. Ed. 267.

**Under a statute of limitations.**—An Arizona statute provides that "in case there shall be no ruling on said motion for a new trial during the term at which it was filed, then said motion shall be denied and the questions that may have been raised thereby shall be subject to review by the supreme court as if said motion had been overruled and exceptions thereto reserved and entered on the minutes of the court." Held, that such statute is merely a statute of limitations, and is constitutional. *James v. Appel*, 192 U. S. 129, 135, 48 L. Ed. 377.

**Continuance void in such case.**—And under such a statute, the motion for new trial must be deemed overruled, even though continued by the court to another term. *James v. Appel*, 192 U. S. 129, 135, 48 L. Ed. 377.

13. **Fraud, wrong or injustice.**—*Belknap v. United States*, 150 U. S. 588, 590, 37 L. Ed. 1191; *In re District of Columbia*, 180 U. S. 250, 251, 45 L. Ed. 516. See the title COURTS, vol. 4, p. 1021.

**Motion lies at subsequent term.**—In order to give full effect to this statute the court of claims must have power to grant a new trial at a term subsequent to that at which the judgment was rendered, for it explicitly provides that it may be exercised at any time within two years. This section has been before this court in several cases, and in them its scope and effect considered and determined. *United States v. Ayres*, 9 Wall. 608, 19 L. Ed. 625; *United States v. Crusell*, 12 Wall. 175, 20 L. Ed. 384; *Ex parte Russell*, 13 Wall. 664, 20 L. Ed. 632; *Ex parte United States*, 16 Wall. 699, 21 L. Ed. 507; *United States v. Young*, 94 U. S. 258, 24 L. Ed. 153; *Young v. United States*, 95 U. S. 641, 24 L. Ed. 467. That a mandate from the supreme court does not prevent the operation of this statute or take away the power or interfere with the discretion of the court of claims to grant a new trial was settled in *Ex parte Russell*, 13 Wall. 664, 20 L. Ed. 632. *Belknap v. United States*, 150 U. S. 588, 591, 37 L. Ed. 1191.

**While appeal pending.**—The act of June 25, 1868, providing for new trials in the court of claims, expressly provides that



or by repeated extensions by order of the court, such motion and notice thereafter come too late.<sup>14</sup>

**C. Notice of Motion.**—Under the rules of the supreme court, notice in writing must be given of an intended motion for a new trial.<sup>15</sup>

**D. Hearing and Determination**—1. BY WHAT COURT.—The motion is heard and determined by the trial court,<sup>16</sup> although it may be by a full bench.<sup>17</sup>

2. PLEADING AND PRACTICE.—The pleading and practice also follow the rules of that court;<sup>18</sup> and where hearing is before a federal court, the state rules need not be followed, as required by § 914 in other cases.<sup>19</sup>

3. EVIDENCE.—In general, the motion is decided upon the evidence and matters brought before the trial court,<sup>20</sup> unless some rule or statute permits addi-

the motion for a new trial may be made in the court below while the appeal from the judgment there is pending in the supreme court. *United States v. Ayres*, 9 Wall. 608, 19 L. Ed. 625.

**After appeal decided.**—The words "final disposition" mean the final determination of the suit on appeal (if an appeal is taken), or if none is taken, then its final determination in the court of claims. The court of claims has accordingly power to grant a new trial, if the same be done within two years next after the final disposition, although the case may have been decided on appeal in the federal supreme court, and its mandate have been issued. *Ex parte Russell*, 13 Wall. 664, 20 L. Ed. 632.

**After mandate issued.**—Where on certain facts found by the court of claims—it refusing to find as a fact a certain allegation which the petitioner in the suit requested it to find—that court has given judgment against the petitioner, and the petitioner has taken the record to the federal supreme court, which, upon considering the case found, reverses the judgment of the court of claims and remands the cause "for further proceedings in conformity with law and justice," there is nothing which prevents the court of claims from setting aside the findings of fact which it had made on the first trial and trying the case *de novo*. *Ex parte Medway*, 23 Wall. 504, 23 L. Ed. 160.

**14. Expiration of lawful time or extensions.**—*Glaspell v. Northern Pac. R. Co.*, 144 U. S. 211, 223, 36 L. Ed. 409.

**When case no longer pending.**—Where if notice of intention to move for new trial could lawfully have been given or renewed, or such motion have lawfully been made, notwithstanding the expiration of the time allowed by law or by order of the territorial court, this had not been done, the motion was not pending within the intent and meaning of the twenty-third section of the Dakota enabling act, providing for the removal of pending causes into the newly established state court. *Glaspell v. Northern Pac. R. Co.*, 144 U. S. 211, 223, 36 L. Ed. 409.

**When renewed in state court.**—And the renewal of notice and motion after the state was admitted, if it could have been

made, would necessarily have been in the state court, whose jurisdiction would have attached to determine it. *Glaspell v. Northern Pac. R. Co.*, 144 U. S. 211, 223, 36 L. Ed. 409. See the title REMOVAL OF CAUSES.

**Statutory allowance after expiration time.**—A Connecticut act allowing a new trial after the expiration of time allowed by existing law, was held constitutional in *Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648.

**15. Notice in writing.**—*Foxcraft v. Nagle*, 2 Dall. 150, 1 L. Ed. 327.

**16. Hearing before trial court.**—*Woods v. Young*, 4 Cranch 237, 2 L. Ed. 607; *Metropolitan R. Co. v. Moore*, 121 U. S. 558, 573, 30 L. Ed. 1022.

**17. May be by full bench.**—Where, under a criminal rule of the circuit court, a motion for a new trial was heard before three judges, the trial court having been held before a single judge, such court was legally constituted, and had authority to pass upon the motion. *In re Claassen*, 140 U. S. 200, 206, 35 L. Ed. 409.

**Mandamus to compel hearing.**—Under § 1088 of the Revised Statutes, providing for new trial in claim cases, a mandamus lies from the supreme court to compel the hearing and determination of the motion. *Ex parte Roberts*, 15 Wall. 384, 387, 21 L. Ed. 131; *Ex parte United States*, 16 Wall. 699, 703, 21 L. Ed. 507. See the title MANDAMUS, ante, p. 1.

**18. Rules of trial court.**—*Woods v. Young*, 4 Cranch 237, 2 L. Ed. 607.

**19. State rules not followed.**—Section 914 of the Revised Statutes, requiring the practice and pleadings of the federal courts to conform "as near as may be" to those existing at the time in like causes in the courts of record of the state, does not apply to a motion for new trial, nor affect the power of the circuit court to grant or refuse a new trial at its discretion. *Chateaugay, etc., Iron Co., Petitioner*, 128 U. S. 544, 32 L. Ed. 508; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898. See the title COURTS, vol. 4, p. 1123.

**Exceptions.**—Exceptions may not be taken for first time on new trial. *Dreyer v. Illinois*, 187 U. S. 71, 77, 47 L. Ed. 79. And see the title APPEAL AND ERROR, vol. 2, p. 87.

**20. Evidence before trial court.**—*Metro-*

tional findings upon the hearing,<sup>21</sup> or except in the case of newly-discovered evidence.<sup>22</sup>

4. **DISPOSITION.**—Under statutes, as at common law, the court, upon the hearing of a motion for a new trial, may, in the exercise of its judicial discretion, either absolutely deny the motion, or grant a new trial generally.<sup>23</sup>

**E. Division of Opinion.**—A division of opinion on a motion for a new trial may not be certified to the supreme court, but operates as a rejection of the motion.<sup>24</sup>

**F. Imposition of Terms.**—The exaction, as a condition of refusing a new trial, that the plaintiff shall do some act, as to remit a part of an excessive verdict, is within the discretion of the court.<sup>25</sup>

#### IV. Grounds of Motion.

**A. In General.**—New trials are frequently necessary, for the purpose of attaining complete justice; but the important right of trial by jury requires they should never be granted, without solid and substantial reasons; otherwise, the province of jurymen might be often transferred to the judges, and they instead of the jury would become the real triers of the facts. A reasonable doubt, barely, that justice has not been done, especially in cases where the value or importance of the cause is not great, appears to be too slender a ground for them. But whenever it appears, with a reasonable certainty, that actual and manifest injustice is done, or that the jury have proceeded on an evident mistake, either in point of law or fact, or contrary to strong evidence, or have grossly misbehaved themselves, or given extravagant damages, the court will always give an opportunity, by a new trial, of rectifying the mistakes of the former jury, and of doing complete justice to the parties.<sup>26</sup>

**Second New Trial.**—Courts rarely grant a new trial after two verdicts upon the facts in favor of the same party, except for error of law.<sup>27</sup>

politan R. Co. v. Moore, 121 U. S. 558, 573, 30 L. Ed. 1022.

**Evidence impeaching verdict.**—On a motion for new trial, the evidence of jurors as to the motives and influences affecting their verdict is generally inadmissible, yet they may testify as to the mere existence of extraneous influences. *Mattox v. United States*, 146 U. S. 140, 149, 36 L. Ed. 917. See the title **JURY**, vol. 7, p. 748.

21. **Additional findings.**—The Dakota code of civil procedure (§§ 266, 267), as established by the decisions of the supreme court of that territory, allows the trial court to make additional findings after judgment has been ordered and entered, and on a motion for new trial. *North v. Peters*, 138 U. S. 271, 282, 34 L. Ed. 936.

22. **Newly-discovered evidence.**—See post, "New Evidence," IV, J.

23. **Motion granted or denied.**—*Kennon v. Gilmer*, 131 U. S. 22, 29, 33 L. Ed. 110, citing *Hopkins v. Orr*, 124 U. S. 510, 31 L. Ed. 523; *Arkansas, etc., Cattle Co. v. Mann*, 130 U. S. 69, 32 L. Ed. 854.

**Or remittitur entered.**—Or it may order that a new trial be had unless the plaintiff elects to remit a certain part of the verdict, and that, if he does so remit, judgment be entered for the rest. See the title **REMITTITUR**.

24. **Rejection of motion.**—See the title **APPEAL AND ERROR**, vol. 2, p. 34.

**When certified.**—But where such division arises on motion for new trial, but

includes a question of jurisdiction, it may be so certified. *United States v. Thomas*, 151 U. S. 577, 38 L. Ed. 276. See the title **APPEAL AND ERROR**, vol. 2, p. 22.

**Where division only preliminary.**—Where a court is, like the court of claims, composed of five judges, and a motion for a new trial of a case is argued before, and submitted to, four of them, who, in conference, are equally divided in opinion; but the majority do not order any judgment to be announced in open court based upon such equal division, and none is so announced; and afterwards a majority of the whole court remand the motion to the law docket for reargument; the fact that two of the judges, at the time of such remanding, file their decision that the motion be denied upon the merits, does not decide the question involved in the motion, nor take away the jurisdiction of the court to hear and decide the motion upon reargument. *Ex parte United States*, 16 Wall. 699, 21 L. Ed. 507.

25. *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 646, 29 L. Ed. 755. See the title **REMITTITUR**.

26. **In general.**—*Cowperthwaite v. Jones*, 2 Dall. 55, 56, 1 L. Ed. 287; *Smale v. Mitchell*, 143 U. S. 99, 109, 36 L. Ed. 90.

27. **Rarely granted same party.**—*Louisville, etc., R. Co. v. Woodson*, 134 U. S. 614, 623, 33 L. Ed. 1032.

**Statute may take away discretion.**—But the Tennessee statutes, in the interest of



**B. Misconduct of Counsel.**—Misconduct of counsel, if prejudicial, will be ground for new trial.<sup>28</sup>

**C. Misconduct and Incompetency of Jurors.**—In general, misconduct of jurors will be ground for new trial, though it must appear that such misconduct was prejudicial, or affected their verdict.<sup>29</sup> Incompetency of jurors is also ground for new trial, if it is not known until after the jury is impaneled, without fault of party alleging it.<sup>30</sup>

**D. Admission or Exclusion of Evidence.**—Where the trial court has erroneously admitted or excluded evidence, and exception is properly taken, a trial de novo must be granted by an appellate court.<sup>31</sup>

the termination of litigation, make that imperative which would otherwise be discretionary. *Louisville, etc., R. Co. v. Woodson*, 134 U. S. 614, 623, 33 L. Ed. 1032.

**28. Breach of official duty.**—Where the prosecuting attorney is guilty of a breach of professional and official duty, and the presiding judge refuses to interpose upon the defendant's objection, a new trial must be granted. *Hall v. United States*, 150 U. S. 76, 81, 37 L. Ed. 1003.

**Where conduct not prejudicial.**—Under the Utah statute providing that "the granting of a new trial places the parties in the same position as if no trial had been had" and that "all the testimony must be produced anew, and a former verdict cannot be used or referred to either in evidence or in argument," the mere mention by counsel of the number of times the case had been before the court, which remark was withdrawn upon objection, will not be ground for reversal and new trial. *Hopt v. Utah*, 120 U. S. 430, 442, 30 L. Ed. 708.

**29. Misconduct of jury.**—*Cowperthwaite v. Jones*, 2 Dall. 55, 56, 1 L. Ed. 287. See the title JURY, vol. 7, p. 777.

**Reading newspaper.**—See the title JURY, vol. 7, p. 777.

**Method of reaching verdict.**—In an action of tort, it is not ground for a new trial, that the jurors each set down a particular sum, divided the aggregate by twelve, and returned the quotient as their verdict; in the absence of any fraudulent abuse of the mode adopted. *Cowperthwaite v. Jones*, 2 Dall. 55, 1 L. Ed. 287. See the title VERDICT.

**Testimony of jurors.**—Where parol evidence had been allowed to be given of the contents of a deed and of a will, without previous notice to the defendant to produce it, and it appeared that two of the jury had testified to their brethren, on the question in issue, after the jury had withdrawn, a new trial was granted. *Bradley v. Bradley*, 4 Dall. 112, 1 L. Ed. 763.

**Unsworn officer.**—See the title JURY, vol. 7, p. 777.

**Separation of jury.**—See the title JURY, vol. 7, p. 777.

**Question for trial court.**—Whether there has been a separation of the jurors in a murder case is a question for the trial court alone, upon motion for a new trial.

In *re Buchanan*, 158 U. S. 31, 34, 39 L. Ed. 884.

**30. Incompetency of jurors.**—*United States v. Fries*, 3 Dall. 515, 1 L. Ed. 701. See the title JURY, vol. 7, p. 770.

**Declarations showing bias.**—A new trial was granted in a capital case, on the ground that one of the jurors had, before the trial, made declarations manifesting a bias against the prisoner, which was not known to him at the time the jury was impaneled. *United States v. Fries*, 3 Dall. 515, 1 L. Ed. 701.

**Question for trial court.**—Yet the competency of a juror is a question of fact, and the decision of the trial court, upon motion for a new trial, is final for such question. In *re Buchanan*, 158 U. S. 31, 34, 39 L. Ed. 884.

**31. Admissibility of evidence.**—*Drakely v. Gregg*, 8 Wall. 242, 19 L. Ed. 409; *Cook v. United States*, 138 U. S. 157, 184, 34 L. Ed. 906; *Mattox v. United States*, 146 U. S. 140, 151, 36 L. Ed. 917; *Bates v. Preble*, 151 U. S. 149, 38 L. Ed. 106; *Motes v. United States*, 178 U. S. 458, 474, 44 L. Ed. 1150. See the title EVIDENCE, vol. 5, p. 1004.

**Proceedings resting on improper evidence.**—Where the direction of a verdict appears to have been rested on an instruction that there was not sufficient evidence to be submitted to the jury, and certain material evidence had been held inadmissible, the whole proceeding is erroneous and a new trial will be awarded. *Spaids v. Cooley*, 113 U. S. 278, 286, 28 L. Ed. 984.

**Sufficiency of other evidence immaterial.**—Where the court erred in admitting as testimony papers which ought not to have been received, the judgment is to be reversed and a new trial awarded even though it is urged that there is enough in the record to induce a jury to find a verdict for the defendants, independent of the testimony objected to. If this was true, in point of fact, there must still be a new trial, and at that new trial, each party is at liberty to produce new evidence. *Church v. Hubbard*, 2 Cranch 187, 239, 2 L. Ed. 249.

**Necessity for exceptions.**—"In such a case we are confined to the consideration of exceptions, taken at the trial, to the admission or rejection of evidence and to the charge of the court and its refusals to charge. We have no concern with ques-



**E. Errors in Instructions.**—If a judge states the law incorrectly, or refuses to state it at all, on a point material to the issue, the party aggrieved will be entitled to a new trial.<sup>32</sup>

**F. Errors in Verdict.**—1. IN GENERAL.—Verdicts, it is said, are either general or special, and if there is error in a case where the verdict is general, it can only be corrected by a new trial; and it must be admitted that the rule as suggested finds much countenance in the text-books.<sup>33</sup> And if a special verdict is ambiguous or imperfect,<sup>34</sup> or if a judgment assuming to be upon a special verdict

tions of fact, or the weight to be given to the evidence which was properly admitted. *Minor v. Tillotson*, 2 How. 392, 393, 11 L. Ed. 312; *Zeller v. Eckert*, 4 How. 289, 11 L. Ed. 979; *Dirst v. Morris*, 14 Wall. 484, 490, 20 L. Ed. 722; *Prentice v. Zane*, 8 How. 470, 485, 12 L. Ed. 1160; *Wilson v. Everett*, 139 U. S. 616, 35 L. Ed. 286." *Ætna Life Ins. Co. v. Ward*, 140 U. S. 76, 91, 35 L. Ed. 371. See the title APPEAL AND ERROR, vol. 2, p. 83.

**Where affidavits excluded on motion for new trial.**—Where the district court excluded affidavits, and, in passing upon the motion, did not exercise any discretion in respect of the matters stated therein, due exception being taken, the question of admissibility is thereby preserved for an appellate court. *Mattox v. United States*, 146 U. S. 140, 147, 36 L. Ed. 917, distinguished in *Haws v. Victoria Copper Min. Co.*, 160 U. S. 303, 313, 40 L. Ed. 436. See ante, "Discretion," III, A. And see the title APPEAL AND ERROR, vol. 1, p. 997.

**Where proceedings used without exceptions.**—Although the subsequent proceedings had at the trial, and stated in the original bill of exceptions, do not appear on the record to have been excepted to, yet those proceedings may properly be considered for the purpose of showing that the judge's rulings in favor of the defendant proceeded solely upon the incompetent evidence to the admission and consideration of which the plaintiff had persistently excepted; and such evidence having clearly prejudiced the plaintiff, the judgment must be reversed and a new trial ordered. *Michigan Ins. Bank v. Eldred*, 143 U. S. 293, 301, 36 L. Ed. 162.

**Motion for new trial essential.**—Questions as to the proper admission of evidence could not arise after the verdict, unless a motion had been made for a new trial. *Konig v. Bayard*, 1 Pet. 250, 261, 7 L. Ed. 132.

**32. Erroneous instructions.**—Continental Imp. Co. v. Stead, 95 U. S. 161, 24 L. Ed. 403; *Scott v. Lunt*, 7 Pet. 596, 8 L. Ed. 797; *Thornton v. Wynn*, 12 Wheat. 183, 188, 6 L. Ed. 595; *Mills v. Smith*, 8 Wall. 27, 19 L. Ed. 346; *Nudd v. Burrows*, 91 U. S. 426, 23 L. Ed. 286; *Hall v. Weare*, 92 U. S. 728, 23 L. Ed. 500; *Britton v. Nicolls*, 104 U. S. 757, 766, 26 L. Ed. 917; *Davis v. Patrick*, 122 U. S. 138, 154, 30 L. Ed. 1090; *Ætna Life Ins. Co. v. Davey*, 123 U. S. 739, 742, 31 L. Ed. 315; *Cook v. United States*, 138 U. S. 157, 184, 34 L. Ed.

906; *Smith v. United States*, 161 U. S. 85, 40 L. Ed. 626.

**Refusal to instruct.**—*Mills v. Smith*, 8 Wall. 27, 19 L. Ed. 346; *Nudd v. Burrows*, 91 U. S. 426, 23 L. Ed. 286; *Continental Imp. Co. v. Stead*, 95 U. S. 161, 24 L. Ed. 403; *Britton v. Nicolls*, 104 U. S. 757, 766, 26 L. Ed. 917; *Wilmington Star Min. Co. v. Fulton*, 205 U. S. 60, 77, 51 L. Ed. 708. See the title INSTRUCTIONS, vol. 7, p. 26.

**More ambiguity not enough.**—Courts are not inclined to grant a new trial merely on account of ambiguity in the charge of the court to the jury, where it appears that the complaining party made no effort at the trial to have the point explained. *Tweed's Case*, 16 Wall. 504, 516, 21 L. Ed. 389, citing *Express Co. v. Kountze Bros.*, 8 Wall. 342, 353, 19 L. Ed. 457; *Baltimore, etc., R. Co. v. Mackey*, 157 U. S. 72, 87, 39 L. Ed. 624; *Spring Co. v. Edgar*, 99 U. S. 645, 25 L. Ed. 487.

**Jury's failure to observe instructions.**—If the jury fail to observe the instructions of the court, the only remedy for the defendants is by motion for a new trial. *Chesapeake, etc., Canal Co. v. Knapp*, 9 Pet. 541, 570, 9 L. Ed. 222; *Walker v. New Mexico, etc., R. Co.*, 165 U. S. 593, 596, 41 L. Ed. 837; *Steinmetz v. Currey*, 1 Dall. 234, 1 L. Ed. 115.

**Exception necessary in appellate court only.**—A trial court may, in the exercise of its judicial discretion, grant a new trial, if convinced that its charge was wrong, even though its attention was not called to the error complained of before the case was finally submitted to the jury; but the power of an appellate court is confined to exceptions actually taken at the trial. *Railway Co. v. Heck*, 102 U. S. 120, 26 L. Ed. 58. See the title APPEAL AND ERROR, vol. 2, p. 83.

**33. Errors in general verdict.**—*Insurance Co. v. Piaggio*, 16 Wall. 378, 387, 21 L. Ed. 358. See the title VERDICT.

**Verdict contrary to instructions.**—The courts of England have granted new trials, where the jury have found a general verdict, after counsel have prayed for, and the court have directed, a special one. *Steinmetz v. Currey*, 1 Dall. 234, 1 L. Ed. 115. See ante, "Errors in Instructions," IV, E.

**34. Ambiguity in special verdict.**—If a special verdict be ambiguous or imperfect, if it find but the evidence of facts and not the facts themselves, or find but parts of the facts in issue, and is silent as to

is in fact upon a partial finding only,<sup>35</sup> or if the whole evidence is sent up instead of an agreed statement of facts,<sup>36</sup> a venire de novo must be awarded.

2. **CONSTITUTIONAL ERROR.**—If a verdict violates a constitutional requirement, a new trial must be granted upon motion.<sup>37</sup>

3. **MISTAKE OF LAW.**—A verdict founded on a mistake of law will be ground for new trial.<sup>38</sup>

4. **INSUFFICIENT EVIDENCE.**—It is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor, since that is the business of the jury, but conceding to all the evidence offered the greatest probative force which according to the law of evidence it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court after a verdict to set it aside and grant a new trial.<sup>39</sup>

others, it is a mistrial, and the court of error must order a venire de novo. They can render no judgment on an imperfect verdict or case stated. *Graham v. Bayne*, 18 How. 60, 15 L. Ed. 265; *Prentice v. Zane*, 8 How. 470, 12 L. Ed. 1160.

35. **Judgment upon partial finding.**—Where the record shows that the judgment is based upon a finding by the jury as to part only of the material facts, but judgment recites that it was made upon the "special verdict of the jury and facts conceded or not disputed upon the trial," a judgment must be reversed and a new trial ordered, either because the facts found did not authorize the judgment, or because the court has assumed to decide certain facts without a waiver of jury trial. *Hodges v. Easton*, 106 U. S. 408, 410, 27 L. Ed. 169.

36. **Sending up agreed statement of facts.**—Where a case was tried in the circuit court of the United States, in which both parties agreed that matters of law and fact should be submitted to the court, and it was brought to the federal supreme court upon a bill of exceptions which contained all the evidence, the supreme court will remand the case to the circuit court with directions to award a venire de novo. To send the whole evidence up is not the same thing as to agree upon the facts. *Graham v. Bayne*, 18 How. 60, 15 L. Ed. 265. See the title AGREED CASE, vol. 1, p. 204.

37. **Violation of "full faith and credit" clause.**—Where a verdict does not give full faith and credit to a judgment and pending appeal in the court of another state, and a motion for a new trial is overruled by the highest court of the state, such decision will be reversed on appeal to the supreme court of the United States. *Chicago, etc., R. Co. v. Sturm*, 174 U. S. 710, 43 L. Ed. 1144. See the title CONSTITUTIONAL LAW, vol. 4, p. 1.

38. **Verdict founded on mistake of law.**—*Cowperthwaite v. Jones*, 2 Dall. 55, 1 L. Ed. 287. See the title MISTAKE AND ACCIDENT, ante, p. 417.

39. **Verdict on insufficient evidence.**—*Pleasants v. Fant*, 22 Wall. 116, 122, 22 L. Ed. 780; *The City v. Babcock*, 3 Wall. 240, 18 L. Ed. 31; *Thompson v. Bowie*, 4 Wall.

463, 472, 18 L. Ed. 423; *Walker v. New Mexico, etc., R. Co.*, 165 U. S. 593, 596, 41 L. Ed. 837. See the title EVIDENCE, vol. 5, p. 1034.

**Wrongly directing verdict.**—On the other hand, where the plaintiff's evidence would have been sufficient to support a verdict found upon it by the jury, and the lower court directed a verdict for defendants, who had offered no evidence, the supreme court reversed the judgment and remanded the cause for new trial. *Humiston v. Wood*, 124 U. S. 12, 20, 31 L. Ed. 354.

**Insufficiency of law or fact.**—There is no reason for supposing that the language "for insufficient evidence" is to be limited to evidence insufficient in point of law. The words themselves do not import any distinction. It is admitted that according to established rules of procedure in such cases it is customary and proper for courts of justice, sitting in the trial of causes by jury, to set aside verdicts and grant new trials in both classes of cases; that is, where the verdict rests upon evidence which is either insufficient in law or insufficient in fact. *Metropolitan R. Co. v. Moore*, 121 U. S. 558, 568, 30 L. Ed. 1022.

**Prima facie evidence sufficient.**—Prima facie evidence of a fact, is such evidence as, in judgment of law, is sufficient to establish the fact; and if not rebutted, remains sufficient for the purpose; the jury are bound to consider it in that light, unless they are invested with authority to disregard the rules of evidence by which the liberty and estate of every citizen are guarded and supported. No judge would hesitate to set aside their verdict and grant a new trial, if, under such circumstances, without any rebutting evidence, they disregard it; it would be error on their part, which would require the remedial interposition of the court. *Kelly v. Jackson*, 6 Pet. 622, 8 L. Ed. 523.

**Statute limiting to two new trials.**—In Tennessee a statute prohibits more than two new trials on the facts, but such statute manifestly refers to a state of case where, in the opinion of the judge, the verdict should have been otherwise than as rendered because of the insufficiency



5. **AGAINST WEIGHT OF EVIDENCE.**—Upon the whole evidence in the case the testimony in support of the cause of action, or of the defense, may be so slight, although competent in law, or the preponderance against it may be so convincing, that a verdict may be seen to be plainly unreasonable and unjust. In many cases it might be the duty of the court to withdraw the case from the jury, or to direct a verdict in a particular way; and yet, in others, where it would be proper to submit the case to the jury, it might become its duty to set aside the verdict and grant a new trial. That obligation, however, is the result of a conclusion of fact, and in such cases the ground of the ruling is, that the verdict is not supported by sufficient evidence, because it is against the weight of the evidence.<sup>40</sup>

**G. Excessive or Insufficient Damages.**—It cannot be disputed that the court is within the limits of its authority when it sets aside the verdict of the jury and grants a new trial where the damages are palpably or outrageously excessive, or where they are clearly insufficient.<sup>41</sup> If the damages assessed by the

of the evidence to sustain it, but not to a case where there is no evidence at all. *Louisville, etc., R. Co. v. Woodson*, 134 U. S. 614, 621, 33 L. Ed. 1032.

**When finding of jury conclusive.**—The finding of the jury on the sufficiency of the evidence is conclusive, unless a new trial is awarded by the court in which the case is tried, or by an appellate tribunal, for some error of law. *Barreda v. Silsbee*, 21 How. 146, 167, 16 L. Ed. 86; *Wilson v. Everett*, 139 U. S. 616, 621, 33 L. Ed. 286.

**40. Verdict against evidence.**—*Metropolitan R. Co. v. Moore*, 121 U. S. 558, 570, 30 L. Ed. 1022; *Cowperthwaite v. Jones*, 2 Dall. 55, 56, 1 L. Ed. 287; *Respublica v. Lacaze*, 2 Dall. 118, 120, 1 L. Ed. 313; *Schuchardt v. Allens*, 1 Wall. 359, 371, 17 L. Ed. 642; *The Connemara*, 108 U. S. 352, 360, 27 L. Ed. 751; *Crumpton v. United States*, 138 U. S. 361, 363, 34 L. Ed. 958. See the title EVIDENCE, vol. 5, p. 1034.

**Evidence may be circumstantial.**—But the verdict is not against the weight of the evidence because directly counter to testimony which is uncontradicted and unimpeached, if such testimony is contradicted by the circumstances of the case, or is of such a degree of improbability as to deprive it of credit. *Quock Ting v. United States*, 140 U. S. 417, 422, 35 L. Ed. 501.

**Evidence of tariff duties.**—Where, in a suit regarding an excess of tariff duties, the verdict was directed for the importer, and the evidence showed that the duties levied were correct, the judgment must be reversed and the case sent back for new trial. *Arthur v. Vietor*, 127 U. S. 572, 578, 32 L. Ed. 201.

**Evidence of reasonable notice.**—A new trial was granted where verdict was against the strength of the evidence given on the trial, and the law respecting reasonable notice. *Steinmetz v. Currey*, 1 Dall. 234, 1 L. Ed. 115.

**When not considered.**—The alleged fact that the verdict was against the weight of evidence may not be considered, if there was any evidence proper to go to the jury in support of the verdict. *Humes v. United States*, 170 U. S. 210, 212, 42 L. Ed. 1011, citing *Crumpton v. United States*, 138 U.

S. 361, 34 L. Ed. 958; *Moore v. United States*, 150 U. S. 57, 61, 37 L. Ed. 996.

**Discretion of court.**—Motions to grant a new trial, upon the ground that the verdict is against the weight of the evidence, are, in a certain sense, addressed to the discretion of the court, and can be more satisfactorily dealt with by the judge who tried the cause and who had the opportunity of seeing the witnesses and hearing them testify. *Metropolitan R. Co. v. Moore*, 121 U. S. 558, 573, 30 L. Ed. 1022.

**Motion for new trial only remedy.**—If the finding of the jury was against the weight of the evidence, the remedy was by a motion for a new trial, which does not appear to have been made; and the supreme court, on appeal, cannot exercise a function which was that of the jury. *Hedden v. Iselin*, 142 U. S. 676, 680, 35 L. Ed. 1155; *Maryland Ins. Co. v. Ruden*, 6 Cranch 338, 340, 3 L. Ed. 242; *Louisville, etc., R. Co. v. Woodson*, 134 U. S. 614, 621, 33 L. Ed. 1032.

**Not open on appeal in United States courts.**—In some of the states a writ of error is authorized to bring up for review the proceedings and judgment of an inferior court, on which it may be assigned as an error in law, upon a bill of exceptions setting forth the whole evidence, that the court below erred in not granting a new trial because the verdict was against the weight of the evidence, but such a practice does not prevail in the appellate courts of the United States. *Metropolitan R. Co. v. Moore*, 121 U. S. 558, 573, 30 L. Ed. 1022.

**41. Excessive damages.**—*Arkansas, etc., Cattle Co. v. Mann*, 130 U. S. 69, 74, 32 L. Ed. 854; *Cowperthwaite v. Jones*, 2 Dall. 55, 56, 1 L. Ed. 287; *The Connemara*, 108 U. S. 352, 360, 27 L. Ed. 751; *New York, etc., R. Co. v. Winter*, 143 U. S. 60, 75, 36 L. Ed. 71; *Lincoln v. Power*, 151 U. S. 436, 438, 38 L. Ed. 224. See the title DAMAGES, vol. 5, p. 157.

**Recovery of greater amount than defendant received.**—A new trial was granted in an action for money had and received, where the court had left it to the jury to give such damages as they thought just, and the verdict was for a



jury are excessive, the defendant's only remedy is by motion for a new trial in the lower court;<sup>42</sup> though a venire de novo will be awarded where an error in the amount recovered is apparent upon the record,<sup>43</sup> or where insufficient damages are based upon erroneous instructions,<sup>44</sup> or for failure to award legal interest and costs.<sup>45</sup> If excessive damages are also illegal, they may be disallowed, and a mandate issued to enter judgment accordingly;<sup>46</sup> but the appellate court may never enter a judgment according to its own estimate of the damages,<sup>47</sup> and while a remittitur is generally allowed, a venire de novo must be awarded where such verdict is caused by prejudice or recklessness.<sup>48</sup>

**H. Mistake or Surprise.**—A new trial will be granted for innocent mistakes of the parties,<sup>49</sup> or for such surprise as is without fault, and prejudicial to

greater amount than the defendant had received. *Eastwick v. Hugg*, 1 Dall. 222, 1 L. Ed. 109.

**Insufficient damages.**—*Tracy v. Swartwout*, 10 Pet. 80, 81, 9 L. Ed. 354.

**42. Motion for new trial only remedy.**—*Baltimore, etc., R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 576, 34 L. Ed. 784; *Wilson v. Everett*, 139 U. S. 616, 35 L. Ed. 286; *Chesapeake, etc., Canal Co. v. Knapp*, 9 Pet. 541, 570, 9 L. Ed. 222.

**Limits of appellate jurisdiction.**—Whether the order overruling the motion for a new trial based upon excessive damages is erroneous or not, the supreme court's power is restricted to the determination of questions of law arising upon the record. *Wabash R. Co. v. McDaniels*, 107 U. S. 454, 456, 27 L. Ed. 605, citing *Railroad Co. v. Fraloff*, 100 U. S. 24, 25 L. Ed. 531.

**43. Improper recovery apparent on record.**—Where an error in the amount recovered is apparent upon the record, and it could not have been remedied by an amendment of the pleadings, the federal supreme court will of its own motion, in the interests of justice, direct that it be corrected, and, if necessary, order a new trial or further proceedings for that purpose. *Mills v. Scott*, 99 U. S. 25, 26, 25 L. Ed. 294. See the title REMITTITUR.

**44. Based upon erroneous instruction.**—And where a verdict for insufficient damages is based upon an erroneous instruction, and the amount found by the jury is only referred to, as showing that they considered their verdict as controlled by the direction of the court, the proper remedy is not by motion for a new trial on account of insufficient damages but by writ of error for the erroneous instruction. *Tracy v. Swartwout*, 10 Pet. 80, 81, 9 L. Ed. 354.

**45. Legal interest and costs omitted.**—Where the verdict is for insufficient damages, and does not include interest and costs to which plaintiff is legally entitled, the supreme court, on appeal, will order a venire facias de novo. *Lanusse v. Barker*, 3 Wheat. 101, 146, 4 L. Ed. 343.

**46. Mandate disallowing illegal damages.**—*Insurance Co. v. Piaggio*, 16 Wall. 378, 21 L. Ed. 358. See the title MAN-

DATE AND PROCEEDINGS THEREON, ante, p. 97.

**47. Mandate may not enter arbitrary amount.**—Moreover, in a case in which damages for a tort have been assessed by a jury at an entire sum, no court of law, upon a motion for a new trial for excessive damages and for insufficiency of the evidence to support the verdict, is authorized, according to its own estimate of the amount of damages which the plaintiff ought to have recovered, to enter an absolute judgment for any other sum than that assessed by the jury. *Kennon v. Gilmer*, 131 U. S. 22, 29, 33 L. Ed. 110. See the title DAMAGES, vol. 5, p. 157.

**48. When remittitur proper.**—While errors as to excessive damages may in many cases and under most circumstances be obviated by remitting the amount of the excess, where the circumstances clearly indicate that the jury were influenced by prejudice or by a reckless disregard of the instructions of the court, that remedy cannot be allowed. Where such motives or influences appear to have operated, the verdict must be rejected, because the effect is to cast suspicion upon the conduct of the jury and their entire finding. *Arkansas, etc., Cattle Co. v. Mann*, 130 U. S. 69, 73, 75, 32 L. Ed. 854. See the title REMITTITUR.

**Question of damages unimportant after remittitur.**—The question whether a circuit court has erred in excluding from its consideration affidavits filed in support of a motion for new trial, and regarding the amount of damages only, becomes unimportant after a remittitur is filed and judgment rendered thereon. *Koenigsberger v. Richmond Silver Min. Co.*, 158 U. S. 41, 53, 39 L. Ed. 889.

**Not binding if new trial awarded.**—But a remittitur does not bind the party remitting, if the judgment be set aside and a new trial ordered. *Planters' Bank v. Union Bank*, 16 Wall. 483, 498, 21 L. Ed. 473.

**49. Mistake.**—*Cowperthwaite v. Jones*, 2 Dall. 55, 56, 1 L. Ed. 287. See the title MISTAKE AND ACCIDENT, ante, p. 417.

**Mutual mistake in filing case on appeal.**—Where it was apparent that both parties supposed that a case had been made

surprised party.<sup>50</sup>

**I. Fraud.**—Evidence of fraud, wrong or injustice is ground for new trial, on motion of the government, under § 1088 of the Revised Statutes. This section applies only to cases arising in the court of claims.<sup>51</sup>

**J. New Evidence.**—Treating an application as open to consideration by reason of the discovery of the existence of the alleged objection after verdict and judgment, but as amounting to no more than a motion for new trial made in apt time, it is within the discretion of the trial court to grant or deny it.<sup>52</sup>

### V. Effect of Motion as Suspending Judgment.

The federal statutes provide for the suspension of judgment in civil cases, to allow a motion for new trial to be filed and determined.<sup>53</sup> It has also been held

up, according to the practice of Louisiana, for the re-examination of the facts in the supreme court, but one not having been made up by the court nor properly filed according to the requirements of the statute, so that, from that cause, the case could not be properly passed upon, the judgment, under the circumstances (the case being an important one), was not affirmed, but was reversed for mistrial, and remanded for a new trial. *Flanders v. Tweed*, 9 Wall. 425, 426, 19 L. Ed. 678.

**50. Surprise.**—*Mulhall v. Keenan*, 18 Wall. 342, 21 L. Ed. 808.

**Absence and sickness.**—Absence of counsel or sickness of a witness may under some circumstances justify a new trial, on the ground of accident or surprise. *Crim v. Handley*, 94 U. S. 652, 659, 24 L. Ed. 216.

**Motion for new trial only remedy.**—The only remedy for surprise is a motion for new trial, and the refusal of a court below to grant one is not reviewable. *Mulhall v. Keenan*, 18 Wall. 342, 21 L. Ed. 808.

**51. New trial by government for fraud.**—*Young v. United States*, 95 U. S. 641, 643, 24 L. Ed. 467. See the title COURTS, vol. 4, p. 1021.

**Suitor accepts condition in bringing suit.**—The act was passed for the protection of the United States, and constitutes one of the conditions which congress has seen fit to attach to the grant of a right to sue the United States. The suitor cannot complain, for he accepts this condition of the jurisdiction when he commences his suit. *Young v. United States*, 95 U. S. 641, 643, 24 L. Ed. 467.

**Applies only to fraud in fact.**—It seems clear that the relief contemplated by § 1088 of the Revised Statutes, was in respect of matters of fact whereby some fraud, wrong or injustice had been done to defendants and not of errors of law, for which an appeal would lie to the supreme court. Indeed the section provides that new trials shall be granted "upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong or injustice in the premises had been done." In re District of Columbia, 180 U. S. 250, 253, 45 L. Ed. 516.

**New case must be made.**—Under the

act of June 23, 1868 (15 Stat. 75), re-enacted in § 1088, Rev. Stat., it was said, in *Ex parte Russell*, 13 Wall. 664, 20 L. Ed. 632, that to justify the grant of a new trial "a new case must be made—a case involving fraud or other wrong practiced upon the government. It is analogous to the case of a bill of review in chancery to set aside a former decree or a bill impeaching a decree for fraud." This remark of the judge is to be construed in connection with the particular objection to the jurisdiction of the court of claims he was then considering, which was "that the granting of a new trial after a decision by this court is, in effect, an appeal from the decision of this court." This, he said, "would be so, if it were granted upon the same case presented to us; but it is not. A new case must be made," etc. *Young v. United States*, 95 U. S. 641, 642, 24 L. Ed. 467.

**52. Newly-discovered evidence.**—*Raub v. Carpenter*, 187 U. S. 159, 162, 47 L. Ed. 119.

**Statutes authorizing after term are constitutional.**—In none of the decided cases is "there any suggestion of the want of power in the legislature to authorize the granting of a new trial in an action at law upon evidence discovered after the term at which the verdict or decision was rendered. So far as the power of congress is concerned, we cannot conceive that legislation of that character in respect of cases at law, as distinguished from cases in equity, infringes upon any right secured by the constitution of the United States." *Fuller v. United States*, 182 U. S. 562, 575, 45 L. Ed. 1230.

**Congress may extend rule to territories.**—The Arkansas statute providing for new trials upon grounds discovered after the term at which verdict was rendered, and making such new trials a matter of right, was made applicable in the Indian Territory by act of congress of May 2, 1890. *Fuller v. United States*, 182 U. S. 562, 576, 45 L. Ed. 1230.

**53. Judgment suspended by statute.**—By § 987 of the Revised Statutes, when a circuit court enters judgment in a civil action, either upon a verdict or on a finding of the court upon the facts, execution may, on motion of either party, at the



that a motion or petition for new trial, independent of any statute, suspends the operation of a judgment or decree.<sup>54</sup> But where a suspension is claimed by reason of state provisions for new trial in criminal cases, it will depend upon the state statutes and their interpretation by the state courts.<sup>55</sup>

## VI. New Trial in Criminal Cases.

It is settled law in this country that a new trial may be granted in favor of the prisoner, whether the charge be felony or only a misdemeanor. Much effort was expended by Judge Story in the case of *United States v. Gibert*, to prove the negative of that proposition, but his views in that regard have never been accepted by the bench or bar, as appears by the decisions of the circuit courts and by the decisions of nearly all of the state courts, in every one of which it has been held that a new trial may be granted on the application of the accused in any criminal case for good cause shown.<sup>56</sup>

discretion of the court, and on such conditions for the security of the adverse party as it may judge proper, be stayed forty-two days from the time of entering judgment, to give time to file in the clerk's office of the court a petition for a new trial. If such petition is filed within such term of forty-two days, with a certificate thereon of any judge of the court that he allows it to be filed, execution shall, of course, be further stayed until the next session of the court. From this legislation it is apparent that it was not the policy of congress to suspend the operation of a judgment so as to allow an application for a new trial in any case beyond a period of forty-two days from the time of its rendition. *Cambuston v. United States*, 95 U. S. 285, 287, 24 L. Ed. 448.

**Does not affect judgment as estoppel.**—It may be doubted whether the pendency of a motion for a new trial would interfere in any way with the operation of the judgment as an estoppel. *Hubbell v. United States*, 171 U. S. 203, 210, 43 L. Ed. 136.

**54. Decree suspended in equity.**—In *Brockett v. Brockett*, 2 How. 238, 11 L. Ed. 251, it was held that a petition for rehearing filed during the term, and actually entertained by the court, suspended the operation of a decree in equity until the petition was disposed of. *Cambuston v. United States*, 95 U. S. 285, 287, 24 L. Ed. 448. See the title *SUPERSEDEAS AND STAY OF PROCEEDINGS*.

**Judgment not final pending motion.**—Where a judgment is still under the control of the trial court through the pendency of a motion for new trial, it is suspended in the sense that it is not final for the purpose of appeal or writ of error. *Kingman v. Western Mfg. Co.*, 170 U. S. 675, 680, 42 L. Ed. 1192.

**55. Suspension under state laws in capital case.**—Where it is said that under the Massachusetts statutes the party convicted has a year in which to file a motion for a new trial, and, therefore, no sentence can be executed on him until that time, it is a question depending on the statutes of the state, and to be deter-

mined by its courts. The state may see fit to postpone the execution of a capital sentence for a year, or provide that it shall be carried into effect more speedily, and what the state has provided in the matter is for its courts to decide. *Storti v. Massachusetts*, 183 U. S. 138, 142, 46 L. Ed. 120.

**56. Granted in felony or misdemeanor cases.**—Ex parte *Lange*, 18 Wall. 163, 204, 21 L. Ed. 872. See the title *CRIMINAL LAW*, vol. 5, p. 43.

**Not after acquittal.**—See the title *AUTREFOIS, ACQUIT AND CONVICT*, vol. 2, p. 752.

**Rule in England.**—New trials in misdemeanors have always been granted in England in proper cases, as appears by numerous adjudications of the highest authority. Whether a new trial can be granted in felony in the courts of that country is more doubtful. Certainly it was decided in the case of *Regina v. Scaife et al.*, that a new trial may be granted in such a case. Ex parte *Lange*, 18 Wall. 163, 204, 21 L. Ed. 872.

**Trial de novo in Philippines.**—On appeal to the supreme court of the Philippine Islands a trial de novo is had even in a criminal case, but as pointed out in *Kepner v. United States*, 195 U. S. 100, 129, 49 L. Ed. 114, whilst that court on appeal has power to re-examine the law and facts, it does so on the record and does not retry in the fullest sense. *Serra v. Mortiga*, 204 U. S. 470, 477, 51 L. Ed. 571. See the title *APPEAL AND ERROR*, vol. 2, p. 283.

**Prejudicial instruction.**—Where the instruction complained of may have injuriously affected the rights of the accused, the judgment was reversed, with directions to grant him a new trial. *Bucklin v. United States*, No. 2, 159 U. S. 682, 687, 40 L. Ed. 305. See the title *INSTRUCTIONS*, vol. 7, p. 26.

**Denial of statutory right.**—Defendants in different actions cannot be deprived of their several challenges, by the order of the court, made for the prompt and convenient administration of justice, that the three cases shall be tried together. The denial of the right of challenge, secured



## VII. New Trial in Equity.

Technically, there can be no "new trial" in a suit in equity. Hence it is proper to inquire what must have been intended by the use of that term in a decree, since it cannot have its ordinary meaning; and for that purpose resort may be had to the opinion delivered at the time of the decree.<sup>57</sup> But a new trial may be had after the trial of feigned issues, the motion being made to the chancellor who formed the issues and sent them to the law court for trial.<sup>58</sup>

## VIII. New Trial in Ejectment.

A title to real estate has, under the traditions of the common law, been held, in all the states where that law prevailed, to be too important, it might be said too sacred, to be concluded forever by the result of one action between the contesting parties.<sup>59</sup> Hence, those states which, by abolishing the fictions of the action at common law, and substituting a direct suit between the parties actually claiming under conflicting titles, which, according to the nature of this new proceeding, would end in a judgment concluding both parties, have found it necessary to provide for new trials to such extent as each state legislature has thought sound policy to require. These provisions for new trials in actions of ejectment are not the same in all the states, but it is believed that almost all of them which have abolished the common-law action have made provision for one or more new trials as a matter of right.<sup>60</sup> The supreme court is of opinion that when

to the defendants by statute, entitles them to a new trial. *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285, 293, 36 L. Ed. 707. See the title JURY, vol. 7, p. 748.

**Denial of constitutional right.**—Where the court directed each side to proceed with the challenges, without knowledge on the part of either as to what challenges had been made by the other, and a fair reading of the record leads to the conclusion that the prisoner was not brought face to face with the jury until after the challenges had been made and the selected jurors were brought into the box to be sworn, this constitutes such error as to require reversal and new trial. *Lewis v. United States*, 146 U. S. 370, 375, 376, 36 L. Ed. 1011. See the title JURY, vol. 7, p. 748.

See ante, "Grounds of Motion," IV, for grounds of new trials generally. And see ante, "Effect of Motion as Suspending Judgment," V, for effect of motion in capital case.

**57. No new trial technically.**—*Supervisors v. Kennicott*, 94 U. S. 498, 24 L. Ed. 260. See the title EQUITY, vol. 5, p. 803.

As to review, see the titles APPEAL AND ERROR, vol. 1, p. 378; BILL OF REVIEW, vol. 3, p. 244. As to rehearing, see the title REHEARING. As to effect of motion, see ante, "Effect of Motion as Suspending Judgment," V.

**58. New trial of feigned issues.**—*Johnson v. Harmon*, 94 U. S. 371, 378, 24 L. Ed. 271; *Watt v. Starke*, 101 U. S. 247, 255, 25 L. Ed. 826. And see the titles APPEAL AND ERROR, vol. 2, p. 204; ISSUES TO JURY, vol. 7, p. 526.

**59. New trials at common law.**—At the common law, the fiction in an action of ejectment, by which John Doe and Richard Roe were made respectively the plain-

tiff and the defendant, permitted any number of trials after verdict and judgment between the same parties in interest on the same question of title, by the use of other fictitious names, and other allegations of demise, entry, and ouster. The evil of this want of conclusiveness in the result of this form of action led to the interposition of a court of equity, in which, after repeated verdicts and judgments in favor of the same party and upon the same title, that court would enjoin the unsuccessful party from further disturbance of the one who had recovered these judgments. *Equator Co. v. Hall*, 106 U. S. 86, 87, 27 L. Ed. 114. See, generally, the title EJECTMENT, vol. 5, p. 695.

**60. Statutory new trials in ejectment.**—*Equator Co. v. Hall*, 106 U. S. 86, 87, 27 L. Ed. 114.

**In South Carolina.**—*Henderson v. Griffin*, 5 Pet. 151, 8 L. Ed. 79.

**In Colorado.**—Prior to the Colorado act of 1877, it was very clear that only one new trial was demandable as a matter of right in an action of ejectment, and the change of language adopted in the code of 1877 is indicative of intentional change in that respect—a change which can only mean that each party against whom in turn a verdict may be rendered shall have a right to one new trial. Apart from this absolute right of the parties, the court may grant another trial upon reasonable grounds being shown. *Equator Co. v. Hall*, 106 U. S. 86, 88, 27 L. Ed. 114.

**In Illinois.**—The law of Illinois changes the rule of the common law, and makes a judgment in the action of ejectment conclusive as to the title established in such action upon the party against whom it is rendered, and parties claiming un-

an action of ejectment is tried in a circuit court of the United States according to the statutory mode of proceeding, that court is governed by the provisions concerning new trials as it is by the other provisions of the state statute. There is no reason why the federal court should disregard one of the rules by which the state legislature has guarded the transfer of the possession and title to real estate within its jurisdiction.<sup>61</sup>

**NEW YORK.**—See the title **BOUNDARIES**, vol. 3, p. 494. As to citizenship, see the title **ALIENS**, vol. 1, p. 215.

**NEXT FRIEND.**—See the title **INFANTS**, vol. 6, p. 1018.

**NEXT HIGHEST BIDDER.**—See note 1.

**NEXT OF KIN.**—See the titles **COMMON LAW**, vol. 3, p. 975; **WILLS**. See note 2.

der him by title arising after the commencement of the action, subject to certain exceptions named. Those exceptions provide in two cases for a second trial of the action. One is after the first trial and judgment; the party against whom the judgment has been rendered, or his heirs or assigns, is entitled to have the judgment set aside and a new trial granted within one year from the date of the judgment, upon the payment of all costs in the action. The new trial in such case is a matter of right, upon the mere application of the party. The other is after the second trial and judgment; then a new trial may be granted, upon the application of the losing party, if the court is satisfied that justice would be thereby promoted, and the rights of the parties be more satisfactorily ascertained and established. But only two new trials can be granted to the same party. *Smale v. Mitchell*, 143 U. S. 99, 105, 36 L. Ed. 90; *Mansfield v. Excelsior Ref. Co.*, 135 U. S. 326, 327, 34 L. Ed. 162.

**In Iowa.**—In *Ex parte Dubuque, etc., Railroad*, 1 Wall. 69, 17 L. Ed. 514, the new trial depended upon the discretion of the court, and there was no statute at that time in Iowa which gave the party a right to a new trial as a matter of course. It appears from the record in that case, that after the mandate had gone down, and judgment had been entered in obedience to it, affidavits were presented and a motion made for a new trial, which was granted by the court; and that subsequently a mandate was issued by the federal supreme court commanding the court below to vacate the order. *Smale v. Mitchell*, 143 U. S. 99, 109, 36 L. Ed. 90.

**New trial as of right—After mandate.**—Undoubtedly, in ordinary cases, a new trial cannot be granted by the court below, except for good cause, and in the exercise of its sound judgment, and it is not within its power, in entering the judgment of the supreme court, to award a new trial; and it only remains to carry the judgment into execution. But this rule cannot apply to an action of ejectment, where the party is entitled by the law of the state in which the action arose to a new trial without showing cause, and

in regard to which the trial court possesses no discretion. The judgment entered in an action of ejectment in such case, by direction of the supreme court, stands subject to the same control by the lower court as if thus rendered in the first instance. *Smale v. Mitchell*, 143 U. S. 99, 109, 36 L. Ed. 90. See the title **MANDATE AND PROCEEDINGS THEREON**, ante, p. 97.

**61. Federal courts follow state practice.**—*Equator Co. v. Hall*, 106 U. S. 86, 88, 27 L. Ed. 114, citing *Miles v. Caldwell*, 2 Wall. 35, 17 L. Ed. 755; *Smale v. Mitchell*, 143 U. S. 99, 107, 36 L. Ed. 90. And see the title **COURTS**, vol. 4, p. 1148, note 53.

**1. Next highest bidder.**—See *Pacific Electric R. Co. v. Los Angeles*, 194 U. S. 112, 119, 48 L. Ed. 896.

**2. Next of kin—Nearest of kin—Nearest kindred.**—In *Blagge v. Balch*, 162 U. S. 439, 464, 40 L. Ed. 1032, the court said: "In the construction of wills and settlements, after considerable conflict of opinion, the established rule of interpretation in England is that the phrase **next of kin**, when found in ulterior limitations, must be understood to mean nearest of kin without regard to the statute of distribution. 2 Jarman on Wills (5th Ed.), 108, 109. This rule was followed in *Sewasey v. Jaques*, 144 Mass. 135, where Field, J., speaking for the court, said: 'It is certainly difficult to distinguish between the expressions **next of kin**, "nearest of kin," "nearest kindred," and "nearest blood relations," and primarily the words indicate the nearest degree of consanguinity, and they are perhaps more frequently used in this sense than in any other. What little recent authority there is beyond that of the English courts supports the English view; and on the whole we are inclined to adopt it.'"

**French spoliation claims.**—In the act of March 3, 1891, concerning the French spoliation claims, the words **next of kin** contained in the proviso, that where the original sufferers were adjudicated bankrupts, award should be made on behalf of the **next of kin** instead of the assignee in bankruptcy, were held to mean **next of kin** living at the date of the act. The court further said: "Congress in order to reach



**NIL DEBET.**—See the title DEBT, THE ACTION OF, vol. 5, p. 207.

**NIL DICIT.**—See the title JUDGMENTS AND DECREES, vol. 7, p. 559.

**NITRATE OF LEAD.**—Nitrate of lead is not a metal: it has no metallic qualities.<sup>1</sup>

**NO CASE.**—See note 2.

**NOLLE PROSEQUI.**—A “*nolle prosequi*” is “a partial forbearance by the plaintiff to proceed any further as to some of the defendants, or to part of the suit, but still he is at liberty to go on as to the rest.”<sup>3</sup>

**NOMINAL DAMAGES.**—See the titles BONDS, vol. 3, p. 441; DAMAGES, vol. 5, p. 160.

**NOMINAL PARTNERS.**—See the title PARTNERSHIP.

**NONASSESSABLE.**—The word “nonassessable” upon certificates of stock does not cancel or impair the obligation to pay the amount due upon the shares created by the acceptance and holding of such certificates. At most, its legal effect is a stipulation against liability from further assessment or taxation, after the entire subscription of one hundred per cent shall have been paid.<sup>4</sup>

**NON ASSUMPSIT.**—See the title ASSUMPSIT, vol. 2, p. 656.

**NON COMPOS MENTIS.**—See the titles INSANITY, vol. 6, p. 1072; WITNESSES.

**NON DAMNIFICATUS.**—See the titles BONDS, vol. 3, p. 432; COVENANTS, vol. 5, p. 19.

**NON DETINET.**—See the title DETINUE, vol. 5, p. 346.

**NONENUMERATED.**—See the title REVENUE LAWS.

the next of kin of the original sufferers, capable of taking at the time of distribution, on principles universally accepted as most just and equitable, intended next of kin according to the statutes of distribution of the respective states of the domicile of the original sufferers.” *Blagge v. Balch*, 162 U. S. 439, 463, 40 L. Ed. 1032. See the title BANKRUPTCY, vol. 2, p. 902.

**Conflict of laws.**—As to law governing distribution of personal estate, in so far as it designates the person entitled to take as next of kin, see the title CONFLICT OF LAWS, vol. 3, p. 1071.

**Descent and distribution.**—As to meaning of the term next of kin in a statute regulating descent or distribution, see the title DESCENT AND DISTRIBUTION, vol. 5, p. 336.

**Heirs.**—As to when next of kin is included within the meaning of “heir,” see the title HEIR, HEIRS AND THE LIKE, vol. 6, p. 690.

**Legal or personal representatives.**—As to use of legal representatives or personal representatives to the exclusion of next of kin, see LEGAL REPRESENTATIVES, PERSONAL REPRESENTATIVES AND REPRESENTATIVES, vol. 7, p. 852.

1. **Nitrate of lead.**—*Meyer v. Arthur*, 91 U. S. 570, 577, 23 L. Ed. 455. See the title REVENUE LAWS.

2. **No case.**—“Section 4283 (the Harter act) declares that the liability of the owner of any vessel (for various acts and things mentioned) shall ‘in no case’ exceed the value of his interest in the vessel

and her freight then pending. When it says ‘in no case,’ does it mean that for each case of ‘embezzlement, loss, destruction, collision,’ etc., happening during the whole voyage his liability may extend to the value of his whole interest in the vessel? Twenty cases might occur in the course of a voyage, and all at different times. Does not the provision made in § 4284 for compensation pro rata to each party injured, apply to all cases of loss and damage happening during the entire voyage; happening, that is, by the fault of the master or crew, and without the privity or knowledge of the owner? Pending freight is of no value to the shipowner until it is earned, and it is not earned, if earned at all, until the conclusion of the voyage. Does this not show that every ‘case’ in which the principle of limited liability is to be applied means every voyage? We think it does. It seems to us that the fair inference to be drawn from § 4283 is that the voyage defines the limits and boundaries of the casus, or case, to which the law is to be applied.” *The City of Norwich*, 118 U. S. 468, 491, 30 L. Ed. 134. See the title SHIPS AND SHIP-PING.

3. **Nolle prosequi.**—*Minor v. Mechanics’ Bank*, 1 Pet. 47, 77, 7 L. Ed. 47, citing *Serjeant v. Williams*, 1 Saund. 207, note 2. See the titles BONDS, vol. 3, p. 428; DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 5, p. 356; RES ADJUDICATA.

4. **Nonassessable.**—*Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203. See, generally, the title STOCK AND STOCKHOLDERS.



**NON EST FACTUM.**—See the titles BONDS, vol. 3, p. 431; DEBT, THE ACTION OF, vol. 5, p. 209.

**NONFEASANCE.**—See the title PUBLIC OFFICERS. As to whether it constitutes trespass ab initio, see the title TRESPASS.

**NON INFREGIT CONVENTIONEM.**—See the title COVENANTS, vol. 5, p. 19.

**NONINTERCOURSE LAWS.**—See the title EMBARGO AND NONINTERCOURSE LAWS, vol. 5, p. 732.

**NONJOINDER.**—As to nonjoinder of parties, see the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 31; BONDS, vol. 3, p. 427; DEMURRERS, vol. 5, p. 304; PARTIES.

**NON OBSTANTE VEREDICTO.**—As to judgment of, see the title JUDGMENTS AND DECREES, vol. 7, p. 571.

**NON PROS.**—As to judgment of, see the title JUDGMENTS AND DECREES, vol. 7, p. 559. See NOLLE PROSEQUI, ante, p. 924.

**NONRESIDENT.**—See note 1.

**NONSUIT.**—See the title DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 5, p. 356, and references given.

**NON SUM INFORMATUS.**—See the title JUDGMENTS AND DECREES, vol. 7, p. 559.

**NONUSER OF FRANCHISES.**—See the title CORPORATIONS, vol. 4, p. 792.

**NORTH DAKOTA.**—See the title DIVORCE AND ALIMONY, vol. 5, p. 419.

**NORTHERN TRADE.**—See note 2.

**NOSCITUR A SOCIIS.**—See the titles INTERPRETATION AND CONSTRUCTION, vol. 7, p. 267; STATUTES; WILLS.

1. **Nonresident.**—In order to be a “non-resident of that state,” within the meaning of the act of March 3, 1887, authorizing any civil action brought in a court of a state between citizens of different states, and in which the matter in dispute exceeded, exclusive of interest and costs, the sum or value of \$2,000, to be removed into the circuit court of the United States “by the defendant or defendants therein, being nonresidents of that state,” the defendant must be a citizen of another state, or a corporation created by the laws of another state. *Martin v. Baltimore, etc., R.*

*Co.*, 151 U. S. 673, 676, 38 L. Ed. 311, citing *McCormick Harvesting Machine Co. v. Walther*, 134 U. S. 41, 33 L. Ed. 833; *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 36 L. Ed. 768; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 943; *Martin v. Snyder*, 148 U. S. 663, 37 L. Ed. 602. See the title REMOVAL OF CAUSES. And see RESIDENCE; RESIDENT, ETC.

2. **Northern trade.**—See *The John H. Pearson*, 121 U. S. 469, 472, 30 L. Ed. 979. And see the title SHIPS AND SHIP-PING.

## NOTARY PUBLIC.

### CROSS REFERENCES.

See the titles **ACKNOWLEDGMENTS**, vol. 1, p. 76; **AFFIDAVITS**, vol. 1, p. 200; **BILLS, NOTES AND CHECKS**, vol. 3, p. 257; **DEPOSITIONS**, vol. 5, p. 321; **OATH**; **PERJURY**.

As to want of authority of notary publics prior to the act of February 26, 1881 to administer affidavits to officers of national banks verifying reports, see the title **AFFIDAVITS**, vol. 1, p. 201. As to employment of a notary public by banks to make presentment and demand of notes, and the liability of the bank and the notary for his failure of duty, see the title **BANKS AND BANKING**, vol. 3, p. 53. As to a notary public being an agent of the holder in making presentment of bills, and fixing liability of indorsers, see the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 257. As to presentment of commercial paper for payment by notary public, and the holder's liability for negligence of the notary, see the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 320. As to protest of commercial paper by notary public, see the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 322. As to necessity of notary's seal on protest of bill of exchange, see the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 325. As to statutory requirement that a notary public record in a book for that purpose protests of instruments and notices given to parties, see the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 325; **DEPOSITIONS**, vol. 5, p. 330. As to certificate of protest by notary public being evidence, see the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 325. As to liability of notary public for negligence in making protest, see the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 326. As to law governing liability for protest made, see the title **CONFLICT OF LAWS**, vol. 3, p. 1053. As to notary public giving notice of dishonor, see the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 327. As to the use of a deposition of a notary public to prove demand, protest and notice of bills, see the title **DEPOSITIONS**, vol. 5, p. 330. As to the competency of a notary public as a witness to show dishonor and to testify to his usual practice, see the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 333. As to admissibility of books of a notary public, after his death, to show dishonor, see the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 333. As to notice to take depositions before notary public, see the title **DEPOSITIONS**, vol. 5, p. 325. As to recordation, and admissibility in evidence of a bill of sale executed before a notary public, see the title **DOCUMENTARY EVIDENCE**, vol. 5, p. 454. As to being in custody under charge of perjury for statement made before a notary public, see the title **HABEAS CORPUS**, vol. 6, pp. 631, 636. As to judicial notice of seal of notary public, see the title **JUDICIAL NOTICE**, vol. 7, p. 672. As to recitals of delivery of possession in a notarial act not constituting corporeal possession requisite to prescription under Louisiana code, see the title **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, p. 900.

A notary is a public officer whose duties are prescribed by law,<sup>1</sup> and is recognized

**1. Public officer.**—*Britton v. Nicolls*, 104 U. S. 757, 766, 26 L. Ed. 917; *Owings v. Hull*, 9 Pet. 607, 625, 9 L. Ed. 246; *Musson v. Lake*, 4 How. 262, 275, 11 L. Ed. 967.

**Public officers in civil law.**—"In Louisiana, as, indeed, in all countries using the civil law, notaries are officers of high importance and confidence; and the contracts and other acts of parties, executed before them, and recorded by them, are of high credit and authenticity. Some contracts and conveyances are not valid,

unless they are executed in a prescribed manner, before a notary; others again, if executed by the parties elsewhere, may be recorded by a notary; and a copy of such record is in many cases evidence. Where a contract or other act is executed in a particular manner before a notary, the protocol or original remains in his possession *apud acta*; and the act is deemed, what is technically called, an 'authentic act,' and a copy of such act, certified as a true copy, by the notary, who is the depositary of the original, or his succes-

by the commercial law of the world.<sup>2</sup>

**Authority of Notary Public to Administer Oath.**—The United States statutes do not give notary publics any general authority to administer oaths under the laws of the United States.<sup>3</sup>

**Oath of Complainant in Action of Forcible Entry.**—A notary public may administer the oath required to be made by the complainant, in an action of forcible entry and detainer, by a statute, which provides that the summons in such action may issue "on written complaint on oath of the persons entitled to the premises, to a justice of the peace."<sup>4</sup>

**Testimony in Election Cases.**—Testimony taken before a notary public with the single object of being returned to the house of representatives to be there considered in a contested election case, stands upon the same ground as testimony taken before any judge or officer of the United States.<sup>5</sup>

**NOTE.**—See note 1.

**NOTES.**—See the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 257.

**NOT GUILTY.**—In criminal cases, see, generally, the title **CRIMINAL LAW**, vol. 5, p. 107, and the specific crimes. In civil cases, see, generally, the title **PLEADING**, and the titles where the particular actions are treated, such as **TRESPASS**, etc.

sor, is deemed proof of what is contained in the original, for the plain reason, that the original is properly in the custody of a public officer, and not deliverable to the parties." *Owings v. Hull*, 9 Pet. 607, 625, 9 L. Ed. 246.

**2. Recognized in commercial law.**—*Pierce v. Indseth*, 106 U. S. 546, 549, 27 L. Ed. 254, citing *Townsend v. Sumrall*, 2 Pet. 170, 7 L. Ed. 386.

**3. Authority to administer oaths.**—*United States v. Hall*, 131 U. S. 50, 53, 33 L. Ed. 97. See, also, *United States v. Reilly*, 131 U. S. 58, 33 L. Ed. 75.

**Administering oath to national bank officers.**—"In the case of *United States v. Curtis*, 107 U. S. 671, 27 L. Ed. 534, this court, after very careful examination of the statutes on the subject of the powers of notaries public to administer oaths, declared that no such general power existed, and that up to the act of February 26, 1881, c. 82, 21 Stat. 352, a notary public had no authority under any law of the United States to administer the oath to an officer of a national bank in the declaration or statement in a report required by § 5211 of the Revised Statutes. This examination, as found in the opinion of the court by Mr. Justice Harlan, seems to have been very thorough at the time the opinion was delivered in April, 1883." *United States v. Hall*, 131 U. S. 50, 53, 33 L. Ed. 97. See, also, *United States v. Reilly*, 131 U. S. 58, 33 L. Ed. 75. And see the title **PERJURY**.

**Oath administered to deputy surveyor.**—A notary public is not given authority by any statute of the United States to administer an oath to a deputy surveyor of the United States in regard to the manner in which he has fulfilled a contract for surveying several townships of land. *United States v. Hall*, 131 U. S. 50, 51, 33 L. Ed. 97.

**4. Harris v. Barber**, 129 U. S. 366, 370,

32 L. Ed. 697.

In *Harris v. Barber*, 129 U. S. 366, 371, 32 L. Ed. 697, a case of forcible entry and detainer, arising under the landlord and tenant act of the District of Columbia, the court said: "It is suggested that the justice of the peace had no jurisdiction, because the oath to the complaint was not taken before him, but before a notary public in the state of New York. But the statute only requires a 'written complaint on oath of the person entitled to the premises.' Rev. Stat., D. C., § 684. As it requires the oath to be made by the complainant in person, and does not in terms require it to be administered by the justice or within the district, it is a more reasonable construction to permit the oath to be taken anywhere before a proper officer, than to require the personal attendance of the complainant at the filing of the complaint."

**5. Testimony election cases.**—In *re Loney*, 134 U. S. 372, 375, 33 L. Ed. 949.

**I. Note.**—"The use of the word **note**, in the singular number, instead of **notes**, is so palpable a slip of the pen, that its use, although furnishing an opportunity for cavil, could not be said to create an ambiguity on the face of the instrument, or leave any doubt as to its true intent in the mind of any one who will read the whole of it together, and has no intent or desire to pervert it. It refers to 'several notes,' it acknowledges that 'further indulgence was granted on said notes,' and 'obligates' the defendant not to plead the statute of limitations to 'said notes.' Both the **notes** to Toby were admitted to be part of the consideration paid for the purchase of the negroes referred to in the agreement; consequently, the use of the word **note** was a mere error in grammar, or slip of the pen." *Randon v. Toby*, 11 How. 493, 519 13 L. Ed. 784.



# NOTICE.

BY FRANK MOORE.

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As to notice in condemnation proceedings, see the title EMINENT DOMAIN, vol. 5, p. 789. As to notice of pendency, see the title LIS PENDENS, vol. 7, p. 1051. As to notice of proceedings for partition, see the title PARTITION. As to necessity and form of notice by publication to support a judgment or decree, see the titles JUDGMENTS AND DECREES, vol. 7, p. 544; SUMMONS AND PROCESS. As to notice of claim of forfeiture of lease for rent in arrears, see the title LANDLORD AND TENANT, vol. 7, p. 827. As to whether notice to an agent is notice to the principal, see the title PRINCIPAL AND AGENT. As to sufficiency of publication of notice in newspaper, see the titles NEWSPAPER, ante, p. 906; SUMMONS AND PROCESS. As to notice of elections, see the title ELECTIONS, vol. 5, p. 727. As to notice under due process clause of the constitution, see the title DUE PROCESS OF LAW, vol. 5, p. 641. As to notice under the recording acts, see the title RECORDING ACTS. As to who are bona fide purchasers for value and without notice, see the titles SALES; VENDOR AND PURCHASER. As to notice of tax sales, see the title TAXATION. As to sufficiency of notice to terminate a contract of hiring, see the title MASTER AND SERVANT, vol. 8, p. 275. As to notice of motion for new trial, see the title NEW TRIAL, ante, p. 907. As to possession as evidence of notice, see the titles EVIDENCE, vol. 5, p. 1030; SALES; VENDOR AND PURCHASER. As to whether notice is a question of law or of fact, see the title EVIDENCE, vol. 5, p. 1061. As to sufficiency of notice to obligors on a forthcoming bond, see the title FORTHCOMING AND DELIVERY BONDS, vol. 6, p. 390. As to notice of trial, see the title TRIAL. As to notice by importer to collector that he will contest payment of duties, see the title REVENUE LAWS. As to sufficiency of notice to sustain a judgment, see the titles JUDGMENTS AND DECREES, vol. 7, p. 544; SUMMONS AND PROCESS. As to conclusiveness of recital of notice in the record, see the title RECORDS. As to notice by county judge of taking proof of matters stated in petition for issuance of railroad aid bonds, see the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID, ante, p. 618. As to notice to municipality of defects in streets and highways, see the title STREETS AND HIGHWAYS. As to defense of want of notice in action on municipal bonds, see the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES, ante, p. 650. As to notice in foreclosure proceedings, see the title MORTGAGES AND DEEDS OF TRUST, ante, p. 452. As to notice under fugitive slave law, see the title SLAVERY AND INVOLUNTARY SERVITUDE. As to

notice of blockade, see the title **BLOCKADE**, vol. 3, p. 370. As to whether knowledge of attorney is notice to client, see the title **ATTORNEY AND CLIENT**, vol. 2, p. 716. As to notice and knowledge of corporate officers, see the titles **BANKS AND BANKING**, vol. 3, p. 122; **OFFICERS AND AGENTS OF PRIVATE CORPORATIONS**. As to judicial notice, see the title **JUDICIAL NOTICE**, vol. 7, p. 672. As to notice of loss, see the title **INSURANCE**, vol. 7, p. 66. As to whether notice to trustee is notice to cestui que trust, see the title **TRUSTS AND TRUSTEES**. As to notice of defenses cutting off the defense of bona fide purchaser of commercial paper, see the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 299. As to notice of dishonor, see the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 326. As to notice to produce best evidence before secondary evidence can be admitted, see the title **BEST AND SECONDARY EVIDENCE**, vol. 3, p. 222. As to notice of application for injunction, see the title **INJUNCTIONS**, vol. 6, p. 1053. As to notice of default in case of guaranties, see the title **GUARANTY**, vol. 6, p. 590. As to notice of acceptance in case of guaranties, see the title **GUARANTY**, vol. 6, p. 586.

### I. Definition of Notice.

The word "notice" is sometimes to be understood in the same sense as knowledge, and indeed that is one of its usual and appropriate significations.<sup>1</sup>

### II. Kinds of Notice.

**A. In General.**—Actual notice embraces all degrees and grades of evidence, from the most direct and positive proof, to the slightest circumstances from which a jury would be warranted in inferring notice; while constructive notice is a legal inference from established facts, and, like other legal presumptions, does not admit of dispute.<sup>2</sup>

**B. Actual Notice.**—By statute in Dakota actual notice consists in express inquiry of a fact.<sup>3</sup>

**C. Constructive Notice**—1. **IN GENERAL.**—Constructive notice is defined to be in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted.<sup>4</sup> Cases in which constructive notice has been established, resolve themselves into two classes; first, those in which the party charged had actual notice that the property in dispute was in some way affected, and the court has thereupon bound him with constructive notice of facts to a knowledge of which he would have been led by an inquiry into the matters affecting the property, of which he had actual notice; and, secondly, those where the court has been satisfied that the party charged had designedly abstained from inquiry for the purpose of avoiding notice. If there is not actual notice that the property is in some way

1. **Notice and knowledge synonymous.**—*Goodman v. Simonds*, 20 How. 343, 365, 35 L. Ed. 934, cited in *Parker Mills v. Jacot*, 21 N. Y. Superior Ct. 169.

2. **Actual and constructive notice.**—*Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 438, 35 L. Ed. 1062.

3. **Actual notice under Dakota statute.**—*Shauer v. Alterton*, 151 U. S. 607, 38 L. Ed. 286.

4. **Constructive notice defined.**—*Townsend v. Little*, 109 U. S. 504, 511, 27 L. Ed. 1012; *United States v. Detroit Timber, etc., Co.*, 200 U. S. 321, 333, 50 L. Ed. 499.

Mr. Justice Story in his work on Equity Jurisprudence, § 399, adopts this language of Chief Baron Eyre, in *Plumb v. Fluit*, 2 Anstr. 432, 438. *Simmons Creek Coal*

*Co. v. Doran*, 142 U. S. 417, 439, 35 L. Ed. 1062.

In later editions of that work, Judge Redfield (11th Ed., § 410a), says that the term constructive notice "is applied, indiscriminately, to such notice as is not susceptible of being explained or rebutted, and to that which may be. It seems more appropriate to the former kind of notices. It will then include notice by the registry, and notice by *lis pendens*. But such notice as depends upon possession, upon knowledge of an agent, upon facts to put one upon inquiry, and some other similar matters, although often called constructive notice, is rather implied notice, or presumptive notice, subject to be rebutted or explained. Constructive notice is thus a conclusive presumption or a

affected so that the case does not fall within the first class, and no fraudulent turning away from a knowledge of facts which the *res gestæ* would suggest to a prudent mind or gross and culpable negligence, so as to bring it within the second, then the doctrine of constructive notice would not apply.<sup>5</sup>

2. WHEN NOTICE WILL BE IMPLIED—*a. In General.*—Whatever fairly puts a party upon inquiry is sufficient notice in equity, where the means of knowledge are at hand; and if the party, under such circumstances, omits to inquire, and proceeds to do the act, he does so at his peril, as he is then chargeable with all the facts which by a proper inquiry he might have ascertained.<sup>6</sup> As it is well-settled law that a party to a transaction, where his rights are liable to be injuriously affected by notice, cannot willfully shut his eyes to the means of knowledge which he knows are at hand, and thereby escape the consequences which would flow from the notice if it had actually been received; or in other words, the general rule is that knowledge of such facts and circumstances as are sufficient to put a party upon inquiry, and to show that if he had exercised due diligence he would have ascertained the truth of the case, is equivalent to

presumption of law, while implied notice is a mere presumption of fact." *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 439, 35 L. Ed. 1062.

Constructive notice is notice imputed to a person not having actual notice. *Shauer v. Alterton*, 151 U. S. 607, 38 L. Ed. 286.

5. **Cases in which constructive notice has been established.**—*Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 439, 35 L. Ed. 1062.

6. **Where inquiry is a duty this is sufficient notice.**—*Brush v. Ware*, 15 Pet. 93, 10 L. Ed. 672; *Goodman v. Simonds*, 20 How. 343, 15 L. Ed. 934, dissenting opinion of Clifford, J., in *Calais Steamboat Co. v. Van Pelt*, 2 Black 372, 389, 17 L. Ed. 282; *Cordova v. Hood*, 17 Wall. 1, 8, 21 L. Ed. 587; *Angle v. North Western Mut. Life Ins. Co.*, 92 U. S. 330, 342, 23 L. Ed. 556; *Martin v. Webb*, 110 U. S. 7, 28 L. Ed. 49.

Every man is chargeable with notice of that which the law requires him to know, and of that which, after being put upon inquiry, he might have ascertained by the exercise of reasonable diligence. *McClure v. Oxford Tp.*, 94 U. S. 429, 432, 24 L. Ed. 129.

"Whatever is sufficient to put a person on inquiry is considered as conveying notice; for the law imputes a personal knowledge of a fact, of which the exercise of common prudence might have apprised him. When a subsequent purchaser has actual notice that the property in question is incumbered or affected, he is charged constructively with notice of all the facts and instruments, to the knowledge of which he would have been led by an inquiry into the incumbrance or other circumstance affecting the property of which he had notice." *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 438, 35 L. Ed. 1062. See the title **VENDOR AND PURCHASER**.

"Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry might have

led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it." *Wood v. Carpenter*, 101 U. S. 135, 141, 25 L. Ed. 807.

The law imputes knowledge when opportunity and interest, combined with reasonable care, would necessarily impart it. *Wollensak v. Reiher*, 115 U. S. 96, 99, 29 L. Ed. 350.

**Allegations of general ignorance of things** a knowledge of which is easily ascertainable, is insufficient to set into action the remedies of equity. *McQuiddy v. Ware*, 20 Walk 14, 22 L. Ed. 311.

**If the facts are such as to awaken suspicion** and lead a man of ordinary prudence to make inquiry, and he fails to make such inquiry, this is equivalent to actual notice or knowledge of whatever he might have done had he pursued such inquiry. In other words whatever is notice enough to excite attention and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led. *Shauer v. Alterton*, 151 U. S. 607, 38 L. Ed. 286.

**Where, upon the face of the title papers**, the purchaser has full means of acquiring complete knowledge of the title from the references therein made, to the origin and consideration thereof, he will be deemed to have constructive notice thereof. *Oliver v. Piatt*, 3 How. 333, 11 L. Ed. 622.

**A party seeking to avoid the bar of the statute** on account of fraud must aver and show that he used due diligence to detect it, and if he had the means of discovery in his power, he will be held to have known it. *Wood v. Carpenter*, 101 U. S. 135, 141, 25 L. Ed. 807.

**By statute in Dakota** every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself. *Shauer v. Alterton*, 151 U. S. 607, 38 L. Ed. 286.



actual notice of the matter in respect to which the inquiry ought to have been made.<sup>7</sup>

b. *Notice of Contents of Paper.*—It is a general rule that a paper, which expressly refers to another paper, within the power of the party, gives notice of the contents of that other paper.<sup>8</sup>

3. **SUFFICIENCY OF CONSTRUCTIVE NOTICE.**—A man who has neglected his private affairs and gone away from his home and state, for the purpose of devoting his time to the cause of rebellion against the government, cannot come into equity to complain that his creditors have obtained payment of admitted debts through judicial process obtained upon constructive notice, and on a supposition wrongly made by them that he had no home in the state, or none that they knew of.<sup>9</sup> Especially is this true when there is no allegation of want of actual knowledge of what they were doing.<sup>10</sup>

### III. Necessity for Notice.

"No one needs notice of what he already knows," and "knowledge of the danger is equivalent to prior notice."<sup>11</sup> Likewise, where notice will avail nothing, no notice is required.<sup>12</sup>

### IV. Statutory Notice.

Where a statute makes no provision for notice to parties, the court having the duty to investigate the claims and rights of persons proceeding under such statute, has power to provide for reasonable notice by its rules, so as to prevent surprise.<sup>13</sup> But only in a clear case will a notice authorized by the legislature be set aside as wholly ineffectual on account of the shortness of the time.<sup>14</sup>

### V. Pleading.<sup>15</sup>

A general allegation of ignorance at one time and of knowledge at another are of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner.<sup>16</sup>

**NOTICE OF PENDENCY.**—See the title *LIS PENDENS*, vol. 7, p. 1051.

**NOTICE TO QUIT.**—See the titles *EJECTMENT*, vol. 5, p. 706; *LANDLORD AND TENANT*, vol. 7, p. 831.

7. *Goodman v. Simonds*, 20 How. 343, 15 L. Ed. 934; *The Lulu*, 10 Wall. 192, 201, 19 L. Ed. 906.

8. **Notice of contents of paper.**—*Livingston v. Maryland Ins. Co.*, 7 Cranch 506, 538, 3 L. Ed. 421.

If a letter submitted to underwriters, ordering insurance, refer to another letter, previously laid before them, which letter contained information that the vessel had permission to trade to the Spanish colonies, the underwriters are bound to notice that fact, and to know that the vessel would take all the papers necessary to make the voyage legal. *Livingston v. Maryland Ins. Co.*, 7 Cranch 506, 3 L. Ed. 421. See the title *MARINE INSURANCE*, ante, p. 149.

9. **Sufficiency of constructive notice.**—*McQuiddy v. Ware*, 20 Wall. 14, 22 L. Ed. 311.

10. *McQuiddy v. Ware*, 20 Wall. 14, 22 L. Ed. 311.

11. **Necessity for notice.**—*District of Columbia v. Moulton*, 182 U. S. 576, 581, 45 L. Ed. 1237.

**Notice of obstructions in streets.**—Al-

though it may be the duty of a municipality causing an obstruction in the street to give reasonable notice to the traveling public of its presence, yet a view of its obstruction itself in time to avoid it without injury amounts to notice. *District of Columbia v. Moulton*, 182 U. S. 576, 45 L. Ed. 1237. See the title *STREETS AND HIGHWAYS*.

12. **The law never requires a vain act.**—*Carson v. Brockton Sewerage Commission*, 182 U. S. 398, 401, 45 L. Ed. 1151.

13. **Notice under a statute not providing therefor.**—*Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528, 43 L. Ed. 796, citing *United States v. Ritchie*, 17 How. 525, 15 L. Ed. 236.

14. **Sufficiency of statutory notice.**—*Bellingham Bay, etc., R. Co. v. New Whatcom*, 172 U. S. 314, 318, 43 L. Ed. 460.

15. As to necessity for alleging notice of dishonor, see the title *BILLS, NOTES AND CHECKS*, vol. 3, p. 360.

16. **Allegation of notice.**—*Wood v. Carpenter*, 101 U. S. 135, 140, 25 L. Ed. 807.

**NOTIFIED IMPORTER.**—See note 1.

**NOT KNOWN OR USED BEFORE.**—See *KNOWN*, vol. 7, p. 785.

**NOTORIETY.**—As to proof of possession by, see the title *LIMITATION OF ACTIONS AND ADVERSE POSSESSION*, vol. 7, p. 937. As to judicial notice of matters of notoriety, see the title *JUDICIAL NOTICE*, vol. 7, p. 675.

## NOVATION.

**Methods of Novation.**—"A novation takes place in three ways: \* \* \* 1st. When a debtor contracts a new debt to his creditor, which new debt is substituted to the old one, which is extinguished. 2d. When a new debtor is substituted to the old one, who is discharged by the creditor. 3d. When, by the effect of a new engagement, a new creditor is substituted to the old, with regard to whom the debtor is discharged."<sup>2</sup>

**Conditional and Unconditional Novation.**—A novation will, if it be absolute and unconditional, amount to a direct extinguishment of the original debt, by substituting the new contract in its place. But no extinguishment is wrought, if the arrangement is conditional, and the conditions are not fully complied with.<sup>3</sup>

**NOW.**—See note 4.

1. **Notified importer.**—In *Merritt v. Cameron*, 137 U. S. 542, 544, 34 L. Ed. 772, the court said: "The collector ascertained and liquidated the duties on the whole cargo, as imported, \* \* \* and stamped upon the entry 'liquidated, and notified importer August 20, 1880.' \* \* \* Notified importer meant that the fact of the liquidation had been stated on a sheet of paper which was hung up in the custom house for the information of the importer." See the title *REVENUE LAWS*.

2. **Method of novation.**—*Union Bank v. Stafford*, 12 How. 327, 339, 13 L. Ed. 1008, citing the La. Code, art. 2185.

"A valid agreement to substitute another person as creditor may be made, and may be pleaded as a discharge of the debt in the nature of payment. It is not, however, payment in fact, and is binding only when the contract is fair and honest and binding upon the first creditor." *Fox v. Gardner*, 21 Wall. 475, 479, 22 L. Ed. 685. See, generally, the title *PAYMENT*.

In *Louisiana* a sale of the mortgage property for a twelve months' bond under an order of seizure and sale was not a novation or extinguishment of the original mortgage. *Union Bank v. Stafford*, 12 How. 327, 13 L. Ed. 1008.

3. **Conditional and unconditional novation.**—*Hyde v. Booraem*, 16 Pet. 169, 180, 10 L. Ed. 925.

"If the debt of which it is proposed to

make a novation by another engagement, is conditional, the novation cannot take effect, until the condition is accomplished; therefore, if there is a failure in the accomplishment of the condition, there can be no novation, because there is no original debt to which the new one can be substituted; vice versa, if the first debt does not depend on any condition, but the second engagement, intended as a novation, is conditional, the novation can only take effect by the accomplishment of the condition of the new engagement, before the first debt is extinct." *Hyde v. Booraem*, 16 Pet. 169, 180, 10 L. Ed. 925.

4. **Now has.**—See *Chouteau v. Barlow*, 110 U. S. 238, 262, 28 L. Ed. 132.

**Now occupied.**—"The act of Aug. 14, 1848, confirms and establishes title to land occupied at the date of the act as missionary stations among the Indian tribes. The words are 'now occupied.' To occupy means to hold in possession; to hold or keep for use; as to occupy an apartment. Webster's Dictionary. The appellant contends that this act confers title on it for lands which it did not occupy, at the date of the act, but which it had voluntarily abandoned eleven months before, and the occupancy of which it never resumed, either for missionary or any other purposes. Not even a liberal construction would support such a claim." *Missionary Society v. Dalles*, 107 U. S. 336, 343, 27 L. Ed. 545.

# NUISANCES.

BY CHAS. W. FOURL.

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power of municipality to declare a nuisance, see the title *DUE PROCESS OF LAW*, vol. 5, pp. 802, 803. As to order of police jury to remove a nuisance being a defense to an indictment for the act, see the title *NAVIGABLE WATERS*.

### I. Definition.

That is a nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him.<sup>1</sup>

### II. Public and Private Nuisances Distinguished.

"The difference between a public nuisance and a private nuisance is that the one affects the people at large and the other simply the individual. The quality of the wrong is the same, and the jurisdiction of the courts over them rests upon the same principles and goes to the same extent. Of course, circumstances may exist in the one case, which do not in another, to induce the court to interfere or to refuse to interfere by injunction, but the jurisdiction, the power to interfere, exists in all cases of nuisance. True, many more suits are brought by individuals than by the public to enjoy nuisances, but there are two reasons for this. First, the instances are more numerous of private than of public nuisances; and second, often that which is in fact a public nuisance is restrained at the suit of a private individual, whose right to relief arises because of a special injury resulting therefrom." "A public nuisance is also a private nuisance, where a special and irremediable mischief is done to an individual."<sup>2</sup>

### III. General Principles and Considerations.

**A. Population Approaching Nuisance.**—If population, where there was none before, approaches a nuisance, it is the duty of those liable at once to put an end to it.<sup>4</sup>

**B. Comparison between Injuries and Benefits.**—If a structure be declared to be a nuisance, there is no room for a calculation and comparison between the injuries and benefits which it produces.<sup>5</sup>

### IV. Instances of Nuisances.

**A. Obstruction to Navigation.**—1. *IN GENERAL.*—Any obstruction to a navigable stream is a public nuisance,<sup>6</sup> and is punishable, unless authorized by law.<sup>7</sup> But even though a structure is a real impediment to navigation, so as to be a public nuisance, congress, having the power to control and regulate commerce, may authorize the structure and make it lawful.<sup>8</sup>

**1. Definition of nuisance.**—*Baltimore, etc., R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 329, 27 L. Ed. 739.

**Washington code—Definition of nuisance.**—By Washington code, a nuisance, other than the obstruction of a highway, or of navigable or running waters, is defined to be "whatever is injurious to health, or indecent or offensive to the senses, or an obstacle to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property;" and again, "unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or in any way renders other persons insecure in life, or in the use of property." *Northern Pac. R. Co. v. Whalen*, 149 U. S. 157, 162, 37 L. Ed. 686.

**2. Public and private nuisances distinguished.**—*In re Debs*, 158 U. S. 564, 592, 39 L. Ed. 1092. See post, "Public Nuisances—By Private Individuals," VI, D, 2.

**3. Public nuisance may be a private nuisance.**—*Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 565, 14 L. Ed. 249. See post, "Private Individual or Corporation," VI, D, 5, a, (2).

**4. Population approaching nuisance.**—*Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 669, 24 L. Ed. 1036. See post, "Prescription as a Defense," VII.

**5. Comparison of benefits.**—*Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 519, 14 L. Ed. 249. See post, "Defenses," VI, C, 2. See the title *BRIDGES*, vol. 3, p. 526.

**6. Obstruction to navigation.**—*Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 98, 9 L. Ed. 1012. See the title *NAVIGABLE WATERS*, ante, p. 805.

**7. Unauthorized obstruction of navigation punishable.**—*Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 11 Pet. 419, 559, 9 L. Ed. 773.

**8. Congress may legalize obstructions to navigation.**—*Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 421, 432, 15 L.

2. **BRIDGES.**—If the abridgement of the right of passage occasioned by the erection of a bridge is for a public purpose and produces a public benefit and if the erection is in a reasonable situation, and a reasonable space is left for the passage of vessels on the river, it is not an unreasonable obstruction and indictable as a nuisance.<sup>9</sup> Of course every bridge over a navigable river is not necessarily a nuisance.<sup>10</sup> A bridge must appear plainly to be a nuisance before it can be so decreed; since a court of equity, proceeding by bill, like a criminal court trying an indictment, must give the benefit of all reasonable doubts to the defendant.<sup>11</sup> But if a bridge, by measurement of the height of the bridge, of the water, and of the chimneys of steamboats, is found to be an obstruction to navigation, it is a nuisance and a jury is not necessary to ascertain it. The report of the commissioner is considered, as to the fact of the obstruction and the extent of it, of the same force as the verdict of a jury.<sup>12</sup> If the obstruction be slight, as a draw in a bridge, which is safe and convenient for the passage of vessels, it is not a nuisance, where proper attention is given to raise the draw on the approach of vessels.<sup>13</sup>

3. **BRIDGE PIERS, LANDING PLACES, WHARVES AND PERMANENT PIERS.**—Bridge piers, landing places, wharves and permanent piers, constructed by the riparian proprietor on the shores of navigable rivers, bays, lakes and arms of the sea, where they do not extend below low-water mark, are not a nuisance, unless it appears that they are an obstruction to the paramount right of navigation;<sup>14</sup> and if the wharves and piers are confined to the shore and no positive law is violated in their erection, the presumption is that they are not a nuisance or obstruction to navigation.<sup>15</sup>

4. **UNDERGROUND TUNNELS.**—A tunnel, under a navigable stream, although lawful when constructed, may subsequently become an obstruction to navigation and a nuisance and removable without compensation to the owner, when the superior rights of navigation require it, although the owners of the tunnel own the bed of the stream.<sup>16</sup>

5. **SEWERS.**—See post, "Municipal Corporations," VI, D, 3, a.

**B. Obstructions and Defects in Streets and Pavements**—1. **OBSTRUCTING HIGHWAY.**—The obstruction of a highway is a public nuisance.<sup>17</sup> Therefore, if a street be extended to low-water mark, the adjoining property owners have a right to pass along and across the same, and anything which obstructs such passage is a nuisance and injurious to their rights.<sup>18</sup>

Ed. 435. See the titles BRIDGES, vol. 3, p. 516; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 269.

9. **Reasonable obstruction.**—Mississippi, etc., R. Co. v. Ward, 2 Black 485, 494, 17 L. Ed. 311; Pennsylvania v. Wheeling, etc., Bridge Co., 13 How. 518, 14 L. Ed. 249. See the title BRIDGES, vol. 3, p. 516.

10. **Every bridge over navigable stream not a nuisance.**—The Passaic Bridges, 3 Wall., appx., 782, 16 L. Ed. 799; Mississippi, etc., R. Co. v. Ward, 2 Black 485, 17 L. Ed. 311.

11. **Bridge must plainly appear to be a nuisance.**—Mississippi, etc., R. Co. v. Ward, 2 Black 485, 495, 17 L. Ed. 311.

12. **Commissioner's report equivalent to verdict of jury as to obstruction.**—Pennsylvania v. Wheeling, etc., Bridge Co., 13 How. 518, 567, 568, 14 L. Ed. 249.

13. **Draw bridge no nuisance.**—Pennsylvania v. Wheeling, etc., Bridge Co., 13 How. 518, 577, 14 L. Ed. 249.

14. **Bridge piers, landing places and wharves.**—Dutton v. Strong, 1 Black 1, 31, 17 L. Ed. 29.

15. **Presumption as to wharves and piers being nuisances.**—Dutton v. Strong, 1 Black 1, 31, 17 L. Ed. 29.

16. **Underground tunnel obstructing navigation may become a nuisance.**—West Chicago St. R. Co. v. Chicago, 201 U. S. 506, 50 L. Ed. 845.

**City cannot grant authority to construct tunnel obstructing navigation.**—The rights of the owner of the bed of a navigable stream are subordinate to the public right of navigation, and the city cannot, if it would, grant the right to a railroad company to construct a tunnel under such navigable river which would interfere or obstruct the navigation of the river. West Chicago St. R. Co. v. Chicago, 201 U. S. 506, 526, 50 L. Ed. 845.

17. **Obstruction of highway.**—In re Debs, 158 U. S. 564, 587, 39 L. Ed. 1092.

18. **Anything obstructing street is a nuisance.**—Richardson v. Boston, 19 How. 263, 270, 15 L. Ed. 639. See post, "Municipal Corporations," VI, D, 3, a.

**City sewer hindering public use of street.**—Where R. owned two wharves and the city owned the intervening space



2. **DIGGING AREAWAY UNDER PAVEMENT.**—An areaway dug in a street though lawful, may become unlawful and a nuisance by being left open and without guards to warn people of its existence.<sup>19</sup> Indeed, such digging necessarily results in a nuisance—is the result of the work itself—unless due care is taken to make the area safe.<sup>20</sup>

3. **STONES, SAND, BRICK PLACED IN STREETS.**—Because building is necessary stones, brick, lime, sand, and other materials may be placed in the street, provided it be done in the most convenient manner, “but these encroachments on a street must be reasonable, not continued longer than is necessary, and must be properly guarded and protected so as to secure the public against danger, and if these things do not concur, then they become nuisances and can be abated.”<sup>21</sup>

**C. Interfering with Graveyards.**—Interfering with a public graveyard is not a mere private trespass, but is a public nuisance which a court of equity may prevent by injunction.<sup>22</sup>

**D. Smoke—Low Chimneys.**—It is an actionable nuisance to build one’s chimney so low as to cause the smoke to enter his neighbor’s house.<sup>23</sup>

**E. Nuisances Arising from Conduct of Lawful Occupations**—1. **SLAUGHTERING CATTLE, TRAINING TALLOW, BURNING LIME.**—“There are many lawful and necessary occupations which, by the odors they engender, or the noise they create, are nuisances when carried on in the heart of a city, such as the slaughtering of cattle, the training of tallow, the burning of lime, and the like.”<sup>24</sup>

2. **ROUND HOUSE AND REPAIR SHOPS.**—It is a nuisance for a railroad to build a round house and repair shop so near a church that they interfere with the enjoyment of the property by reason of the cinders, noise, smoke and disagreeable odors rendering the church not only uncomfortable but almost unendurable as a place of worship.<sup>25</sup>

3. **FERTILIZER PLANTS.**—A fertilizer manufacturing plant is a nuisance in a populous community and is abatable without compensation to its owners, although when built it may have been in an unpopulated district, and subsequently population has grown up around the plant.<sup>26</sup>

and had extended the street to low-water mark, it was held that though it was the duty of the city to make drains along or under the streets, they could not construct them so as to hinder the public use of them as streets, or erect thereon a nuisance to the adjoining. *Richardson v. Boston*, 19 How. 263, 270, 15 L. Ed. 639.

19. **Areaway dug in street improperly guarded.**—*Robbins v. Chicago*, 4 Wall. 657, 677, 18 L. Ed. 427; *Chicago v. Robbins*, 2 Black 418, 424, 17 L. Ed. 298. See post, “Persons Liable,” VI, D, 3.

20. **Digging areaway necessarily results in nuisance unless properly guarded.**—*Chicago v. Robbins*, 2 Black 418, 426, 17 L. Ed. 298.

21. **Stones, brick, sand placed in streets.**—*Chicago v. Robbins*, 2 Black 418, 424, 17 L. Ed. 298.

22. **Interfering with graveyards.**—*Beatty v. Kurtz*, 2 Pet. 566, 584, 7 L. Ed. 521.

23. **Smoke—Low chimneys.**—*Baltimore, etc., R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 335, 27 L. Ed. 739.

**Chimney as high as city regulations require.**—The fact that the smokestacks of an engine house are as high as the city regulations for chimneys require, is no answer to an action for damages, if the stacks are too low to keep the smoke out of the

plaintiff’s church. *Baltimore, etc., R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 334, 27 L. Ed. 739.

24. **Slaughtering cattle, training tallow, and burning lime.**—*Baltimore, etc., R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 334, 27 L. Ed. 739.

25. **Round house and repair shops.**—*Baltimore, etc., R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 329, 27 L. Ed. 739.

26. **Fertilizer plants.**—*Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036. See ante, “Population Approaching Nuisance,” III, A. See the title **POLICE POWER**.

**Population approaching nuisance.**—Where a fertilizer company had been incorporated and authorized to convert dead animals into an agricultural fertilizer outside of the then city limits of Chicago but subsequently population gathered around the factory and the business became a nuisance to them, whereupon the village of Hyde Park passed an ordinance to suppress these works, it was held that the ordinance was valid and that although when established the works were located in a territory where there was no population, yet when the population grew up around it, the police power was sufficient to stop the existence of the nuisance, without compensation to the owner. *Fer-*

4. **COPPER REDUCING WORKS.**—Sulphurous gases from a copper reduction works, causing and threatening damage to forests and vegetable life, if not to health in another state, have been enjoined as a nuisance at the suit of a state.<sup>27</sup>

**F. Gambling Apparatus.**—Many articles, such, for instance, as cards, dice, and other articles used for gambling purposes, are perfectly harmless in themselves, but may become nuisances by being put to an illegal use, and in such cases fall within the ban of the law and may be summarily destroyed.<sup>28</sup>

**G. Maintaining Nuisances on One's Own Premises—Fencing Public Lands.**—A fence erected on one's own premises but so constructed as to enclose public lands of the United States is a nuisance.<sup>29</sup>

## V. Legislative Authority Over Nuisances.

**A. Legalized Nuisances.**—There is a class of nuisances designated "legalized." These are cases which rest for their sanction upon the intent of the law under which they are created, the paramount power of the legislature, the principle of "the greatest good of the greatest number," and the importance of the public benefit and convenience involved in their continuance.<sup>30</sup> It is well settled that the legislature may authorize and even direct acts to be done which are harmful to individuals, and which without such authority would be nuisances; but in such a case, if the statute be such as the legislature has power to pass, the acts are lawful, and are not nuisances.<sup>31</sup> That which the law authorizes can never be a nuisance such as to authorize a common-law right of action, unless the power has been exceeded.<sup>32</sup> Statutory authority, however, cannot be in-

tilizing *Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036.

27. **Copper reduction works.**—*Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 51 L. Ed. 1038.

28. **Gambling apparatus.**—*Lawton v. Steele*, 152 U. S. 133, 142, 38 L. Ed. 385. See post, "Summary Abatement," VI, B, 3, c.

29. **Fence enclosing public lands.**—*Camfield v. United States*, 167 U. S. 518, 525, 42 L. Ed. 260. See post, "Public Lands," VI, B, 4, b. See, generally, the title PUBLIC LANDS.

**Fencing public lands—Abatement of fence upon one's own land.**—Where A. owning the uneven numbered sections of land in two adjoining townships, so constructed his fence, upon his own land, as to enclose the even numbered sections retained by the United States as public lands, it was held to be a nuisance and congress could constitutionally pass a law providing for the abatement of fences so erected upon private property, notwithstanding such action might involve an entry upon the lands of a private individual. *Camfield v. United States*, 167 U. S. 518, 525, 42 L. Ed. 260.

**Erections on one's own land.**—The right to erect what one pleases upon his own land will not justify him in maintaining a nuisance, or in carrying on a business or trade that is offensive to his neighbors. *Camfield v. United States*, 167 U. S. 518, 522, 42 L. Ed. 260.

30. **Legalized nuisances.**—*Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 670, 24 L. Ed. 1036.

31. **Legislature may authorize acts which otherwise would be nuisances.**—

*Transportation Co. v. Chicago*, 99 U. S. 635, 640, 25 L. Ed. 336.

32. **Act authorized by legislature no nuisance unless authority is exceeded.**—*Transportation Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336. See ante, "Obstructions to Navigation," IV, A.

**Clinton bridge.**—Where a suit was begun in chancery praying an injunction against a bridge obstructing navigation as a nuisance, and congress passed a law pending the suit, making the bridge a "post road," it made the bridge lawful and no longer a nuisance and the suit was abated. *The Clinton Bridge*, 10 Wall. 454, 463, 19 L. Ed. 969.

**Wheeling bridge.**—Where the supreme court of the United States declared a bridge obstructing navigation to be a nuisance and afterwards congress passed a law making it lawful and it was destroyed by a storm, whereupon an injunction was granted against its rebuilding, except in conformity with a former decree and the injunction was disobeyed and the bridge rebuilt, it was held that the act of congress afforded full authority for the rebuilding of the bridge, and the former decree directing the alteration or abatement could not be carried into effect and an attachment would not issue under the circumstances. *Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. 421, 437, 15 L. Ed. 435.

**Act legalizing obstruction as giving preference to one port over another.**—An act of congress legalizing a bridge interfering with the navigation of a navigable stream, is not unconstitutional on the ground that the act virtually operates to give a preference to one port



voked to justify acts, creating physical discomfort and annoyance to others in the use and enjoyment of their property, to a less extent than entire deprivation, if different places from those occupied could be used by the corporation for its purposes, without causing such discomfort and annoyance.<sup>33</sup> "The acts that a legislature may authorize, which, without such authorization, would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest and over which the public have control. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the state; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large."<sup>34</sup>

**B. Power to Declare Nuisances.**—The legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, but a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed.<sup>35</sup> But the power of the legislature to declare that which is perfectly innocent in itself to be unlawful is beyond question, and in such case the legislature may annex to the prohibited act all the incidents of a criminal offense, including the destruction of property denounced by it as a public nuisance.<sup>36</sup>

over another because the bridge obstructs navigation beyond a certain point. *Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. 421, 433, 15 L. Ed. 435.

**Obstructing navigable stream.**—A riparian owner on a navigable stream, or an adjoiner on a public highway, cannot maintain a suit at common law against public agents to recover consequential damages resulting from obstructing a stream or highway in pursuance of legislative authority, unless that authority has been transcended, or unless there was a wanton injury inflicted, or carelessness, negligence, or want of skill in causing the obstruction. *Transportation Co. v. Chicago*, 99 U. S. 635, 643, 25 L. Ed. 336.

**33. Statutory authority as defense when different place could be used without causing discomfort.**—*Baltimore, etc., R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 332, 27 L. Ed. 739.

**Annoyances not necessarily incident to operation of railroad.**—That a railroad was constructed and operated under authority of congress is no defense to an action for damages caused by annoyances and injury not necessarily incident to the operation of the railroad in the vicinity. *Baltimore, etc., R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. Ed. 739.

**34. Legislative authorization exempts from liability to state only.**—*Baltimore, etc., R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 332, 27 L. Ed. 739. See *Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 L. Ed. 421, 432, 15 L. Ed. 435.

**Railroad liable for rendering church unfit for worship.**—Where a railroad is authorized to bring its tracks into the city of Washington by congress and for that purpose to construct such works as were necessary and expedient for the completion and maintenance of the railroad, it is not relieved from liability for damages for maintaining a nuisance by erect-

ing its engine house and repair shops so near a church that the smoke, cinders and soot render the church unfit for religious worship. *Baltimore, etc., R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. Ed. 739.

**35. Legislature has wide discretion.**—*Lawton v. Steele*, 152 U. S. 133, 140, 38 L. Ed. 385. See post, "Declaring Nuisance," VI, B, 2, b.

**Nets used unlawfully may be summarily abated.**—If nets are being used in a manner detrimental to the interests of the public, it is within the power of the legislature to declare them to be nuisances, and to authorize the officers of the state to summarily abate them. *Lawton v. Steele*, 152 U. S. 133, 139, 38 L. Ed. 385.

**Prohibiting the manufacture and sale of intoxicants.**—A state has the right to prohibit the manufacture and sale of intoxicants within its borders and for that purpose provide for the abatement in equity as a public nuisance of property used for the illegal manufacture and sale of such intoxicants, and legislation of this character does not violate the fourteenth amendment, or deprive any person of his property without due process of law or abridge the privileges and immunities of citizens of the United States. *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205.

**State law abating nuisance and punishing criminally the offender.**—A state law is not unconstitutional which declares that any place, kept and maintained for the illegal manufacture and sale of such liquors, shall be deemed a common nuisance, and be abated, and, at the same time, provides for the indictment and trial of the offender. One is a proceeding against the property used for forbidden purposes, while the other is for the punishment of the offender. *Mugler v. Kansas*, 123 U. S. 623, 671, 31 L. Ed. 205.

**36. Legislature may "declare nuisances."**



## VI. Remedies.

**A. Ancient Remedies.**—The ancient common-law remedies were proceedings by assize of nuisance and by writ quod permittat prosternere, but they have been abolished by statute in England, and are now obsolete, if ever used, in this country.<sup>37</sup>

**B. Abatement**—1. **BY PRIVATE INDIVIDUAL.**—Any individual may abate a public nuisance.<sup>38</sup> But this right to forcibly abate a nuisance does not preclude the right of appeal to the courts for a judicial determination, and an exercise of their powers by writ of injunction to accomplish the same result.<sup>39</sup>

2. **BY MUNICIPALITY.**—a. *Power to Abate.*—An incorporated town, with power to define and abate nuisances, may abate by ordinance a public nuisance consisting in the making of fertilizer and the carrying of offal, and dead animals, through the streets.<sup>40</sup>

b. *Declaring Nuisance.*—A municipal corporation, without any general laws either of the city or of the state, within which a given structure can be shown to be a nuisance, cannot, by its mere declaration that it is a nuisance, subject it to removal by any person supposed to be aggrieved, or even by the city itself.<sup>41</sup>

3. **BY STATE**—a. *In General.*—A state, under its police power, may abate nuisances,<sup>42</sup> such as legalized lotteries.<sup>43</sup> The abatement of a nuisance—noth-

—*Lawton v. Steele*, 152 U. S. 133, 143, 38 L. Ed. 385. See, generally, the title CONSTITUTIONAL LAW, vol. 4, p. 1.

**State compelling railroad to construct a drawbridge.**—Where a railroad, incorporated under the laws of Louisiana, was recognized and permitted by statute to exercise its corporate powers within the state of Mississippi, it may be compelled by a condition of such statute, to construct and maintain a drawbridge of a specified kind, across a navigable stream where the stream is crossed by the company's road. And, in granting relief, by compelling the railroad to construct the drawbridge, no right belonging to the company, under the constitution or laws of the United States, is violated or withheld. *New Orleans, etc., R. Co. v. Mississippi*, 112 U. S. 12, 28 L. Ed. 619.

**37. Ancient remedies.**—*Cameron v. United States*, 148 U. S. 301, 304, 37 L. Ed. 459.

**38. Individual may abate nuisance.**—*Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 565, 14 L. Ed. 249; *In re Debs*, 158 U. S. 564, 582, 583, 39 L. Ed. 1092.

**39. Right to forcibly abate does not preclude injunction.**—*In re Debs*, 158 U. S. 564, 582, 39 L. Ed. 1092. See post, "Proceedings in Equity," VI, E.

**40. Town may abate a public nuisance by ordinance.**—*Fertilizer Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036. See ante, "Fertilizer Plants," IV, E, 3.

**41. Power of municipality to declare nuisances.**—*Yates v. Milwaukee*, 10 Wall. 497, 505, 19 L. Ed. 984. See ante, "Power to Declare Nuisances," V, B.

**Question of nuisance determined by fixed laws.**—The question of nuisance or obstruction must be determined by general and fixed laws, and it is not to be

tolerated that the local municipal authorities of a city declare any particular business or structure, a nuisance, in a summary mode, and enforce its decision at its own pleasure. *Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984.

**State statute authorizing city to establish dock line as conferring power to declare nuisances.**—But a statute of a state which confers on a city the power to establish dock and wharf lines, and to restrain encroachments and prevent obstructions to such a stream, does not authorize it to declare by special ordinance a private wharf to be an obstruction to navigation and a nuisance, and to order its removal, when, in point of fact, it was no obstruction or hindrance to navigation. *Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984.

**42. State, under police power, may abate nuisances.**—*Crutcher v. Kentucky*, 141 U. S. 47, 61, 35 L. Ed. 649. See, generally, the title POLICE POWER.

**Taking fee to lands to remove nuisance.**—The legislature of Massachusetts under the police power of the state and under its authority to take public property for public use, may constitutionally provide for the taking of the fee of certain lands by a city and the payment therefor through judicial proceedings, in order to abate an existing nuisance detrimental to the health of the community, and this prior to making compensation, and the title to the lands passed to the city, and the owners of the land had thereafter no interest in the lands, but were only entitled to reasonable compensation according to the provisions of the statute. *Sweet v. Rechel*, 159 U. S. 380, 407, 40 L. Ed. 188.

**43. Abatement of lottery.**—*Phalen v. Virginia*, 8 How. 163, 168, 12 L. Ed. 1030.

ing more being required or done—is not of itself, and within the meaning of the constitution, an appropriation of property to public uses.<sup>44</sup>

b. *Power of State over Nuisances Not Surrendered to Federal Government.*—This power to regulate and abate nuisances is one of the ordinary functions of the state and is one which the states did not surrender to the federal government.<sup>45</sup>

c. *Summary Abatement.*—The summary abatement of nuisances without judicial process or proceeding was well known to the common law long prior to the adoption of the constitution.<sup>46</sup> For the police power is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance.<sup>47</sup> It is not easy to draw the line between cases where property illegally used may be destroyed summarily and where judicial proceedings are necessary for its condemnation. Where the property is of great value, as, for instance, where it is a vessel employed for smuggling or other illegal purposes, it would be putting a dangerous power in the hands of a custom officer to permit him to sell or destroy it as a public nuisance, and the owner would have good reason to complain of such act, as depriving him of his property without due process of law. But where the property is of little value, and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance, and subject to summary abatement.<sup>48</sup>

4. BY CONGRESS—*a. In Navigable Waters.*—"By virtue of its plenary power to regulate commerce among the several states, as well as with foreign nations, congress may undoubtedly require the removal of all nuisances and unlawful obstructions in the navigable rivers of the United States, without giving compensation to any persons who may be incidentally affected."<sup>49</sup>

b. *Public Lands.*—The admission of a territory as a state does not deprive congress of the power to legislate for the protection of the public lands from nuisances.<sup>50</sup>

c. *Interfering with Mails and Interstate Commerce.*—A public nuisance, as the interfering with interstate commerce and the carrying of mails on the railroads, is subject to abatement at the instance of the United States

See, generally, the title LOTTERIES, vol. 7, p. 1070.

44. Abatement of nuisance no appropriation of property to public use.—Sweet v. Rechel, 159 U. S. 380, 397, 40 L. Ed. 188. See, generally, the title EMINENT DOMAIN, vol. 5, p. 746.

Distinction between taking of property for public use and abating nuisance.—"The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner." Mugler v. Kansas, 123 U. S. 623, 669, 31 L. Ed. 205.

45. Power to abate nuisances not surrendered by states to federal government.—Fertilizing Co. v. Hyde Park, 97 U. S. 659, 677, 24 L. Ed. 1036; Phalen v. Virginia, 8 How. 163, 165, 168, 12 L. Ed. 1030. See, generally, the title POLICE POWER.

46. Summary abatement of nuisances.

—Lawton v. Steele, 152 U. S. 133, 142, 38 L. Ed. 385.

47. Summary abatement authorized under police power.—Lawton v. Steele, 152 U. S. 133, 136, 38 L. Ed. 385.

Summary destruction of fish nets.—An act providing that nets, maintained in violation of any law for the protection of fisheries, is a public nuisance and may be abated and summarily destroyed by any person, is not unconstitutional as depriving the citizen of his property without due process of law. Lawton v. Steele, 152 U. S. 133, 38 L. Ed. 385. See, generally, the title DUE PROCESS OF LAW, vol. 5, p. 499.

48. Summary abatement—General principles.—Lawton v. Steele, 152 U. S. 133, 140, 38 L. Ed. 385.

49. Power of congress to abate nuisance in navigable rivers.—Bridge Co. v. United States, 105 U. S. 470, 507, 26 L. Ed. 1143. See, generally, the title NAVIGABLE WATERS, ante, p. 805.

50. Public lands within state.—Camfield v. United States, 167 U. S. 518, 526, 42 L. Ed. 260. See ante, "Maintaining Nuisances on One's Own Premises Fencing Public Lands," IV, G.



government.<sup>51</sup>

**C. Indictment**—1. IN GENERAL.—The ordinary and regular proceeding at law for a public nuisance is by indictment, or information.<sup>52</sup> But at common law an indictment could not be sustained against a bridge as a public nuisance in the federal courts.<sup>53</sup> Of course congress might punish such an act criminally, but in the absence of statute, an indictment will not lie in the courts of the United States for an obstruction which is a public nuisance.<sup>54</sup> If the proceeding to abate a nuisance is by indictment, and the jury doubts whether the obstruction is a nuisance or not, they would be instructed to acquit the defendant.<sup>55</sup>

2. DEFENSES.—It is no defense to an indictment for nuisance, in erecting a wharf on the public property, that it would be beneficial to the public.<sup>56</sup>

**D. Actions at Law**—1. PRIVATE NUISANCE.—A corporation may sue<sup>57</sup> or be sued like an individual for injuries caused by nuisances.<sup>58</sup> For annoyance and discomfort constituting a nuisance, the courts of law will afford redress by giving damages against the wrongdoer, and when the cause of the annoyance and discomfort are continuous, courts of equity will interfere and restrain the nuisance.<sup>59</sup>

2. PUBLIC NUISANCES—BY PRIVATE INDIVIDUAL.—Any private individual sustaining special damages, by reason of a public nuisance, may maintain a private action at law for such special damages; because to that extent he has suffered beyond his portion of injury in common with the community at large.<sup>60</sup> The damage makes the public nuisance a private nuisance to the injured party.<sup>61</sup>

3. PERSONS LIABLE—*a. Municipal Corporations.*—A municipal corporation, authorized by law to improve a street by building on the line thereof a bridge over, or a tunnel under, a navigable river, where it crosses the street, incurs no lia-

**51. Interfering with mails and interstate commerce.**—In re Debs, 158 U. S. 564, 587, 39 L. Ed. 1092.

**52. Proceedings by indictment.**—*Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 97, 9 L. Ed. 1012; *Northern Pac. R. Co. v. Whalen*, 149 U. S. 157, 162, 37 L. Ed. 686; *Mugler v. Kansas*, 123 U. S. 623, 672, 31 L. Ed. 205; In re Debs, 158 U. S. 564, 592, 39 L. Ed. 1092.

**Indictment is proper remedy if delay possible.**—When delay can safely be tolerated, the usual remedy in cases of public nuisances is an indictment rather than an injunction. *Irwin v. Dixon*, 9 How. 9, 10, 27, 13 L. Ed. 25.

**53. Public nuisance not indictable at common law in federal courts.**—*Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 563, 14 L. Ed. 249. See, generally, the title COMMON LAW, vol. 4, p. 958.

**54. Congress may punish criminally by statute.**—*Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 565, 14 L. Ed. 249.

**55. On indictment for nuisance jury acquits in case of doubt.**—*Mississippi, etc., R. Co. v. Ward*, 2 Black 485, 495, 17 L. Ed. 311. See, generally, the title CRIMINAL LAW, vol. 5, p. 43.

**56. Public benefit as defense to indictment.**—*Respublica v. Caldwell*, 1 Dall. 150, 1 L. Ed. 77. See ante, "Comparison between Injuries and Benefits," III, B.

**57. Corporation may recover for private nuisance.**—*Baltimore, etc., R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 329, 27 L. Ed. 739.

**58. Corporation may be sued for nuisance.**—*Baltimore, etc., R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 330, 27 L. Ed. 739.

**59. Annoyance and discomfort.**—*Baltimore, etc., R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 329, 27 L. Ed. 739. See post, "Proceedings in Equity," VI, E.

**60. Public nuisance—Action by private individual.**—*Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 98, 9 L. Ed. 1012; *Gilman v. Philadelphia*, 3 Wall. 713, 722, 18 L. Ed. 96; *Northern Pac. R. Co. v. Whalen*, 149 U. S. 157, 162, 37 L. Ed. 686; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. 421, 431, 15 L. Ed. 435; In re Debs, 158 U. S. 564, 587, 39 L. Ed. 1092.

**61. Damage makes the public nuisance a private nuisance.**—In re Debs, 158 U. S. 564, 588, 39 L. Ed. 1092; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 563, 14 L. Ed. 249.

**Amenability to criminal law no defense to action for damages.**—That the perpetrator of the nuisance is amenable to the provisions and penalties of the criminal law is not an answer to an action against him by a private person to recover for injury sustained, and for an injunction against the continued use of his premises in such a manner. In re Debs, 158 U. S. 564, 593, 39 L. Ed. 1092.

**Statute giving action for damages.**—A statute giving an action at law against the seller of liquor, or against the owner of the place where sold, to recover damages suffered by reason of sales to particular persons, cannot be construed as



bility for the damages unavoidably caused to adjoining property by obstructing the street or the river, unless such liability be imposed by statute.<sup>62</sup> But if a town lays out a street to low-water mark the right to use it as a street or highway on land becomes appurtenant to the property of the adjoining, who may maintain an action against the city for a nuisance on such street or highway.<sup>63</sup>

b. *Real Estate Owner*.—"If the owner of real estate suffer a nuisance to be created, or continued, by another on or adjacent to his premises, in a prosecution of a business for his benefit, when he has the power to prevent or abate the nuisance, he is liable for an injury resulting therefrom to third persons."<sup>64</sup> If the nuisance necessarily occurs in the ordinary mode of doing work, the occupant or owner is liable, but if it happens by the negligence of the contractor or his servants, the contractor alone is responsible.<sup>65</sup> But because the city is liable primarily to a sufferer by the insecure state of the streets, offers no reason why the person who permits or continues a nuisance at or near his premises should not pay the city for his wrongful act.<sup>66</sup>

c. *Independent Contractor*.—If a nuisance arises from the negligence of the contractor or his servants in doing the work, then he alone is responsible.<sup>67</sup>

d. *Railroad*.—A railroad is liable for injuries caused by an obstruction in a river, placed there by contractors, where the railroad subsequently abandoned the construction of the bridge, although its engineers notified the contractors to remove the obstructions. It is the duty of the railroad when they discontinue the erection of a bridge to remove all obstructions placed there by its orders.<sup>68</sup> But a railroad is not liable for the noises and disturbances necessarily attending its operation; whatever consequential annoyance follows from the ordinary running of cars on the road with reasonable care is *damnum absque injuria*.<sup>69</sup>

4. LIMITATION OF ACTIONS.—Purprestures and public nuisances encroaching upon the highways and public places are generally offenses against the

authorizing an injunction to prevent the use of the building for future sales of liquor. *Northern Pac. R. Co. v. Whalen*, 149 U. S. 157, 37 L. Ed. 686.

62. Municipality improving highway not liable for obstruction in absence of statute.—*Transportation Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336.

63. Nuisance erected in street by municipality.—*Richardson v. Boston*, 24 How. 188, 193, 16 L. Ed. 625.

*Sewer obstructing navigation*.—A city has a right and it is its duty to extend its sewer to low-water mark for the purpose of removing a nuisance injurious to its inhabitants, and having done so on its own land, it is not liable for damages as for a public nuisance at the suit of an adjoining wharf proprietor, who suffered special damage because it interfered with the passage of ships to his wharf, when he claims only the public right of navigation. *Boston v. Lecraw*, 17 How. 426, 436, 15 L. Ed. 118.

64. Liability of real estate owner for nuisance.—*Chicago v. Robbins*, 2 Black 418, 426, 17 L. Ed. 298.

*Raising sidewalks for private convenience as a public work*.—When A, in order to build a storehouse under the street, raises the sidewalk to conform to the grade of the street in order to secure a private storehouse for his own convenience, it was held he was not performing a work of a public nature, and he was liable for injuries resulting from the con-

duct of the work where it became a nuisance. *Robbins v. Chicago*, 4 Wall. 657, 677, 18 L. Ed. 427.

65. Property owner liable for nuisance occurring in ordinary mode of doing work.—*Chicago v. Robbins*, 2 Black 418, 17 L. Ed. 298.

*Open areaway—Independent contractor*.—Where an areaway in a street is suffered to remain uncovered and become a nuisance, the owner of the lot, for whose benefit it is made, is responsible and cannot escape liability by letting work out to an independent contractor. He cannot refrain from directing his contractor in the execution of the work so as to avoid making a nuisance. *Chicago v. Robbins*, 2 Black 418, 426, 17 L. Ed. 298.

66. Contribution of property owner for damages paid by city.—*Chicago v. Robbins*, 2 Black 418, 425, 17 L. Ed. 298.

67. Independent contractor.—*Chicago v. Robbins*, 2 Black 418, 428, 17 L. Ed. 298. See ante, "Real Estate Owner," VI, D, 3, b.

68. Liability of railroad for obstructions placed in stream by independent contractor.—*Philadelphia, etc., R. Co. v. Philadelphia, etc., Steam Towboat Co.*, 23 How. 209, 217, 16 L. Ed. 433.

69. Railroad not liable for necessary noises.—*Baltimore, etc., R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 331, 27 L. Ed. 739. See ante, "Smoke—Low Chimneys," IV, D.

sovereign power itself and are not subject to the statute of limitations.<sup>70</sup>

5. **DAMAGES**—a. *Measure of Damages*.—The measure of damages in an action against a railroad for maintaining a nuisance by having its engine house so near a church that it interfered with religious services, is not only the depreciation in the value of the property, but recovery may be had for the inconvenience and discomfort caused to the congregation in the use of the church.<sup>71</sup>

b. *Successive Recoveries*.—Indeed every continuance of a nuisance is held to be a fresh one; and therefore a fresh action will lie, and very exemplary damages may be given if, after one verdict against him, the defendant has the hardiness to continue it.<sup>72</sup> And in assessing the damages for continuance of a private nuisance, the jury cannot take into consideration the damages recovered in previous actions for the same nuisance.<sup>73</sup>

c. *Conclusiveness of Verdict*.—In an action for damages for a nuisance, nothing is conclusively determined by the verdict but the damages for the interruption covered by the declaration, but the verdict is permitted to go to the jury as prima facie, or persuasive evidence in a subsequent action for damages for the continuance of the nuisance.<sup>74</sup>

**E. Proceedings in Equity**—1. **EQUITY JURISDICTION**—a. *In General*.—The jurisdiction of courts of equity to redress the grievance of public<sup>75</sup> or private nuisances,<sup>76</sup> or purprestures<sup>77</sup> by injunction, is undoubted and clearly established;

70. **Purprestures not subject to statute of limitations**.—Metropolitan R. Co. v. District of Columbia, 132 U. S. 1, 12, 33 L. Ed. 231. See, generally, the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 900.

71. **Measure of damages**.—Baltimore, etc., R. Co. v. Fifth Baptist Church, 108 U. S. 317, 335, 27 L. Ed. 739.

72. **Successive recoveries**.—Baltimore, etc., R. Co. v. First Baptist Church, 137 U. S. 568, 576, 34 L. Ed. 784.

73. **Assessing damages—Former verdict**.—Baltimore, etc., R. Co. v. First Baptist Church, 137 U. S. 568, 575, 34 L. Ed. 784.

74. **Conclusiveness of verdict**.—Richardson v. Boston, 19 How. 263, 268, 15 L. Ed. 639; Richardson v. Boston, 24 How. 188, 193, 16 L. Ed. 625. See, generally, the title RES ADJUDICATA.

75. **Public nuisances**.—In re Debs, 158 U. S. 564, 39 L. Ed. 1092; Mugler v. Kansas, 123 U. S. 623, 31 L. Ed. 205; Irwin v. Dixon, 9 How. 9, 10, 13 L. Ed. 25; Northern Pac. R. Co. v. Whalen, 149 U. S. 157, 162, 37 L. Ed. 686; Georgetown v. Alexandria Canal Co., 12 Pet. 91, 98, 9 L. Ed. 1012.

**Injunction for public nuisance formerly much questioned**.—The remedy of an injunction was one much questioned, as permissible either to the public or an individual, in the case of a public right of this kind as the right to a highway invaded. And when at last deemed allowable, it was only where the community at large, or some individual, felt interested in having the supposed nuisance immediately prostrated on account of its great, continued, and irreparable injury; and it was then used as a sort of preventive remedy to a multiplicity of suits, and in cases where an action at law would yield too tardy and imperfect redress.

When, however, delay can safely be tolerated, the usual remedy in such cases, by or in behalf of the public, is an indictment rather than injunction. Irwin v. Dixon, 9 How. 9, 10, 27, 13 L. Ed. 25.

**Grounds of equity jurisdiction public nuisances**.—The ground of equity jurisdiction in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give more speedy, effectual, and permanent remedy, than can be had at law. They cannot only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and, by perpetual injunction, protect the public against them in the future; whereas courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community. Mugler v. Kansas, 123 U. S. 623, 673, 31 L. Ed. 205.

**Injunction refused only when circumstances of case make it unnecessary**.—It may be affirmed that in no well-considered case has the power of a court of equity to interfere by injunction in cases of public nuisance been denied, the only denial ever being that of a necessity for the exercise of that jurisdiction under the circumstances of the particular case. In re Debs, 158 U. S. 564, 592, 39 L. Ed. 1092.

76. **Private nuisances**.—Pennsylvania v. Wheeling, etc., Bridge Co., 13 How. 518, 564, 14 L. Ed. 249; Parker v. Winnipiseogee Lake Cotton, etc., Co., 2 Black 545, 551, 17 L. Ed. 333.

77. **Purprestures**.—Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 565, 36 L. Ed. 537; Mugler v. Kansas, 123 U. S. 623, 672, 31 L. Ed. 205. See the title INJUNCTIONS, vol. 6, p. 1060.



but it is well settled that, as a general rule, equity will not interfere, where the object sought can be as well attained in the ordinary tribunals.<sup>73</sup> A jury trial is not required in suits in equity brought to abate a public nuisance.<sup>79</sup>

b. *When Injunction Will Issue and When Be Withheld*—(1) *In General*.—An injunction to restrain a nuisance will issue only in cases where the fact of nuisance is made out upon determinate and satisfactory evidence.<sup>80</sup> If the evidence be conflicting and the injury doubtful, a court of equity will withhold the extraordinary remedy of injunction.<sup>81</sup> And the character of the nuisance and the sufficiency of the damage sustained is to be judged by the courts.<sup>82</sup>

(2) *Threatened Nuisances*.—A municipality cannot restrain by injunction, a threatened nuisance on the part of an individual or a corporation, unless they both aver and prove that they are the owners of property liable to be affected by the nuisance, and that in point of fact were so affected, so that they had thereby suffered a special damage.<sup>83</sup> "Where interposition by injunction is sought, to restrain that which is apprehended will create a nuisance of which its complainant may complain, the proofs must show such a state of facts as will manifest the danger to be real and immediate."<sup>84</sup>

c. *Necessity of Establishing Right at Law*—(1) *General Rule*.—A previous establishment of the right at law is not necessary before resorting to equity where the right is clear and its violation palpable.<sup>85</sup> But this jurisdiction is applied only where the right is clearly established, where no adequate compensation can be made in damages, and where delay itself would be a wrong.<sup>86</sup> It is only where the right or title to the place in controversy or to do the act complained of as a nuisance, is doubtful, and explicitly denied in the answer, that no permanent or temporary injunction will usually be granted until such trial at law, settling the contested rights and interests of the parties.<sup>87</sup> The true dis-

**78. Equity interferes only when object cannot be attained in ordinary tribunals.**—*In re Debs*, 158 U. S. 564, 591, 39 L. Ed. 1092. See, generally, the title EQUITY, vol. 5, p. 803.

**Public nuisance—Indictment generally.**—And because the remedy by indictment is so efficacious, courts of equity entertain jurisdiction in cases of public nuisances with great reluctance, whether their intervention is invoked at the instance of the attorney general, or of a private individual who suffers some injury therefrom distinct from that of the public, and they will only do so where there appears to be a necessity for their interference. *In re Debs*, 158 U. S. 564, 582, 39 L. Ed. 1092.

**79. Jury trial not required to abate a nuisance in equity.**—*Mugler v. Kansas*, 123 U. S. 623, 673, 31 L. Ed. 205; *Eilenbecker v. Plymouth County*, 134 U. S. 31, 33 L. Ed. 801.

**80. Nuisance must be clearly established for injunction.**—*Missouri v. Illinois*, 180 U. S. 208, 248, 45 L. Ed. 497.

**Statutory directions that injunction issue at commencement of action to abate a public nuisance.**—A statutory direction that an injunction issue at the commencement of an action to abate a public nuisance is not to be construed as dispensing with such preliminary proof as is necessary to authorize an injunction pending the suit. The court is not to issue an injunction simply because one is asked, or because the charge is made that a com-

mon nuisance is maintained in violation of law. The statute leaves the court at liberty to give effect to the principle that an injunction will not be granted to restrain a nuisance, except upon clear and satisfactory evidence that one exists. *Mugler v. Kansas*, 123 U. S. 623, 673, 31 L. Ed. 205.

**81. Doubtful injury—Injunction refused.**—*Parker v. Winnipiseogee Lake Cotton, etc., Co.*, 2 Black 545, 552, 17 L. Ed. 333; *Missouri v. Illinois*, 180 U. S. 208, 248, 45 L. Ed. 497.

**82. Court determines character and sufficiency of nuisance.**—*Mississippi, etc., R. Co. v. Ward*, 2 Black 485, 492, 17 L. Ed. 311.

**83. Municipal corporation—Threatened nuisance.**—*Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 99, 9 L. Ed. 1012. See post, "Private Individual or Corporation," VI, E. 5, a. (2).

**84. Threatened nuisances—Danger must be real and immediate.**—*Missouri v. Illinois*, 180 U. S. 208, 248, 45 L. Ed. 497.

**85. Previous establishment of right at law not always necessary.**—*Parker v. Winnipiseogee Lake Cotton, etc., Co.*, 2 Black 545, 552, 17 L. Ed. 333; *Irwin v. Dixon*, 9 How. 9, 10, 13 L. Ed. 25.

**86. Jurisdiction applied only where right is clearly established.**—*Parker v. Winnipiseogee Lake Cotton, etc., Co.*, 2 Black 545, 552, 17 L. Ed. 333.

**87. Jurisdiction not applicable where right or title in controversy.**—*Irwin v. Dixon*, 9 How. 9, 10, 28, 13 L. Ed. 25;



tion is that in a prospect of irremediable injury by what is apparently a nuisance, a temporary or preliminary injunction may at once issue before the rights of the parties are settled at law.<sup>88</sup> But not a permanent or perpetual injunction until the title, if disputed, is settled at law.<sup>89</sup>

(2) *Effect of Laches on Necessity of Establishment at Law.*—A delay of three years or more has been frequently held to be such laches as will preclude a party from relief in equity until he has vindicated his right at law.<sup>90</sup> But the better opinion now is, that laches is only a fact to be considered by the chancellor, in connection with the other facts of the case, by which his discretion is to be guided.<sup>91</sup>

(3) *Effect of Judgment at Law.*—Even after the right has been established at law, a court of chancery will not, as of course, interpose by injunction. It will consider all the circumstances, the consequences of such action, and the real equity of the case.<sup>92</sup> Many cases of private nuisance will sustain an action at law, which would not justify relief in equity.<sup>93</sup>

d. *No Adequate Remedy at Law.*—Where there is no adequate remedy at law, equity will take jurisdiction of a suit for a public nuisance.<sup>94</sup> In the United States courts an objection to a bill in equity for an injunction against a private nuisance, that there is an adequate and complete remedy at law, goes to the jurisdiction of the forum and the court will enforce same *sua sponte*, without being raised either in pleadings or by suggestion of counsel.<sup>95</sup> Of course the court will not dismiss the bill where the remedy at law is not "plain, adequate, and complete," or in other words, where it is not as "practical, and as efficient to the ends of justice and to its prompt administration" as the remedy in equity.<sup>96</sup>

e. *Irreparable Injury.*—A court of equity will interfere by injunction to

Parker v. Winnipiseogee Lake Cotton, etc., Co., 2 Black 545, 552, 17 L. Ed. 333.

88. **Irremediable injury—Preliminary injunction will issue before trial of right at law.**—Irwin v. Dixon, 9 How. 9, 10, 28, 13 L. Ed. 25; Parker v. Winnipiseogee Lake Cotton, etc., Co., 2 Black 545, 552, 17 L. Ed. 333.

89. **Permanent injunction will not issue until disputed title is settled at law.**—Irwin v. Dixon, 9 How. 9, 10, 29, 13 L. Ed. 25.

90. **Laches frequently held to require previous establishment of right at law.**—Parker v. Winnipiseogee Lake Cotton, etc., Co., 2 Black 545, 552, 17 L. Ed. 333.

**There must be no improper delay.**—Where an injunction to abate a private nuisance is granted without a trial at law, it is usually upon the principle of preserving the property, until a trial at law can be had. A strong *prima facie* case of right must be shown, and there must have been no improper delay. The court will consider all the circumstances and exercise a careful discretion, and where an injunction in such a case has been granted, and the complainant fails to proceed with diligence in his action at law, the injunction will be dissolved. Parker v. Winnipiseogee Lake Cotton, etc., Co., 2 Black 545, 552, 17 L. Ed. 333.

91. **Laches now only a fact to be considered by chancellor.**—Parker v. Winnipiseogee Lake Cotton, etc., Co., 2 Black 545, 552, 17 L. Ed. 333.

92. **Equity does not grant injunction after settlement at law as matter of right.**—Parker v. Winnipiseogee Lake Cotton,

etc., Co., 2 Black 545, 552, 17 L. Ed. 333.

93. **Not all cases justify relief in equity.**—Parker v. Winnipiseogee Lake Cotton, etc., Co., 2 Black 545, 551, 17 L. Ed. 333.

94. **No adequate remedy at law.**—Georgetown v. Alexandria Canal Co., 12 Pet. 91, 98, 9 L. Ed. 1012; Pennsylvania v. Wheeling, etc., Bridge Co., 13 How. 518, 566, 14 L. Ed. 249; Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 567, 36 L. Ed. 537; Mugler v. Kansas, 123 U. S. 623, 672, 31 L. Ed. 205; In re Debs, 158 U. S. 564, 592, 39 L. Ed. 1092.

**Proceedings at law inadequate where purpresture is continued.**—"Proceedings at law or by indictment can only reach past or present wrongs done by the appellant, and will not adequately protect the public interests in the future. What the public are entitled to have is security for all time against illegal interference with the control by the state of the digging, mining and removing of phosphate rock and phosphate deposits in the bed of Coosaw River." Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 567, 36 L. Ed. 537.

95. **Adequate remedy at law fatal to bill in United States courts.**—Parker v. Winnipiseogee Lake Cotton, etc., Co., 2 Black 545, 550, 17 L. Ed. 333. See, generally, the title EQUITY, vol. 5, p. 815.

96. **Remedy at law must be as plain, adequate and complete as in equity.**—Parker v. Winnipiseogee Lake Cotton, etc., Co., 2 Black 545, 551, 17 L. Ed. 333.

abate a nuisance when the injury by the wrongful act of the adverse party will be irreparable, as where the loss of health, the loss of trade, the destruction of the means of subsistence, or the ruin of the property must ensue.<sup>97</sup> A nuisance, however, causing a diminution in the value of the premises without irreparable injury, is no ground for interference.<sup>98</sup>

f. *Multiplicity of Suits*.—A court of equity will also give its aid to prevent oppressive and interminable litigation, or a multiplicity of suits, or where the injury is of such a nature that it cannot be adequately compensated by damages at law, or is such, as, from its continuance or permanent mischief, must occasion a constantly recurring grievance, which cannot be prevented otherwise than by an injunction.<sup>99</sup>

2. JURISDICTION OF COURTS—a. *United States Courts*—(1) *In General*.—A United States court sitting in equity has jurisdiction of a suit at the instance of a state to restrain a public nuisance within its territory.<sup>1</sup>

(2) *Actions between States*.—The United States supreme court has jurisdiction of a suit in equity to enjoin one state from conducting its sewerage by an artificial channel into a river running between two states, from which river one of the states derives its water supply, but the facts as to the pollution of the water by such sewerage must be clearly shown and where the complainant states allows discharges similar to those of which it complains, from which such pollution might arise, the strictest proof that the plaintiff's own conduct does not produce the result, or at least so conduce to it that courts should not be curious to apportion the blame, must be shown, or the bill will be dismissed—without prejudice, however.<sup>2</sup>

97. *Irreparable injury*.—*Parker v. Winnipiseogee Lake Cotton, etc., Co.*, 2 Black 545, 551, 17 L. Ed. 333; *Gilman v. Philadelphia*, 3 Wall. 713, 722, 18 L. Ed. 96; *In re Debs*, 158 U. S. 564, 592, 39 L. Ed. 1092; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 567, 36 L. Ed. 537.

*Obstruction to navigation*.—If an obstruction be unlawful, and the injury irreparable, by a suit at common law, the injured party may claim the extraordinary protection of a court of chancery. *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 563, 14 L. Ed. 249.

*Action at law too tardy*.—The jurisdiction of a court of equity in cases of public nuisances is one of delicacy, but it may be exercised in those cases where there is imminent danger of irreparable mischief, before the tardiness of the law can reach it. *Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 97, 9 L. Ed. 1012.

98. *Diminution in value of property*.—*Parker v. Winnipiseogee Lake Cotton, etc., Co.*, 2 Black 545, 552, 17 L. Ed. 333.

99. *Multiplicity of suits*.—*Parker v. Winnipiseogee Lake Cotton, etc., Co.*, 2 Black 545, 551, 17 L. Ed. 333; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 567, 36 L. Ed. 537.

1. *State restraining nuisance*.—*Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 36 L. Ed. 537.

2. *Actions between states*.—*Missouri v. Illinois*, 200 U. S. 496, 520, 522, 50 L. Ed. 572.

*Controversy between states*.—The acts of one state in seeking to promote the health and prosperity of its inhabitants

by a system of public works, which endangers the health and prosperity of the inhabitants of another and adjacent state creates a sufficient basis for a controversy between two states, in the sense of the constitutional provision giving the supreme court of the United States original jurisdiction in controversies between two or more states, as to give the supreme court of the United States jurisdiction of a bill for an injunction to restrain the nuisance. *Missouri v. Illinois*, 180 U. S. 208, 45 L. Ed. 497.

*Public corporation created for constructing works for carrying sewage*.—A public corporation incorporated by Illinois to construct works for carrying off the sewage of a city into the Mississippi River is an agency of the state, wholly within its control, and an action in equity, against the state of Illinois, may be maintained, in order to abate the nuisance caused by the sewage being conducted into the river. *Missouri v. Illinois*, 180 U. S. 208, 45 L. Ed. 497.

*States by uniting did not surrender right to enjoin nuisance created by another state*.—When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi sovereign interests; and the alternative to force is a suit in the federal supreme court. *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237, 51 L. Ed. 1038; *Missouri v. Illinois*, 180 U. S. 208, 241, 45 L. Ed. 497.



(3) *Value of Object to Be Removed Determines Jurisdiction of Court.*—In a suit in equity to abate a bridge claimed to be an obstruction to navigation and a nuisance, the want of a sufficient amount of damage will not defeat the jurisdiction of the federal courts, as the removal of the obstruction is the matter of controversy, and the value of the object must govern.<sup>3</sup>

3. *VENUE.*—A bill in equity to abate a nuisance is a local suit, and can be brought only in the district where the nuisance is situated.<sup>4</sup>

4. *NECESSARY AVERMENTS IN BILL.*—Equity will not grant an injunction to restrain a private nuisance where there is no allegation of either danger of irreparable injury, or of protracted litigation, or of a multiplicity of suits, but will leave him to his remedy at law.<sup>5</sup>

5. *PARTIES.*—a. *Plaintiff.*—(1) *Information by Attorney General.*—“The usual, and perhaps the more correct, mode of proceeding in equity in cases of public nuisance is by information at the suit of the attorney general.”<sup>6</sup>

(2) *Private Individual or Corporation.*—An individual or a corporation may institute a suit in equity in the courts of the United States against a nuisance, on the ground of a private and irreparable injury,<sup>7</sup> but he must show that he has sustained, and is still sustaining, individual damage.<sup>8</sup> The injury need not be direct but is sufficient if it be consequential.<sup>9</sup> But as a corporation cannot be said to have life or health or senses, the only ground on which it can obtain either damages or an injunction against a nuisance is injury to its property.<sup>10</sup> The private party, though nominally suing on his own account, acts

3. *Removal of obstruction is matter of controversy.*—Mississippi, etc., R. Co. v. Ward, 2 Black 485, 492, 17 L. Ed. 311. See, generally, the title COURTS, vol. 4, p. 861.

4. *Bill for abatement of nuisance a local suit.*—Mississippi, etc., R. Co. v. Ward, 2 Black 485, 17 L. Ed. 311.

*Bridge across river dividing two states.*—If a bridge across the Mississippi where that river divides the states of Illinois and Iowa is a nuisance and the state line is in the middle of the river, the district court for Iowa has no power to abate it on the Illinois side as it can exercise no jurisdiction beyond what a state court sitting in equity could exercise. Mississippi, etc., R. Co. v. Ward, 2 Black 485, 17 L. Ed. 311.

5. *Allegations necessary in bill for an injunction.*—Parker v. Winnipiseogee Lake Cotton, etc., Co., 2 Black 545, 553, 17 L. Ed. 333. See ante, “Threatened Nuisances,” VI, E, 1, b, (2).

*Injunction for abatement of piling in front of wharf.*—A bill in equity praying an injunction and abatement of certain piling being placed in front of plaintiff’s wharves, alleging that the depth of water is being constantly lessened by the piling, greatly to his pecuniary loss and to his irreparable injury, contains sufficient allegations for relief in equity. Griffing v. Gibb, 2 Black 519, 522, 17 L. Ed. 353.

6. *Information in equity by attorney general.*—Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 566, 567, 36 L. Ed. 537. See, also, Missouri v. Illinois, 180 U. S. 208, 244, 45 L. Ed. 497; In re Debs, 158 U. S. 564, 592, 39 L. Ed. 1092; Mugler v. Kansas, 123 U. S. 623, 672, 31 L. Ed. 205; Georgetown v. Alexandria Canal Co., 12 Pet. 91, 98, 9 L. Ed. 1012.

7. *Suit in equity by private individual.*—Pennsylvania v. Wheeling, etc., Bridge Co., 13 How. 518, 563, 14 L. Ed. 249; Mississippi, etc., R. Co. v. Ward, 2 Black 485, 492, 17 L. Ed. 311. See ante, “Public Nuisances—By Private Individual,” VI, D, 2.

*Remedy at law inadequate.*—Where a private individual is in imminent danger of irreparable damage, incapable of compensation in damages and the law would therefore afford no adequate remedy, a court of equity will enjoin a public nuisance. Georgetown v. Alexandria Canal Co., 12 Pet. 91, 98, 9 L. Ed. 1012.

8. *Private individual must show special damage.*—Mississippi, etc., R. Co. v. Ward, 2 Black 485, 492, 17 L. Ed. 311.

*Special injury.*—An injunction in case of private action for nuisance will only be granted where there is special injury to plaintiff’s property. Northern Pac. R. Co. v. Whalen, 149 U. S. 157, 162, 37 L. Ed. 686.

The United States has sufficient property in the mails to justify relief in equity, by injunction, against a nuisance, consisting in the obstruction of artificial highways interfering with interstate commerce and the transmission of the mails. In re Debs, 158 U. S. 564, 583, 39 L. Ed. 1092.

9. *Injury may be consequential.*—Gilman v. Philadelphia, 3 Wall. 713, 722, 18 L. Ed. 96.

10. *Corporation can only obtain injunction upon ground of injury to its property.*—Northern Pac. R. Co. v. Whalen, 149 U. S. 157, 163, 37 L. Ed. 686. See ante, “Threatened Nuisances,” VI, E, 1, b, (2).

*Employer’s right to injunction against sale of liquor to employees.*—No em-



rather as a public prosecutor, on behalf of all who are or may be injured.<sup>11</sup> But no remedy exists in cases of a public nuisance by an individual unless he has suffered some private, direct and material damage beyond the public at large, as well as otherwise irreparable.<sup>12</sup>

(3) *Municipal Corporation*.—A municipality cannot maintain a suit in equity to enjoin an obstruction in a navigable river, claimed to be a public nuisance, unless it shows special damage to its own property.<sup>12a</sup>

(4) *Necessity for Joinder of Copartners*.—If a person seeks an abatement of a nuisance and has partners in the particular business affected by the nuisance, he need not join them as plaintiffs, any more than he need join other persons who have suffered similar injuries.<sup>13</sup>

b. *Defendants*.—Where the nuisance has been erected, and is maintained by several persons or corporations, those who are not within the jurisdiction of the court need not be joined as defendants in the bill.<sup>14</sup>

6. **THE DECREE**.—The United States supreme court may order a bridge which is an obstruction to navigation and constitutes a public nuisance to be removed by elevating the bridge according to certain plans, or require the adoption of some other plan adapted to relieve navigation from the obstruction before a certain date or abate same.<sup>15</sup> But it will not affirm a decree of a district court ordering part of a bridge removed, claimed to be a public nuisance, where it would result in great inconvenience and would not remedy the nuisance complained of.<sup>16</sup>

## VII. Prescription as a Defense.

The right to maintain a nuisance cannot arise by prescription. Every day's continuance is a new offense, and it is no justification that the party complaining came voluntarily within its reach. Pure air and the comfortable enjoyment of property are as much rights belonging to it as the right of possession and occupancy.<sup>17</sup>

ployer has such a property in his workmen, or in their services, that he can, under the ordinary jurisdiction of a court of chancery, maintain a suit, as for a nuisance, against the keeper of a house at which they voluntarily buy intoxicating liquors, and thereby get so drunk as to be unfit for work. *Northern Pac. R. Co. v. Whalen*, 149 U. S. 157, 162, 37 L. Ed. 686.

11. **Private individual acts as public prosecutor**.—*Mississippi, etc., R. Co. v. Ward*, 2 Black 485, 17 L. Ed. 311, distinguished in *Adams v. New York*, 192 U. S. 585, 48 L. Ed. 575.

12. **Injury to private individual must be private and direct**.—*Irwin v. Dixon*, 9 How. 9, 27, 28, 13 L. Ed. 25; *Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 97, 98, 9 L. Ed. 1012; *Northern Pac. R. Co. v. Whalen*, 149 U. S. 157, 37 L. Ed. 686.

**Mere inconvenience**.—Whenever the exercise of a right, conferred by law for the benefit of the public, is attended with temporary inconvenience to private parties, in common with the public in general, they are not entitled to any damages therefor. The obstruction caused to the navigation of a stream during the progress of work on a new bridge, affords no ground of action. The inconvenience is *damnum absque injuria*. *Hamilton v. Vicksburg, etc., Railroad*, 119 U. S. 280, 285, 30 L. Ed. 393. See, also, the title

DUE PROCESS OF LAW, vol. 5, p. 595.

12a. **Municipality must show damage to its own property**.—*Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 99, 9 L. Ed. 1012.

13. **Necessity for joinder of copartners**.—*Mississippi, etc., R. Co. v. Ward*, 2 Black 485, 17 L. Ed. 311. See the title PARTIES.

14. **Necessity for joinder of defendants beyond jurisdiction of court**.—*Mississippi, etc., R. Co. v. Ward*, 2 Black 485, 17 L. Ed. 311.

15. **Decree directing elevating of bridge**.—*Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 578, 14 L. Ed. 249.

16. **United States supreme court will not affirm a decree causing great inconvenience but not remedying nuisance**.—*Mississippi, etc., R. Co. v. Ward*, 2 Black 485, 494, 17 L. Ed. 311. See, also, the title BRIDGES, vol. 3, p. 526.

17. **Prescription**.—*Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 669, 24 L. Ed. 1036. See, generally, the title PRESCRIPTION.

**Actions between states**.—"The reasons on which prescription for a public nuisance is denied or may be granted to an individual as against the sovereign power to which he is subject have no application to an independent state. It would be con-

**NUL TIEL CORPORATION.**—See the title CORPORATIONS, vol. 4, p. 768.

**NUL TIEL RECORD.**—See, generally, the title RECORDS. As to point that nul tiel record is proper plea in action on judgment, see the title JUDGMENTS AND DECREES, vol. 7, p. 612.

**NUNC PRO TUNC.**—As to docketing nunc pro tunc, see the title APPEAL AND ERROR, vol. 2, p. 261. As to whether limitation for appeal runs from date of entry of judgment nunc pro tunc, see the title APPEAL AND ERROR, vol. 2, p. 133. As to allowance of appeal nunc pro tunc, see the title APPEAL AND ERROR, vol. 2, p. 126. As to filing appeal bond nunc pro tunc, see the title APPEAL AND ERROR, vol. 2, p. 183. As to entry of appeal nunc pro tunc, see the title APPEAL AND ERROR, vol. 2, p. 235. As to mandamus to compel signing of bill of exceptions nunc pro tunc, see the title EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL, vol. 6, p. 71. As to signing of bill nunc pro tunc, see the title EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL, vol. 6, p. 63. As to entry of judgment nunc pro tunc, see the title JUDGMENTS AND DECREES, vol. 7, p. 577. As to amendment of judgment by order nunc pro tunc, see the title JUDGMENTS AND DECREES, vol. 7, p. 586. As to nunc pro tunc order of sale, see the title JUDICIAL SALES, vol. 7, p. 709. As to amendment of record nunc pro tunc, see the titles MANDAMUS, vol. 8, p. 94; RECORDS.

**NUNCUPATIVE WILLS.**—See the title WILLS.

tradicting a fundamental principle of human nature to allow no effect to the lapse of time, however long. *Davis v. Mills*, 194 U. S. 451, 457, 48 L. Ed. 1067, yet the

fixing of a definite time usually belongs to the legislature rather than the courts." *Missouri v. Illinois*, 200 U. S. 496, 500, 50 L. Ed. 572.

## OATH.

### CROSS REFERENCES.

See the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 12; ACKNOWLEDGMENTS, vol. 1, p. 76; ADMIRALTY, vol. 1, p. 119; AFFIDAVITS, vol. 1, p. 200; AMENDMENTS, vol. 1, p. 288; APPEAL AND ERROR, vol. 1, p. 333; ATTACHMENT AND GARNISHMENT, vol. 2, p. 660; ATTORNEY AND CLIENT, vol. 2, p. 703; BANKRUPTCY, vol. 2, p. 792; CLERKS OF COURT, vol. 3, p. 849; COMMITMENT AND PRELIMINARY EXAMINATION OF ACCUSED, vol. 3, p. 951; CONSTITUTIONAL LAW, vol. 4, p. 1; DOCUMENTARY EVIDENCE, vol. 5, p. 431; ELECTIONS, vol. 5, p. 721; EQUITY, vol. 5, p. 804; EVIDENCE, vol. 5, p. 1004; EXECUTORS AND ADMINISTRATORS, vol. 6, p. 119; EXTRADITION, vol. 6, p. 215; GRAND JURY, vol. 6, p. 570; HABEAS CORPUS, vol. 6, p. 610; INDICTMENTS, INFORMATIONS, PRESENTMENTS AND COMPLAINTS, vol. 6, p. 961; JUDGES, vol. 7, p. 538; JUSTICES OF THE PEACE, vol. 7, p. 780; JURY, vol. 7, p. 748; NATURALIZATION; NOTARY PUBLIC; PERJURY; PLEADING; PUBLIC OFFICERS; PUBLIC LANDS; SHERIFFS AND CONSTABLES; UNITED STATES COMMISSIONERS; WAR; WITNESSES.

As to oath of assessors, see the title TAXATION. As to oath of appraisers and commissioners in condemnation proceedings, see the title EMINENT DOMAIN, vol. 5, p. 792. As to oath of referee in bankruptcy, see the title BANKRUPTCY, vol. 2, p. 870. As to oath of grand jurors, see the title GRAND JURY, vol. 6, p. 577. As to oath of locators of mining claims as to citizenship, see the title MINES AND MINERALS, ante, p. 364. As to pre-emptor's oath, see the title PUBLIC LANDS. As to necessity of oath by attorneys, see the title ATTORNEY AND CLIENT, vol. 2, p. 708. As to test oath required at close of Civil War in order to hold office and engage in certain professions and be entitled to other privileges, see the titles CONSTITUTIONAL LAW, vol. 4, pp. 430, 431, 519, 521, 522, 523; PUBLIC OFFICERS; WAR. As to test oath required to be taken by attorneys, see the title ATTORNEY AND CLIENT, vol. 2, p. 708. As to test oath required to be taken by jurors, see the title JURY, vol. 7, p. 748. As to exaction of test oath as requirement to pursue remedies in court, see the title CONSTITUTIONAL LAW, vol. 4, p. 523. As to test oath required under act of congress providing for redemption of property sold for taxes due the United States, see the title TAXATION. As to test oath being within the ex post facto provision as being an assumption of guilt, see the title CONSTITUTIONAL LAW, vol. 4, p. 519. As to test oaths, required in order to practice certain professions, being ex post facto laws, see the title CONSTITUTIONAL LAW, vol. 4, p. 521. As to necessity that charges against attorneys be made on oath, see the title ATTORNEY AND CLIENT, vol. 2, p. 736. As to oath for enlistment in the army, see the title ARMY AND NAVY, vol. 2, p. 528. As to necessity of oath of inventor in application for patents, see the title PATENTS. As to necessity of answer in equity being under oath, see the title EQUITY, vol. 5, p. 868. As to answer under oath in equity being evidence, see the title EQUITY, vol. 5, p. 886. As to amount of evidence necessary to overcome an answer under oath in an action of fraud, see the title FRAUD AND DECIT, vol. 6, p. 444. As to necessity of oath in obtaining bounties, see the title BOUNTIES, vol. 3, p. 512. As to oath required by the bankrupt act, see the title BANKRUPTCY, vol. 2, p. 839. As to necessity that a judge swear to return of reason for refusal to sign bill of exceptions, see the title MANDAMUS, vol. 8, p. 1. As to claims made under oath against the United States, see the title UNITED STATES. As to oath to petition for removal of causes, see the title REMOVAL OF CAUSES. As to false entries made under oath in reports by officers of national banks, see the titles AFFIDAVITS, vol. 1, p. 201; BANKS AND BANKING, vol. 3, p. 118. As to administering oath in deposition,



see the title *DEPOSITIONS*, vol. 5, pp. 327, 328. As to estoppel to deny the truth of statement of fact made under oath, see the title *ESTOPPEL*, vol. 5, p. 984. As to waiving objections as to sufficiency of oath to depositions, see the title *DEPOSITIONS*, vol. 5, p. 332. As to making objection to form of oath administered to jurors, see the title *CRIMINAL LAW*, vol. 5, p. 114. As to effect of failure to administer special oath to officers in charge of jury, see the title *NEW TRIAL*. As to making false oath to declarations and certificates, see the title *PERJURY*. As to the rule that a person offered as a juror is not compelled to disclose under oath guilt of crime, see the title *JURY*, vol. 7, p. 748. As to the power of various officers to administer oaths in regard to affidavits, see the title *AFFIDAVITS*, vol. 1, p. 200. As to authority of state officers to administer oaths in support of claims against the United States, see the title *AFFIDAVITS*, vol. 1, p. 201. As to authority of officers to administer oaths in depositions, see the title *DEPOSITIONS*, vol. 5, p. 323. As to the authority of notary publics to administer oaths, see the title *NOTARY PUBLIC*. As to fees of clerks of courts for administering oaths, see the title *CLERKS OF COURT*, vol. 3, p. 856. As to fees of commissioners for administering oaths, see the title *UNITED STATES COMMISSIONERS*. As to fee of chief supervisor of elections for drawing and administering oaths, see the title *ELECTIONS*, vol. 5, p. 725.

**Oath Including Affirmation.**—Statutes sometimes provide that the requirement of an oath shall be complied with by making affirmation in judicial form.<sup>1</sup>

**Authority to Administer Oath.**—There is no statute which gives a general authority to any officer, or any person whatever, to administer oaths in all cases where, by the laws of the United States, they are required.<sup>2</sup>

**Unauthorized Oath.**—An oath administered by a person without authority is a void act.<sup>3</sup>

**Oath Administered by State Magistrate.**—If a state magistrate shall administer an oath, under an act of congress expressly giving him the power to do so, it would be a lawful oath, by one having competent authority; and as much so as if he had been specially appointed a commissioner, under the law of the United States for that purpose.<sup>4</sup>

**OBITER DICTA.**—See *DICTUM*, vol. 5, p. 347. And see the titles *JUDGMENTS AND DECREES*, vol. 7, p. 553; *STARE DECISIS*.

1. *Bram v. United States*, 168 U. S. 532, 566, 42 L. Ed. 568.

**United States statutes.**—In § 1 of the Revised Statutes of the United States it is provided, among other things, that, in determining the meaning of the Revised Statutes, "a requirement of an 'oath' shall be deemed complied with by making affirmation in judicial form." *Bram v. United States*, 168 U. S. 532, 566, 42 L. Ed. 568.

2. *United States v. Hall*, 131 U. S. 50, 54, 33 L. Ed. 97.

In *United States v. Hall*, 131 U. S. 50, 54, 33 L. Ed. 97, it is said: "The statutes are full of such partial and special enactments about notaries public, commissioners of the circuit courts, clerks of the courts and various others by whom oaths may be administered; but there is no general definition; and we have been unable to find, after a most careful and protracted examination, any statute which gives a general authority to any officer,

or any person whatever, to administer oaths in all cases where, by the laws of the United States, they are required."

3. *United States v. Bailey*, 9 Pet. 238, 257, 9 L. Ed. 113, dissenting opinion of Justice McLean.

**Unauthorized oath imports no obligation.**—"Lord Coke, in 3 Inst. 165, says, 'that no old oath can be altered or new oath raised, without an act of parliament; or any oath administered by any that hath not allowance by the common law, or by act of parliament.' No one can doubt, that an oath administered by a person without authority, is a void act. It imposes no legal obligation on the person swearing to state the truth, nor is he punishable under any law, for swearing falsely in such a case." *United States v. Bailey*, 9 Pet. 238, 257, 9 L. Ed. 113, dissenting opinion of Justice McLean.

4. **Oath by magistrate.**—*United States v. Bailey*, 9 Pet. 238, 9 L. Ed. 113.

**OBJECT.**—See note 1.

**OBJECTIONS.**—See, generally, the title *APPEAL AND ERROR*, vol. 2, p. 83. See, also, the particular titles.

**OBLIGATION.**—“‘Obligation’ is defined to be ‘the act of obliging or binding; that which obligates; the binding power of a vow, promise, oath, or contract.’”<sup>2</sup>

**OBSCENITY.**—See the titles *ADULTERY, FORNICATION AND LEWDNESS*, vol. 1, p. 195; *POSTAL LAWS*. And see *INDECENT PUBLICATION*, vol. 6, p. 902.

**1. Object or purpose of legislation.**—“I submit that the validity of state legislation, as affected by the constitution of the United States, is not to be determined altogether by what is supposed to be the ‘object or purpose’ of such legislation, if by **object** or purpose is meant the motive which controlled members of the state legislature when they enacted such legislation. In a legal sense the **object** or purpose of legislation is to be determined by its natural and reasonable effect, whatever may have been the motives upon which legislators acted.” *New York State v. Roberts*, 171 U. S. 658, 681, 43 L. Ed. 323, dissenting opinion of Justice Harlan. See, also, *Henderson v. Mayor of New York*, 92 U. S. 259, 262, 23 L. Ed. 543. See, generally, the title *STATUTES*.

**2. Obligation.**—*Edwards v. Kearzey*, 96 U. S. 595, 600, 24 L. Ed. 793, citing Webster’s Dict.

**Derivation.**—“The word is derived from the Latin word *obligatio*, tying up; and that from the verb *obligo*, to bind or tie up; to engage by the ties of a promise or oath, or form of law; and *obligo* is compounded of the verb *ligo*, to tie or bind fast, and the preposition *ob*, which is prefixed to increase its meaning.” *Edwards v. Kearzey*, 96 U. S. 595, 600, 24 L. Ed. 793.

**Joint obligation.**—See *JOINT OBLIGATION*, vol. 7, p. 531.

**Obligation of contracts.**—See the title *IMPAIRMENT OF OBLIGATION OF CONTRACTS*, vol. 6, p. 765, et seq.

## OBSTRUCTING JUSTICE.

### CROSS REFERENCES.

See the titles ARREST, vol. 2, p. 541; CONSPIRACY, vol. 3, p. 1099; CONTEMPT, vol. 4, p. 531; INDICTMENTS, INFORMATIONS, PRESENTMENTS AND COMPLAINTS, vol. 6, p. 961; SUMMONS AND PROCESS.

As to acts obstructing administration of justice, constituting contempt of court, see the title CONTEMPT, vol. 4, p. 537. As to misbehavior in the vicinity of a court constituting obstruction of justice, see the title CONTEMPT, vol. 4, p. 535, et seq. As to conspiracies to obstruct the administration of justice, see the title CONSPIRACY, vol. 3, p. 1102.

**Statutes Punishing Obstruction of Justice.**—Section 5399 of the Revised Statutes provides for the punishment of any person who corruptly endeavors to influence, intimidate or impede any witness or officer in any court of the United States, in the discharge of his duty, or corruptly, or by threats or force, obstructs or impedes, or endeavors to obstruct or impede, the due administration of justice therein. This section is a reproduction of § 2 of the act of March 2, 1831, "declaratory of the law concerning contempts of court," though proceeding by indictment is not exclusive if the offense of obstructing justice be committed under such circumstances as to bring it within the power of the court under § 725, which authorizes courts to punish for contempts of their authority.<sup>1</sup>

**Under § 5398,** United States Revised Statutes, every person who knowingly and willfully obstructs, resists or opposes any officer of the United States in serving or attempting to serve or execute any mesne process or warrant, or any rule of or order of any court of the United States, may be imprisoned and fined.<sup>2</sup>

**Necessity of Knowledge and Evil Intent.**—The obstruction of the due administration of justice in any court of the United States, corruptly or by threats or force, can only arise when justice is being administered. Unless that fact exists, the statutory offense cannot be committed; and while, with knowledge or notice of that fact, the intent to offend accompanies obstructive action, without such knowledge or notice the evil intent is lacking. It is enough if the thing is done which the statute forbids, provided the situation invokes the protection of the law, and the accused is chargeable with knowledge or notice of the situation; but not otherwise.<sup>3</sup>

**Interference with Case Pending.**—A preliminary examination before a commissioner cannot be considered a case pending in any court of the United States in the sense of § 5406, Revised Statutes, which provides for punishment

1. **Section 5399—Obstructing justice.**—*Pettibone v. United States*, 148 U. S. 197, 206, 37 L. Ed. 419; *Savin, Petitioner*, 131 U. S. 267, 275, 33 L. Ed. 150.

**Obstructing justice punishable as contempt.**—As to obstructing justice being punishable by contempt though an indictable offense under § 5399 of the Revised Statutes, see the titles CONTEMPT, vol. 4, p. 535; INDICTMENTS, INFORMATIONS, PRESENTMENTS AND COMPLAINTS, vol. 6, p. 969.

2. **Section 5399—Interference with officers.**—*Pettibone v. United States*, 148 U. S. 197, 205, 37 L. Ed. 419.

3. **Knowledge and evil intent.**—*Pettibone v. United States*, 148 U. S. 197, 207, 37 L. Ed. 419.

**Intent to commit an unlawful act.**—"It is insisted, however, that the evil intent is to be found, not in the intent to violate the United States statute, but in the intent to commit an unlawful act, in the doing of which justice was in fact obstructed, and that, therefore, the intent to proceed in the obstruction of justice must be supplied by a fiction of law. But the specific intent to violate the statute must exist to justify a conviction, and this being so, the doctrine that there may be a transfer of intent in regard to crimes flowing from general malevolence has no applicability." *Pettibone v. United States*, 148 U. S. 197, 207, 37 L. Ed. 419.

**Necessity of knowledge in conspiracy.**—As to necessity of notice that justice



for conspiring to deter persons from attending United States courts and from testifying as to matters pending therein.<sup>4</sup>

**Indictments—Averment of Notice—Section 5399.**—An indictment against a person for corruptly or by threats or force endeavoring to influence, intimidate or impede a witness or officer, in a court of the United States in the discharge of his duty, must charge knowledge or notice, or set out facts that show knowledge or notice, on the part of the accused, that the witness or officer was such. A person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court.<sup>5</sup>

**An indictment under § 5398** must distinctly state and charge that a legal process, warrant, etc., was issued by a court of the United States, and was in the hands of some officer of the United States for service who had authority to serve the same, and that after such process was in the hands of the officer for service some one knowingly and willfully obstructed, resisted or opposed him serving or attempting to execute the same.<sup>6</sup>

**OBSTRUCTION.**—As to obstructing navigation, see the titles *NAVIGABLE WATERS*, ante, p. 805; *NUISANCES*, ante, p. 933. As to obstructions in streets, see the titles *NUISANCES*, ante, p. 933; *STREETS AND HIGHWAYS*.

**OCCUPATION AND BUSINESS TAXES.**—See the title *LICENSES*, vol. 7, p. 869, and references given.

**OCCUPY.**—To occupy means to hold in possession, to hold or keep for use; as to occupy an apartment.<sup>1</sup>

**OCCUPYING CLAIMANT.**—See the title *IMPROVEMENTS*, vol. 6, p. 896.

**OCEAN.**—See *MAIN SEA*, vol. 7, p. 1077. And see, generally, the title *NAVIGABLE WATERS*, ante, p. 805.

**OF.**—See note 2.

**OFFENSE.**—An offense, in its legal signification, means the transgression of a law.<sup>3</sup>

was being administered in case of prosecution for conspiracy to obstruct administration of justice in a federal court, see the title *CONSPIRACY*, vol. 3, p. 1102.

**Intent to commit crime against a state.**—As to criminal intent to commit a crime against a state not constituting a conspiracy to obstruct justice, see the title *CONSPIRACY*, vol. 3, p. 1102.

4. *Todd v. United States*, 158 U. S. 278, 284, 39 L. Ed. 982. See the titles *COMMITMENT AND PRELIMINARY EXAMINATION OF ACCUSED*, vol. 3, p. 954; *UNITED STATES COMMISSIONERS*.

5. *Pettibone v. United States*, 148 U. S. 197, 206, 37 L. Ed. 419.

6. *Pettibone v. United States*, 148 U. S. 197, 206, 37 L. Ed. 419.

"In *United States v. Stowell*, 2 Curtis 153, it was decided that an averment that the warrant resisted was issued by a commissioner was not good, but the facts constituting the due issue must be recited, and the absence of an averment that the commissioner who issued the warrant was thereto authorized, could not be aided by referring to the court records." *Pettibone v. United States*, 148 U. S. 197, 206, 37 L. Ed. 419.

**Conspiracy to obstruct justice.**—As to indictment for conspiracies to obstruct

the administration of justice, see the title *CONSPIRACY*, vol. 3, p. 1103, et seq.

1. **Occupy.**—*Missionary Society v. Dalles*, 107 U. S. 336, 343, 27 L. Ed. 545. See the title *PUBLIC LANDS*.

**Enter upon and "occupy" land.**—See *ENTER—ENTRY*, vol. 5, p. 799. And see the title *PUBLIC LANDS*.

2. **Of similar description.**—As to meaning of the term goods of similar description, see *SIMILAR*.

**Of the blood.**—As to the meaning of the term of the blood, used in the law of descent, see the title *DESCENT AND DISTRIBUTION*, vol. 5, p. 337.

3. **Offense.**—*Moore v. Illinois*, 14 How. 13, 19, 14 L. Ed. 306; *Coleman v. Tennessee*, 97 U. S. 509, 537, 24 L. Ed. 1118.

**Jeopardy.**—As to rule that no one shall be twice put in jeopardy for the same offense, see the title *AUTREFOIS, ACQUIT AND CONVICT*, vol. 2, p. 751.

As to identity of offenses as applicable to the rule no one shall twice be put in jeopardy for the same offense, see the title *AUTREFOIS, ACQUIT AND CONVICT*, vol. 2, p. 755, et seq.

**Proceedings for removal of attorneys.**—Proceedings taken for the removal of an attorney cannot be deemed a criminal procedure, which, under the laws of Massachusetts, entitle a party to a full,

**OFFER AND ACCEPTANCE.**—See the title **CONTRACTS**, vol. 4, p. 556.

**OFFERED LANDS.**—See note 1.

**OFFER OF JUDGMENT.**—See the title **JUDGMENTS AND DECREES**, vol. 7, p. 559.

**OFFICE.**—"An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties."<sup>2</sup>

**OFFICE COPY.**—See the title **DOCUMENTARY EVIDENCE**, vol. 5, p. 443.

**OFFICE FOUND.**—See the titles **ALIENS**, vol. 1, pp: 225, 226, 227; **ES-CHEAT**, vol. 5, p. 898.

**OFFICE JUDGMENT.**—See the title **JUDGMENTS AND DECREES**, vol. 7, p. 656, et seq.

**OFFICERS.**—See the title **PUBLIC OFFICERS**.

formal, and substantial description of the offense charged. *Randall v. Brigham*, 7 Wall. 523, 541, 19 L. Ed. 285.

1. **Offered lands.**—After the passage of the act of April 24, 1820, providing for sale of public lands, the public lands came to be spoken of as "unoffered lands," or those which had not been exposed to public sale, and **offered lands**, or those which had been so exposed and remained unsold; and under the statute regulating the sales of public lands it would seem that unoffered land could not be purchased at any price or in any manner in advance of the public sale, while **offered land** was at all times subject to purchase by the first applicant at a fixed price. *Northern Pac. R. Co. v. De Lacey*, 174 U. S. 622, 629, 43 L. Ed. 1111. See, generally, the title **PUBLIC LANDS**.

2. **Office.**—*United States v. Hartwell*, 6 Wall. 385, 393, 18 L. Ed. 830; *United States v. Germaine*, 99 U. S. 508, 511, 25 L. Ed. 482; *Hall v. Wisconsin*, 103 U. S. 5, 8, 26 L. Ed. 302.

**Classes of offices.**—"Offices may be and usually are divided into two classes—civil and military. Civil **offices** are also usually divided into three classes—political, judicial, and ministerial. Political **offices** are such as are not immediately connected with the administration of justice, or with the execution of the mandates of a superior, as the president or head of a department. Judicial **offices** are those which relate to the administration of justice, and which must be exercised by the persons appointed for that purpose and not by deputies. Ministerial **offices** are those which give the officer no power to judge of the matter to be done, and which require him to obey some superior, many of which are merely employments requiring neither a commission nor a warrant of appointment,

as temporary clerks or messengers." *Twenty Per Cent Cases*, 13 Wall. 568, 575, 20 L. Ed. 707.

**Government office and government contract distinguished.**—"A government office is different from a government contract. The latter from its nature is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other." *United States v. Hartwell*, 6 Wall. 385, 393, 18 L. Ed. 830; *Hall v. Wisconsin*, 103 U. S. 5, 8, 26 L. Ed. 302.

**In the office of.**—A joint resolution of congress increased the pay of employees in the **office** of the commissioner of public buildings, and other designated employees of the government. It was urged that the words of the act "in the **office** of" had respect to another class of employees, that those words referred to the clerks and messengers and the like; but the court was of a different opinion. As clerks and messengers were specially mentioned in the same enactment, it showed that the words "employees in the **office** of," were intended to embrace a class of persons other and different from the persons having appointments as officers in the building assigned to the commissioner. *Twenty Per Cent Cases*, 13 Wall. 568, 575, 20 L. Ed. 707.

**Office and employment distinguished.**—"Although an **office** is an employment, it does not follow that every employment is an **office**. A man may certainly be employed under a contract, express or implied, to perform a service without becoming an officer." *Hall v. Wisconsin*, 103 U. S. 5, 8, 26 L. Ed. 302, quoting Chief Justice Marshall in *United States v. Maurice*, 2 Brock. 96.

# OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

BY JAMES F. MINOR.

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**CROSS REFERENCES.**

See the titles CORPORATIONS, vol. 4, p. 621, and references there made; EXTRADITION, vol. 6, p. 218; FOREIGN CORPORATIONS, vol. 6, p. 305; INSURANCE, vol. 7, p. 66; PRINCIPAL AND SURETY; PUBLIC OFFICERS; STOCK AND STOCKHOLDERS.

As to actuary of bank, see the title BANKS AND BANKING, vol. 3, p. 85. As to assessments by officers on stock, see the title STOCK AND STOCKHOLDERS. As to authority of masters of vessels for corporations, see the title MASTERS OF VESSELS, ante, p. 300. As to directors as necessary parties to suits by stockholders, see the title STOCK AND STOCKHOLDERS. As to entries of officers in corporate books, etc., as evidence, see the title DOCUMENTARY EVIDENCE, vol. 5, p. 464. As to estoppel of directors to deny validity of preferred stock issue, see the title STOCK AND STOCKHOLDERS. As to estoppel of president to deny validity of incorporation, see the title CORPORATIONS, vol. 4, p. 675. As to extraterritorial action, see the title FOREIGN CORPORATIONS, vol. 6, pp. 306, et seq., 311, et seq., 315, et seq., 318, et seq. As to failure to elect trustees as ground of dissolution, see the title CORPORATIONS, vol. 4, p. 793. As to guaranty of performance of duties of agent, see the title GUARANTY, vol. 6, pp. 583, 586. As to illegal contracts and arrangements with reference to public policy, see the title ILLEGAL CONTRACTS, vol. 6, p. 747. As to increase of capital stock and issue, transfer and cancellation of stock, see the title STOCK AND STOCKHOLDERS. As to officers and agents of banks, see the title BANKS AND BANKING, vol. 3, p. 83, et seq. As to officers and agents of insurance companies, see the title INSURANCE, vol. 7, p. 86, et seq. As to officers of de facto corporations, see the title CORPORATIONS, vol. 4, pp. 672-675. As to officers of railroad companies, and their duties to bondholders, see the title RAILROADS. As to preferences generally, see the title CORPORATIONS, vol. 4, p. 741, et seq. As to residence of officer as not giving corporation a domicile, see the title CORPORATIONS, vol. 4, p. 646. As to sale of stockholder's holdings by directors for nonpayment of assessment, see the title STOCK AND STOCKHOLDERS. As to ultra vires acts generally, see the title CORPORATIONS, vol. 4, p. 745, et seq. As to defects and irregularities in exercise of powers, see the title CORPORATIONS, vol. 4, p. 747, et seq. As to fraudulent acts as extraditable offense, see the title EXTRADITION, vol. 6, p. 218.

**I. Definition.**

See post, "Election and Appointment," III.

**II. Eligibility and Qualifications.**

**Stockholding.**—The common requirement that corporate officers must be

stockholders is satisfied where the officer subscribed for stock and paid the first installment thereon, and acted as a stockholder until his resignation, although the condition of his subscription was never fulfilled.<sup>1</sup>

### III. Election and Appointment.

**A. In General.**—The stockholders elect the directors,<sup>2</sup> and a private corporation, unless restricted by its charter, has the power to appoint agents like a natural person.<sup>3</sup>

**Creation of Agency.**—The fact that a foreign corporation paid one-half of the expense incurred in the maintenance and operation of a joint warehouse, alone would not create the relation of principal and agent between an employee therein and the foreign corporation.<sup>4</sup>

**Seal Unnecessary.**—The appointment of an agent need not be by instrument under seal.<sup>5</sup>

**B. Cumulative Voting.**—The right to cumulate votes upon any one or more candidates for directors, is intended to secure representation to minority stockholders.<sup>6</sup>

**C. De Facto Officers.**—1. **PRESUMPTION OF REGULARITY.**—Persons acting publicly as officers of a corporation are ordinarily presumed to be rightfully in office.<sup>7</sup>

1. **Stockholding.**—Stockholders elect the directors, and where it is claimed by the defendant that he was not legally elected president, because he was not a stockholder, the condition of his subscription having never been fulfilled, but he paid the first installment, and the evidence reported shows that he acted as a stockholder from the time of his election as president until his resignation, the objection cannot be sustained. His subscription to the new stock was made before he was elected president, and the bill of exceptions shows that on the following day he paid the required amount of his subscription. *Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 192, 25 L. Ed. 786. See post, "De Facto Officers," III, C.

2. **Electorate.**—*Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 192, 25 L. Ed. 786.

3. **Power to appoint agents.**—*United States Bank v. Dandridge*, 12 Wheat. 64, 67, 68, 6 L. Ed. 552; *Fleckner v. United States Bank*, 8 Wheat. 338, 359, 5 L. Ed. 631.

As to selection of directors by promoters, see the title CORPORATIONS, vol. 4, p. 658.

4. **Creation of agency.**—*Mexican Cent. R. Co. v. Pinkney*, 149 U. S. 194, 202, 37 L. Ed. 699. See, generally, the titles PRINCIPAL AND AGENT; SUMMONS AND PROCESS.

5. **Seal unnecessary.**—*Fleckner v. United States Bank*, 8 Wheat. 338, 357, 5 L. Ed. 631. See, also, *Bank v. Guttschlick*, 14 Pet. 19, 27, 10 L. Ed. 335. See the title CORPORATIONS, vol. 4, p. 648, et seq.

And if a general authority for such purposes, under the corporate seal, would be binding upon the corporation, because it is the mode prescribed by the common law, the like authority, exercised by agents appointed in the mode prescribed

by the charter, and to whom it is exclusively given by the charter, must be of as high and solemn a nature to bind the corporation. *Fleckner v. United States Bank*, 8 Wheat. 338, 357, 5 L. Ed. 631. See, also, post, "Evidence and Presumptions," VI, A, 3.

The civil code of Louisiana declares that, as corporations cannot personally transact all that they have a right legally to do, therefore it becomes necessary for every corporation to appoint some of their members, to whom they may intrust the direction and care of their affairs. There is nothing which, in the slightest degree, points to the necessity of using a corporate seal in appointing agents, or authorizing corporate acts; and the fair inference deducible from the silence of the code is, that it does not contemplate any such formality as essential to the validity of any official acts done by the officer of the corporation; and gives such acts a binding authority, if evidenced by a vote. *Fleckner v. United States Bank*, 8 Wheat. 338, 359, 5 L. Ed. 631. See post, "Necessity for Seal," VI, A, 2, b.

6. **Cumulative voting.**—*Looker v. Maynard*, 179 U. S. 46, 51, 45 L. Ed. 79.

As to constitutionality of amendment of charter for that purpose, see the title CORPORATIONS, vol. 4, p. 709.

7. **Presumption of regularity.**—*Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 192, 25 L. Ed. 786; *United States Bank v. Dandridge*, 12 Wheat. 64, 6 L. Ed. 552. See, also, *Sun Printing, etc., Ass'n v. Moore*, 183 U. S. 642, 649, 46 L. Ed. 366; *Jacksonville, etc., Nav. Co. v. Hooper*, 160 U. S. 514, 519, 40 L. Ed. 515; *Pittsburgh, etc., R. Co. v. Keokuk, etc., Bridge Co.*, 131 U. S. 371, 382, 33 L. Ed. 157.

**Necessity for approval and acceptance of bond.**—See post, "Approval and Acceptance, and Proof Thereof," IV, A.



2. **POWERS.**—And officers de facto, holding under color of an election, and having charge of the affairs of the company, are capable of binding it in all matters legitimately devolving upon them.<sup>8</sup> Although there had been a decree of ouster against them, but which did not take effect until the succeeding day after the action in question.<sup>9</sup>

**Directors.**—So as to de facto directors.<sup>10</sup>

3. **PERSONAL LIABILITY.**—See post, "De Facto Officers," VIII, A, 3, a, (6).

#### IV. Official Bonds.

See the title **BANKS AND BANKING**, vol. 3, pp. 84, 96, et seq., where will be found many cases relating particularly to bank officers' bonds, which are also declaratory of the law as to corporate official bonds generally.<sup>11</sup>

**A. Approval and Acceptance, and Proof Thereof.**—In a suit brought by a corporation, upon a bond given to it to secure the faithful performance of the official duties of one of its officers, evidence of the execution of the bond, and of its approval by the board of directors (according to the rules and regulations contained in the charter), is admissible notwithstanding there was no record of such approval; and the plaintiff may prove the fact of such approval by the board, by presumptive evidence, in the same manner as such fact might be proved in the case of private persons, not acting as a corporation, or as the agents of a corporation.<sup>12</sup>

**Presumption.**—The acceptance and approval may be presumed from circumstances.<sup>13</sup>

**B. Scope of Bond.**—The official bond must be construed to cover all defaults in duty which are annexed to the office, from time to time, by those who are authorized to control the affairs of the corporation, and the sureties in the

8. **Powers of de facto officers.**—Mining Co. v. Anglo-Californian Bank, 104 U. S. 192, 196, 26 L. Ed. 707; Porter v. Pittsburg, etc., Steel Co., 120 U. S. 649, 671, 30 L. Ed. 830.

9. **When judgment of ouster had not taken effect.**—Mining Co. v. Anglo-Californian Bank, 104 U. S. 192, 196, 26 L. Ed. 707, where it was said: "The majority of the court are of opinion that the judgment for the amount of the overdraft, with interest at the agreed rate, must stand; this, because the decree of ouster against the persons who passed the resolution of June 21, 1877, did not take effect until the succeeding day when it was actually filed with the clerk and entered on the record; and because, in the language of Mr. Justice Field, who tried the case, the 'parties ousted were officers de facto, holding under color of an election, having charge of the affairs of the company, and capable of binding it in all matters legitimately devolving upon directors of the company.'" See post, "After Decree of Ouster," V, A.

10. **De facto directors.**—Mining Co. v. Anglo-Californian Bank, 104 U. S. 192, 196, 26 L. Ed. 707.

Directors may be directors de facto, who hold themselves out to the world as such, under such circumstances that their official acts bind the corporation and all persons who claim under it. Porter v. Pittsburg, etc., Steel Co., 120 U. S. 649, 671, 30 L. Ed. 830.

11. As to bond of insurance agent, see the title **INSURANCE**, vol. 7, p. 92.

12. **Approval and acceptance and proof thereof.**—United States Bank v. Dandridge, 12 Wheat. 64, 6 L. Ed. 552. See, also, Minor v. Mechanics' Bank, 1 Pet. 46, 70, 7 L. Ed. 47; Pittsburg, etc., R. Co. v. Keokuk, etc., Bridge Co., 131 U. S. 371, 382, 33 L. Ed. 157.

13. **Presumption.**—United States Bank v. Dandridge, 12 Wheat. 64, 6 L. Ed. 552. See, also, the title **BANKS AND BANKING**, vol. 3, p. 84.

Where the officer is duly appointed, and permitted to act in his office, for a long time, under the sanction of the directors, it is not necessary that his official bond should be accepted by the board of directors as satisfactory, according to the terms of the charter, in order to enable him to enter legally on the duties of his office, or to make his sureties responsible for the nonperformance of those duties; the charter and the by-laws are to be considered, in this respect, as directory to the board, and not as conditions precedent. United States Bank v. Dandridge, 12 Wheat. 64, 6 L. Ed. 552.

The directors might have been responsible for their neglect of duty; but it was a matter wholly between themselves and the stockholders, and between the latter and the government, as a violation of the charter and by-laws. So far, indeed, as respects the sureties to the bond, they may not be responsible for any breaches

bond are presumed to enter into a contract, with reference to the rights and authorities of the president and directors, under the charter and by-laws.<sup>14</sup>

**Construction.**—While an official bond, if fairly susceptible of two constructions, is to be given that favorable to the corporation secured,<sup>15</sup> this rule cannot be availed of to refine away terms of a contract expressed with sufficient clearness to convey the plain meaning of the parties, and embodying requirements, compliance with which is made the condition to liability thereon.<sup>16</sup>

**C. Breach.**—The condition of an official bond, that the corporate officer who gives it, shall "well and truly" execute the duties of his office, includes not only honesty, but reasonable skill and diligence. If the duties are performed negligently and unskillfully; if they are violated from want of capacity, or want of care; they can never be said to have been "well and truly executed."<sup>17</sup> And the directors cannot authorize a breach of the bond.<sup>18</sup>

**Supervision and Notice of Default or Loss.**—The cases involving these questions are more conveniently treated under other titles.<sup>19</sup>

**D. Enforcement.—Of Joint and Several Bond.**—See the title BONDS, vol. 3, p. 482.

### V. Continuance, Termination or Vacation of Office.

**A. After Decree of Ouster.**—Corporate officers, holding under color of an election, although the validity of the election is disputed, continue in office and with power to act to bind the corporation until a decree removing them has actually taken effect, in this case until it was actually filed with the clerk and entered on the record, the day after it was rendered.<sup>20</sup>

of official duty, before the obligation has been accepted. But this is a very different consideration from that which respects the legal effects of the acts of the officer himself upon the interests and transactions of the corporation. *United States Bank v. Dandridge*, 12 Wheat. 64, 89, 6 L. Ed. 552.

**14. Scope of bond.**—*Minor v. Mechanics' Bank*, 1 Pet. 46, 7 L. Ed. 47. See, also, *United States v. Powell*, 14 Wall. 493, 501, 20 L. Ed. 726. See the title BANKS AND BANKING, vol. 3, p. 99.

**15. Construction.**—*American Surety Co. v. Pauly*, No. 1, 170 U. S. 133, 144, 42 L. Ed. 977; *American Surety Co. v. Pauly*, No. 2, 170 U. S. 160, 164, 168, 42 L. Ed. 987; *Guarantee Co. v. Mechanics' Sav. Bank, etc., Co.*, 183 U. S. 402, 46 L. Ed. 253.

**16. Guarantee Co. v. Mechanics' Sav. Bank, etc., Co.**, 183 U. S. 402, 419, 46 L. Ed. 253, distinguishing "Pauly's Case." See the title BANKS AND BANKING, vol. 3, p. 103.

**17. Breach.**—*Minor v. Mechanics' Bank*, 1 Pet. 46, 7 L. Ed. 47.

**18. Directors cannot authorize breach.**—No act or vote of the board of directors, in violation of their own duties, and in fraud of the rights and interests of the stockholders, will justify an officer in acts which are in violation of the stipulation in his official bond, "well and truly" to execute the duties of his office. Acts done by him, under the authority of such a vote, or of a usage permitted by the directors, in violation of the trusts assumed by them, are on the responsibility of the officer and of his sureties. *Minor v. Mechanics' Bank*, 1 Pet. 46, 7 L. Ed. 47.

**19. Liabilities and rights of sureties and surety companies.**—See the titles BANKS AND BANKING, vol. 3, p. 99, et seq.; PRINCIPAL AND SURETY, and other titles treating of the different corporations.

**Under a bond requiring notice of acts, "which may involve loss,"** when those words are taken with the words in the same sentence, "as soon as practicable after such act shall have come to the knowledge of the employer," it may well be held that the surety company did not intend to require written notice of any act upon the part of the officer that might involve loss, unless the corporation had knowledge, not simply suspicion, of the existence of such facts as would justify a careful and prudent man in charging another with fraud or dishonesty. *American Surety Co. v. Pauly*, No. 1, 170 U. S. 133, 147, 42 L. Ed. 977.

**Time for notice.**—A requirement in the bond "that the employer shall immediately give the company notice in writing of the discovery of any default or loss" ought not to receive the construction that it was intended by the parties that notice of a default should be given instantly on the discovery of a default, but that what was meant was that notice should be given within a reasonable time, having in view all the circumstances of the case. *Fidelity, etc., Co. v. Courtney*, 186 U. S. 342, 345, 46 L. Ed. 1193. See the title BANKS AND BANKING, vol. 3, pp. 102, 103.

**20. After decree of ouster.**—*Mining Co. v. Anglo-Californian Bank*, 104 U. S. 192, 26 L. Ed. 707.

Where in the afternoon of the day when



**B. After Resolution of Suspension by Board.**—The mere passage of a resolution suspending a corporate officer, does not have the effect of discharging the sureties upon his official bond from any further liability until the same is put into actual effect by the removal of the officer from the discharge of his duties.<sup>21</sup>

**C. Contract to Retain in Office.**—An agreement by a director of a corporation to keep a person permanently as an officer thereof, was one on the part of the director whereby he might be required to act contrary to the duty which, as an officer of the company, he owed to that company and to the stockholders other than the plaintiff. The same rule which is applicable to the case of a public office applies to the present case, although it does not appear that the promisor was to receive direct personal pecuniary compensation or gain for what he was to do.<sup>22</sup>

**D. Resignation.**—See the title BANKS AND BANKING, vol. 3, p. 84.

## VI. Powers.

**A. In General**—1. POWER TO ACT FOR AND BIND CORPORATION.—See post, "Liability of Corporation for Acts of Officers and Agents, and Rights Thereunder," IX.<sup>23</sup>

2. MODE OF ACTION—*a. Directory Provisions of Charter and By-Laws.*—Noncompliance with merely directory provisions of the charter and by-laws, while possibly subjecting the officers to responsibility, will not affect the validity of their acts as to third persons.<sup>24</sup>

*b. Necessity for Seal.*—See the title CORPORATIONS, vol. 4, p. 648, et seq. See, also, ante, "In General," III, A.<sup>25</sup>

the decision was announced, the directors whose removal was declared thereby, met as a board, and a resolution was adopted authorizing the president and secretary to execute, in behalf of the company, to settle an overdrawn bank account, a note with interest at a rate greater than could be demanded unless upon an express contract therefor in writing; held, that the parties ousted were still de facto directors, and the note so executed was binding on the company. *Mining Co. v. Anglo-Californian Bank*, 104 U. S. 192, 26 L. Ed. 707. See ante, "Powers," III, C, 2.

**21. After resolution of suspension by board.**—*McGill v. United States Bank*, 12 Wheat. 511, 6 L. Ed. 711.

**22. Contract to retain in office.**—*West v. Camden*, 135 U. S. 507, 520, 34 L. Ed. 254.

"The principle involved is well settled in regard to public employments. *Me-guire v. Corwine*, 101 U. S. 108, 111, 25 L. Ed. 899; *Oscanyan v. Arms Co.*, 103 U. S. 261, 272, 273, 26 L. Ed. 539. The same doctrine has been applied to the directors of a private corporation, charged with duties of a fiduciary character to private parties, on the view that it is public policy to secure fidelity in the discharge of such duties. *Wardell v. Railroad Co.*, 103 U. S. 651, 658, 26 L. Ed. 509; *Woodstock Iron Co. v. Richmond, etc.*, *Extension Co.*, 129 U. S. 643, 32 L. Ed. 1819, and cases there cited." *West v. Camden*, 135 U. S. 507, 521, 34 L. Ed. 254. See, also, the title ILLEGAL CONTRACTS, vol. 6, p. 447.

**23. Representation of corporation by**

**officers and agents.**—See the title CORPORATIONS, vol. 4, p. 722.

As to management for corporation as distinct entity, see the title CORPORATIONS, vol. 4, p. 726. See, also, p. 633.

**24. Directory provisions of charter and by-laws.**—*United States Bank v. Dandridge*, 12 Wheat. 64, 79, 6 L. Ed. 552.

"That some of the provisions of the charter and by-laws may well be deemed directory to the officers, and not conditions without which their acts would be utterly void, will scarcely be disputed. What are to be deemed such provisions, must depend upon the sound construction of the nature and object of each regulation, and of public convenience, and apparent legislative intention. If a regulation be merely directory, then any deviation from it, though it may subject the officers to responsibility both to the government and the stockholders, cannot be taken advantage of by third persons. *United States v. Kirkpatrick*, 9 Wheat. 720, 6 L. Ed. 199; *United States v. Vanzandt*, 11 *Ibid.* 184." *United States Bank v. Dandridge*, 12 Wheat. 64, 79, 6 L. Ed. 552. See, also, post, "Mode and Locality of Action," VI, B, 1, d. See the title CORPORATIONS, vol. 4, pp. 724, 725.

**25. Assignment of patent.**—Where, on account of the want of the corporate seal and of the manner of its execution, it is insisted that an assignment of a patent declared to be in behalf of a corporation and officially signed by S. as president, was not the transfer of the company, but the personal deed of S., there is no ground



c. *Locality of Action*.—It may authorize its agents to act for it without as well as within the state.<sup>26</sup>

3. EVIDENCE AND PRESUMPTIONS—*a. Of Authority*.—If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed.<sup>27</sup>

**As Question of Law or Fact**.—Where only one inference can be drawn from the evidence, the question of the existence of the authority is one of law, otherwise one of fact for the jury.<sup>28</sup>

**Record Evidence Not Essential**.—And the existence of the requisite authority from the corporation need not be shown by the official record of the proceedings of the governing board, in the absence of statutory requirement. It may be proved by other evidence or presumed from circumstances.<sup>29</sup>

whatever for this contention to stand on. Assignments of patents are not required to be under seal. The statute regulating their transfer simply provides that "every patent, or any interest therein, shall be assignable in law by an instrument in writing." 16 Stat. p. 203, § 36; Rev. Stat., § 4898. *Gottfried v. Miller*, 104 U. S. 521, 527, 26 L. Ed. 851.

**26. Locality of action**.—A corporation's officers and agents constitute all that is visible of its existence; and they may be authorized to act for it without as well as within the state. There would seem, therefore, to be no sound reason why, to the extent of their agency, they should not be equally deemed to represent it in the states for which they are respectively appointed when it is called to legal responsibility for their transactions. *St. Clair v. Cox*, 106 U. S. 350, 355, 27 L. Ed. 222; *Galveston Railroad v. Cowdrey*, 11 Wall. 459, 477, 20 L. Ed. 199. See, also, post, "Mode and Locality of Action," VI, B, 1, d.

**27. Evidence and presumption of authority**.—*United States Bank v. Dandridge*, 12 Wheat. 64, 70, 6 L. Ed. 552; *Sun Printing, etc., Ass'n v. Moore*, 183 U. S. 642, 649, 46 L. Ed. 366; *Insurance Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 689; *Commercial, etc., Ins. Co. v. Union Mut. Ins. Co.*, 19 How. 318, 15 L. Ed. 636.

In short the acts of artificial persons afford the same presumptions as the acts of natural persons. Each affords presumptions, from acts done, of what must have preceded them, as matters of right, or matters of duty. *United States Bank v. Dandridge*, 12 Wheat. 64, 70, 6 L. Ed. 552; *Pittsburg, etc., R. Co. v. Keokuk, etc., Bridge Co.*, 131 U. S. 371, 382, 33 L. Ed. 157. See, also, post, "Ratification and Estoppel to Deny Authority," VI, A, 5. See the title BANKS AND BANKING, vol. 3, p. 20.

Evidence of powers habitually exercised by an officer of a corporation with its knowledge and acquiescence, defines and establishes, as to the public, those powers, provided that they be such as the directors of the corporation may,

without violation of its charter, confer on such officer. *Merchants' Bank v. State Bank*, 10 Wall. 604, 19 L. Ed. 1008. See, also, *Putnam v. United States*, 162 U. S. 687, 713, 40 L. Ed. 1118; *Creswell v. Lanahan*, 101 U. S. 347, 351, 25 L. Ed. 853.

**28. As question of law or fact**.—Upon an inquiry whether the evidence is sufficient upon which a jury might be permitted to base an inference that the officer had the necessary authority to act for the company in this business, if different inferences might fairly be drawn from the evidence by reasonable men, then the jury should be permitted to choose for themselves, but if only one inference could be drawn from the evidence, and that is a want of authority, then the question is a legal one for the court to decide. *Washington Gas Light Co. v. Lansden*, 172 U. S. 534, 545, 43 L. Ed. 543.

**29. Record evidence not essential**.—*Mining Co. v. Anglo-Californian Bank*, 104 U. S. 192, 194, 26 L. Ed. 707; *Jacksonville, etc., Nav. Co. v. Hooper*, 160 U. S. 514, 522, 40 L. Ed. 515; *Fleckner v. United States Bank*, 8 Wheat. 338, 357, 5 L. Ed. 631; *Mammoth Min. Co. v. Salt Lake, etc., Mach. Co.*, 151 U. S. 447, 38 L. Ed. 229.

A resolution or order in writing by the trustees or board of directors is not essential. *Eureka Co. v. Bailey Co.*, 11 Wall. 488, 491, 20 L. Ed. 209. See, also, ante, "In General," III, A.

**Of president**.—See post, "Burden of Proof and Sufficiency of Evidence," VI, C, 1, d.

**President and secretary**.—"And the finding that 'no resolution or special authority of the defendant was shown authorizing its president and secretary, or either of them, to overdraw its account in bank,' fairly interpreted, means nothing more than that no proof was made, either way, on that point. It does not necessarily imply that resolution to that effect was not, in fact, passed, nor that such special authority was not, in effect, given. The meagre evidence upon which, ac-

b. *Of Action for Corporation*.—Record evidence of the action of corporate officers or agents in behalf of the corporation is not essential in order to bind the corporation, but any evidence that is the best the nature of the case admits of, is competent.<sup>30</sup>

**Presumptions.**—See post, "Ratification and Estoppel to Deny Authority," VI, A, 5.

4. LIMITATIONS ON POWERS AND NOTICE THEREOF.—a. *In General*.—It is competent for any corporation employing an agent in the negotiation of a contract, whether of insurance or otherwise, to limit his powers, provided the limitation is brought home to the knowledge of the other contracting party, otherwise the principal will be bound by the apparent as well as the actual powers of the agent; and as, in this case, the limitation was made a part of the contract between the parties, it was binding upon them.<sup>31</sup>

b. *Imputed Knowledge of Limitations*.—But knowledge of limitations imposed by the act of incorporation is imputed to those dealing with corporate officers and agents,<sup>32</sup> and where transactions are much out of the course of ordinary and legitimate business, those so dealing with the corporation officers or agents are bound to see to it that the officer or agent acting for the corporation had special

cording to the special finding, the case was tried below, is \* \* \* insufficient to overturn the presumptions which should be indulged in favor as well of the bank as of the integrity and fidelity of the officers of the mining company." *Mining Co. v. Anglo-Californian Bank*, 104 U. S. 192, 196, 26 L. Ed. 707. See, also, post, "Of President and Secretary," VI, D.

30. **Record evidence of action for corporation not essential.**—*United States Bank v. Dandridge*, 12 Wheat. 64, 74, 6 L. Ed. 552; *Fleckner v. United States Bank*, 8 Wheat. 338, 357, 5 L. Ed. 631. See *Jacksonville, etc., Nav. Co. v. Hooper*, 160 U. S. 514, 522, 40 L. Ed. 515.

"In reason and justice, there does not seem any solid ground, why a corporation may not, in case of the omission of its officers to preserve a written record, give such proofs to support its rights, as would be admissible in suits against it, to support adverse rights. The true question in such case would seem to be, not which party was plaintiff or defendant, but whether the evidence was the best the nature of the case admitted of, and left nothing behind in possession or control of the party, higher than secondary evidence." *United States Bank v. Dandridge*, 12 Wheat. 64, 74, 6 L. Ed. 552, followed in *Minor v. Mechanics' Bank*, 1 Pet. 46, 70, 7 L. Ed. 47, where it was said that the circumstances were far more cogent than there to found a presumption of the official acts of the board, and if "the usage and practice alluded to, in the instruction, were within the legitimate authority of the board, and such as its written vote might justify, there would be no question, in this court, that it ought to have been given" *Minor v. Mechanics' Bank*, 1 Pet. 46, 70, 7 L. Ed. 47.

It is the law of Massachusetts that inferences may be drawn from corporate acts, tending to prove a contract or

promise, as well as in the case of an individual; and that a vote is not always necessary to establish such contract or promise. *United States Bank v. Dandridge*, 12 Wheat. 64, 73, 6 L. Ed. 552.

31. **Limitations and notice thereof.**—*New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 524, 29 L. Ed. 934; *Hubbard v. Tod*, 171 U. S. 474, 499, 43 L. Ed. 246.

Unless instructions limiting the authority of a general agent of a corporation, whose powers would otherwise be coextensive with the business intrusted to him, are communicated to the party with whom he deals, the company is bound to the same extent as though such special instructions had not been given. *Insurance Co. v. McCain*, 96 U. S. 84, 24 L. Ed. 653.

**Of president's authority.**—See post, "Secret Limitations," VI, C, 1, b.

**Of directors' authority.**—See post, "General Scope and Limitations," VI, B, 1, b.

32. **Limitations imposed by charter.**—*Pearce v. Madison, etc., R. Co.*, 21 How. 441, 443, 16 L. Ed. 184; *United States v. Robertson*, 5 Pet. 641, 666, 8 L. Ed. 257, per Baldwin, J., dissenting; *Scovill v. Thayer*, 105 U. S. 143, 151, 26 L. Ed. 968; *Zabriskie v. Cleveland, etc., R. Co.*, 23 How. 381, 16 L. Ed. 488.

"Persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation. Their powers are conceded in consideration of the advantage the public is to receive from their discreet and intelligent employment, and the public have an interest that neither the managers nor stockholders of the corporation shall transcend their authority." *Pearce v. Madison, etc., R. Co.*, 21 How. 441, 443, 16 L. Ed. 184. See, also, *Louisville, etc., R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 571, 43 L. Ed. 1081. See the title CORPORATIONS, vol. 4, p. 676.



authority therefor.<sup>33</sup>

c. *Revocation*.—Persons who deal with an officer or agent of a corporation with certain powers, before notice of the recall of his powers, are not affected by the recall.<sup>34</sup>

5. **RATIFICATION AND ESTOPPEL TO DENY AUTHORITY.**—And it is settled law that the existence of the requisite authority in subordinate officers may, in the absence of express statutory prohibition, be shown otherwise than by the official record of the proceedings of the board. It may be established by proof of the course of business between the parties themselves; by the usages and practice which the company may have permitted to grow up in its business; and by the knowledge which the board, charged with the duty of controlling and conducting the transaction and property of the corporation, had, or must be presumed to have had, of the acts and doings of its subordinates in and about the affairs of the corporation.<sup>35</sup> And the same presumptions of regularity, applied to individ-

**33. Extraordinary powers.**—*Western Nat. Bank v. Armstrong*, 152 U. S. 346, 351, 38 L. Ed. 470.

Persons dealing with a corporation are presumed to know the extent of the general powers of the officers. *Western Nat. Bank v. Armstrong*, 152 U. S. 346, 352, 38 L. Ed. 470. See, also, dissenting opinion in *Humboldt Tp. v. Long*, 92 U. S. 642, 648, 23 L. Ed. 752.

And the fact that the charter declares that "all the corporate powers of the said corporation shall be vested in and exercised by a board of directors and such officers and agents as said board shall appoint" does not alter the case. The powers thus granted to the directors, etc., refer to the ordinary business transactions of the corporation. *Railway Co. v. Allerton*, 18 Wall. 233, 21 L. Ed. 902.

**Powers of agent.**—Where a power exercised by the agent of a corporation in making a contract, was liable to two objections—it was ultra vires, and it was a fraud as respects the company—and the other party must have known that no agent had any authority to enter into such an arrangement, and he was a party to the fraud, no valid contract as to the company could arise from such a transaction. *Hoffman v. Hancock, etc., Ins. Co.*, 92 U. S. 161, 165, 23 L. Ed. 539.

**Power to contract to transmit money for United States.**—No authority short of the most certain should be taken to establish the representative character of any one for a private company or corporation to enter into a contract with the secretary of the treasury for the transmission of money, free of charge, to those posts where the United States should designate it to be put. *United States v. City Bank*, 21 How. 356, 366, 16 L. Ed. 139. See the title **BANKS AND BANKING**, vol. 3, p. 90.

As to ultra vires contracts generally, see the title **CORPORATIONS**, vol. 4, p. 621.

**34. Revocation and notice thereof.**—*Hatch v. Coddington*, 95 U. S. 48, 56, 24 L. Ed. 339.

**Presumption of continuance.**—A corporation cannot hold out a person as its

agent, and then disavow responsibility for his acts. Persons dealing with him in the particular business for which he was appointed have a right to rely upon the continuance of his authority, until in some way informed of its revocation. *Insurance Co. v. McCain*, 96 U. S. 84, 24 L. Ed. 653.

**President's authority.**—See post, "To Borrow Money and Give Necessary Securities," VI, C, 4.

**35. Ratification and estoppel to deny authority.**—*Mining Co. v. Anglo-Californian Bank*, 104 U. S. 192, 194, 26 L. Ed. 707. See, also, *Martin v. Webb*, 110 U. S. 7, 14, 28 L. Ed. 49; *Sun Printing, etc., Ass'n v. Moore*, 183 U. S. 642, 650, 46 L. Ed. 366; *Potts v. Wallace*, 146 U. S. 689, 706, 36 L. Ed. 1135; *Minor v. Mechanics' Bank*, 1 Pet. 46, 7 L. Ed. 47; *Case v. Bank*, 100 U. S. 446, 25 L. Ed. 695.

Where the officer was held out to the world as competent to do what he did, and it was done in conformity to the established usage of the company in all such cases, under such circumstances, the institution cannot be permitted to deny that he had all such powers as he habitually exercised, and thus assumed to have. *Creswell v. Lanahan*, 101 U. S. 347, 351, 25 L. Ed. 853; *Merchants' Bank v. State Bank*, 10 Wall. 604, 19 L. Ed. 1008; *Hubbard v. Tod*, 171 U. S. 474, 496, 43 L. Ed. 246; *Putnam v. United States*, 162 U. S. 687, 713, 40 L. Ed. 1118. See the title **BANKS AND BANKING**, vol. 3, p. 85.

And where the company was concluded, the commissioners appointed to wind up its affairs can be in no better position. They, like assignees in bankruptcy, can have no rights, legal or equitable, but those of the insolvent party whom they represent. *Creswell v. Lanahan*, 101 U. S. 347, 352, 25 L. Ed. 853, citing *Gibson v. Warden*, 14 Wall. 244, 20 L. Ed. 797.

**Disaffirmance must be prompt.**—"The rule of law upon the subject of the disaffirmance or ratification of the acts of an agent required that if they had the right to disaffirm it they should do it promptly, and, if after a reasonable time they did not so disaffirm it, a ratification would be



uals, are applicable to corporations.<sup>36</sup>

**Ratification.**—Like an individual, a corporation may ratify the acts of its agents done in excess of authority, and such ratification may, in many cases, be

presumed." *Indianapolis Rolling Mill v. St. Louis, etc., Railroad*, 120 U. S. 256, 259, 30 L. Ed. 639. See, also, ante, "Evidence and Presumptions," VI, A, 3.

**Of secretary and treasurer.**—Where S., as secretary and treasurer, was the person who was actively engaged in the management of the affairs of the Union Loan & Trust Company, and held out to the public as having unlimited authority to manage its business and dispose of any of its securities, and he endorsed in the company's name every note it put out, signed every letter that it wrote, and was, as respected the public, the Trust Company itself; in any view S.'s acts in the company's behalf must be held to have been performed with the actual or implied authority of the directors. *Hubbard v. Tod*, 171 U. S. 474, 496, 43 L. Ed. 246.

**Of vice-president.**—And where throughout all the transactions S.'s conduct conceded that G., the vice-president, was the lawful holder of the stock and bonds tendered by him as collateral to the loans he negotiated, and as such officer, he directly transmitted the securities of the Sioux City & Northern Railroad Company to New York, and likewise the \$1,433,000 of Nebraska & Western bonds to G. at Omaha, to be delivered to the agent of Tod & Co., under the contract for the million dollar loan, and to be turned into court in carrying out the reorganization scheme in accordance with which the Sioux City, O'Neill & Western bonds were to be issued, held that it appears indisputable on the face of this record that G. was entrusted, according to the understanding of all parties, with the right to sell the Sioux City & Northern bonds; that the Union Loan & Trust Company received the proceeds of a million dollars of those bonds, thus ratifying the transaction; and that the proceeds of the balance were applied with S.'s knowledge, without objection on his part, or that of any other officer or director of the trust company, to taking up notes secured thereby, which had been given by G. to acquire the Nebraska & Western bonds, which he afterwards pledged to Tod & Co., and which were exchanged for the bonds of the Sioux City, O'Neill & Western Railroad in controversy. *Hubbard v. Tod*, 171 U. S. 474, 496, 43 L. Ed. 246.

None of the securities ever stood in the name of the Union Loan & Trust Company. And they were delivered in such form as to enable G. to hold himself out as the owner or lawful holder thereof, with full power of disposition. *Hubbard v. Tod*, 171 U. S. 474, 497, 43 L. Ed. 246.

The mere fact that a person negotiating securities, with apparently full au-

thority to do so, was one of the officers of a corporation which was a pledgee thereof, was not in itself sufficient to call for an inference that he was acting as such in these transactions, there being nothing to indicate such interest and affect the takers of such securities with notice of the trust. *Hubbard v. Tod*, 171 U. S. 474, 499, 43 L. Ed. 246.

**Liability on quantum meruit.**—Where a corporation was sued upon a quantum meruit, alleging a contract to pay therefor by an agent of the corporation, the contract spoken of being for a compensation on a quantum meruit, and not for a specified price, it is immaterial whether the agent had such an authority or not. If, as the representative of the company, he had made no express promise to pay, the law would imply one, there being no question as to his power to direct the work, and no claim that he exceeded his authority in such direction. *Henderson Bridge Co. v. McGrath*, 134 U. S. 260, 276, 33 L. Ed. 934.

**Authority of solicitor.**—"A solicitor for a corporation may certainly consent to whatever his client authorizes, and in this case it distinctly appears of record that the company assented through its solicitor. This is equivalent to a direct finding by the court as a fact that the solicitor had authority to do what he did, and binds us on an appeal so far as the question is one of fact only. The remedy for the fraud or unauthorized conduct of a solicitor, or the officers of the corporation, in such a matter, is by an appropriate proceeding in the court where the consent was received and acted on, and in which proof may be taken and the facts ascertained." *Pacific Railroad v. Ketchum*, 101 U. S. 289, 296, 25 L. Ed. 932. See the titles ATTORNEY AND CLIENT, vol. 2, p. 703; STOCK AND STOCKHOLDERS.

**36. Presumptions.**—*United States Bank v. Dandridge*, 12 Wheat. 64, 70, 6 L. Ed. 552.

"In the *Dandridge* case, speaking through Mr. Justice Story, the court said (p. 69): 'By the general rules of evidence, presumptions are continually made in cases of private persons of acts even of the most solemn nature, when those acts are the natural result or necessary accompaniment of other circumstances.' After illustrating the application of the principle to cases of public duty and many others, it was said (p. 70): 'The same presumptions are, we think, applicable to corporations. Persons acting publicly as officers of the corporation are to be presumed rightfully in office; acts done by the corporation, which presuppose the existence of other acts to make them legally operative, are presumptive

inferred from acquiescence in those acts, as well as from express adoption.<sup>37</sup>

**Acceptance of Benefits.**—A corporation may become liable upon contracts assumed to have been made in its behalf by an unauthorized agent by appropriat-

proofs of the latter. Grants and proceedings beneficial to the corporation are presumed to be accepted; and slight acts on their part, which can be reasonably accounted for only upon the supposition of such acceptance, are admitted as presumptions of the fact. If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. If a person acts notoriously as cashier of a bank, and is recognized by the directors, or by the corporation, as an existing officer, a regular appointment will be presumed; and his acts, as cashier, will bind the corporation, although no written proof is or can be adduced of his appointment." *Sun Printing, etc., Ass'n v. Moore*, 183 U. S. 642, 649, 46 L. Ed. 366. See, also, *Jacksonville, etc., Nav. Co. v. Hooper*, 160 U. S. 514, 519, 40 L. Ed. 515, and cases cited; *Pittsburg, etc., R. Co. v. Keokuk, etc., Bridge Co.*, 131 U. S. 371, 382, 33 L. Ed. 157; *Keely v. Sanders*, 99 U. S. 441, 447, 25 L. Ed. 327. See ante, "Evidence and Presumptions," VI, A, 3.

"The case of the *Bank v. Patterson*, in this court (7 Cranch 299, 3 L. Ed. 351), did not call for any expression of opinion upon the particular point now under consideration; but the court there held, that from the evidence in that case, the jury might legally infer an express or an implied promise of the corporation. The court there said, 'the contracts were for the exclusive use and benefit of the corporation, and made by their agents, for purposes authorized by the charter. The corporation proceeded, on the faith of those contracts, to pay money, from time to time, to the intestate. Although, then, an action might have lain against the committee personally (for the contract was a personal contract by them, under their private seals), upon their express contract, yet, as the whole benefit resulted to the corporation, it seems to the court that from this evidence the jury might legally infer that the corporation had adopted the contracts of the committee, and had voted to pay the whole sum which should become due under the contracts, and that the intestate had expected their engagement.' Here, then, secondary evidence and presumptive proof was admitted in a suit against the corporation, to fix its responsibility. A vote of the corporation was presumed from other acts, though there was no proof of such a vote being on record." And so even if the absence of such recorded votes were

shown. *United States Bank v. Dandridge*, 12 Wheat. 64, 73, 6 L. Ed. 552. See, also, *Pittsburgh, etc., R. Co. v. Keokuk, etc., Bridge Co.*, 131 U. S. 371, 381, 33 L. Ed. 157. See, also, ante, "Evidence and Presumptions," VI, A, 3.

**37. Ratification.**—*Supervisors v. Schenck*, 5 Wall. 772, 782, 18 L. Ed. 556; *United States Bank v. Dandridge*, 12 Wheat. 64, 70, 6 L. Ed. 552; *Martin v. Webb*, 110 U. S. 7, 14, 28 L. Ed. 49; *Potts v. Wallace*, 146 U. S. 689, 706, 36 L. Ed. 1135; *Railroad Co. v. Howard*, 7 Wall. 392, 415, 19 L. Ed. 117.

Such ratification may be by express consent, or by acts and conduct of the principal inconsistent with any other hypothesis than that he approved, and intended to adopt, what had been done in his name; and it was held in *Peterson v. The Mayor of New York*, that the principle is as applicable to corporations as to individuals. Where the officers of the corporation openly exercise powers affecting the interests of third persons, which presupposes a delegated authority for the purpose, and other corporate acts subsequently performed show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. *Supervisors v. Schenck*, 5 Wall. 772, 782, 18 L. Ed. 556; *United States Bank v. Dandridge*, 12 Wheat. 64, 70, 6 L. Ed. 552; *Martin v. Webb*, 110 U. S. 7, 14, 28 L. Ed. 49; *Jacksonville, etc., Nav. Co. v. Hooper*, 160 U. S. 514, 40 L. Ed. 515. See, also, *Pacific Railroad v. Ketchum*, 101 U. S. 289, 296, 25 L. Ed. 932; *Whitney v. Wyman*, 101 U. S. 392, 397, 25 L. Ed. 1050.

Where a contract appears on its face to have been duly executed, and the parties have entered upon its execution, necessarily with full knowledge on the part of the board of directors of the company, the board would be presumed to have ratified it, although it in fact took no affirmative action in the matter. *Union Pac. R. Co. v. Chicago, etc., R. Co.*, 163 U. S. 564, 596, 41 L. Ed. 265; *Pittsburgh, etc., R. Co. v. Keokuk, etc., Bridge Co.*, 131 U. S. 371, 381, 33 L. Ed. 157.

And where an agent of a corporation without authority borrows moneys in the name of his principal, and the latter, when they have been applied to his use and payment is demanded of him, fails, within a reasonable time thereafter, to disavow the act of his agent, the jury is authorized to consider the principal as assenting to what was done in his name. *Gold-Mining Co. v. National Bank*, 96 U. S. 640, 24 L. Ed. 648.

The law on the silence of the company,



ing and retaining, with knowledge of the facts, the benefits of the contracts so made on its behalf.<sup>38</sup>

6. **TO BORROW MONEY AND EXECUTE SECURITIES THEREFOR.**—A general power conferred upon the agent of a corporation to borrow money on its behalf, in such sums, for such length of time, and at such a rate of interest as he may think proper, and to purchase appropriate supplies, etc., on such terms as he may deem advisable, and, in order so to do, to make, execute, and deliver obligations, bills of exchange, contracts, and agreements of the company, includes authority to give to the lender of the money borrowed, or to the seller of the things purchased, the ordinary securities.<sup>39</sup>

after receiving a statement of the agent as to his acts, is free from doubt. Silence, then, is equivalent to an adoption of the act of the agent, and closed the mouth of the principal ever afterwards. *Insurance Co. v. McCain*, 96 U. S. 84, 86, 24 L. Ed. 653.

**Ultra vires guaranty.**—See the title CORPORATIONS, vol. 4, p. 749.

**Express ratification.**—It was held in *Union Pac. R. Co. v. McAlpine*, 129 U. S. 305, 311, 32 L. Ed. 673, that the record of the board of directors of the Kansas Pacific Railway Company of the 28th of June, 1878, measured and fixed the limits of the liabilities and obligations of that company under an agreement for the exchange of land negotiated by the officers of the company previously thereto. It shows a ratification of the past negotiations between the other parties and the company for the exchange.

And a corporate resolution by the board of directors, which contains, either in its body or its preamble, nothing which denies that the contract to which it refers had been made, or asserts that no obligation had been assumed, but on the contrary, all its language is appropriate to a contract perfected, is an admission that the company had confirmed and accepted it. It speaks of the contract as made, not merely proposed, and asserts an impossibility to comply with its terms, not of an impossibility to enter into the engagement. All this is plain recognition of the contract as a binding obligation, and an assertion of a wish to obtain a release from it. *Hatch v. Coddington*, 95 U. S. 48, 57, 24 L. Ed. 339.

38. **Acceptance of benefits.**—*Western Nat. Bank v. Armstrong*, 152 U. S. 346, 352, 38 L. Ed. 470.

"And when a contract is made by any agent of a corporation in its behalf, and for a purpose authorized by its charter, and the corporation receives the benefit of the contract, without objection, it may be presumed to have authorized or ratified the contract of its agent. *Bank v. Patterson*, 7 Cranch 299, 3 L. Ed. 351; *United States Bank v. Dandridge*, 12 Wheat. 64, 6 L. Ed. 552; *Zabriskie v. Cleveland*, etc., R. Co., 23 How. 381, 16 L. Ed. 488; *Gold-Mining Co. v. National Bank*, 96 U. S. 640, 24 L. Ed. 648; *Pneumatic Gas Co. v. Berry*, 113 U. S. 322, 327, 28 L. Ed. 1003. This doctrine was clearly

and strongly stated by Mr. Justice Story, delivering the judgment of this court, in each of the first two of the cases just cited." *Pittsburgh, etc., R. Co. v. Keokuk, etc., Bridge Co.*, 131 U. S. 371, 381, 33 L. Ed. 157. See, also, *Fidelity, etc., Co. v. Courtney*, 186 U. S. 342, 350, 46 L. Ed. 1193.

Where all the parties engaged in the transaction and the privies were agents of the corporation, if there were any defect of authority on their part, the retention and enjoyment of the proceeds of the transaction by their principal constituted an acquiescence as effectual as would have been the most formal authorization in advance, or the most formal ratification afterwards. *People's Bank v. National Bank*, 101 U. S. 181, 183, 25 L. Ed. 907. See the title CORPORATIONS, vol. 4, p. 751.

And where the contract in question was within the legitimate scope of the powers of the company, was executed by that officer of the company who by the by-laws was the proper agent to perform such function, and as the company went into possession of and received the rents and profits of the hotel, the company was bound thereby, even if the minutes of the company fail to disclose authority expressly given to the president to execute the contract. *Jacksonville, etc., Nav. Co. v. Hooper*, 160 U. S. 514, 522, 40 L. Ed. 515.

**Of directors.**—See post, "Acquiescence and Estoppel of Corporation," VI, B, 1, c; "Loan to Corporation," VI, B, 1, e, (6).

**Of president.**—See post, "Disaffirmance by Board and Time Therefor," VI, C, 1, c.

**Estoppel.**—See the titles CORPORATIONS, vol. 4, p. 747; ESTOPPEL, vol. 5, p. 1000.

**Presumption of continuance.**—See ante, "Revocation," VI, A, 4, c.

39. **To borrow money and execute securities therefor.**—*Hatch v. Coddington*, 95 U. S. 48, 24 L. Ed. 339. See, also, *Fitzgerald, etc., Const. Co. v. Fitzgerald*, 137 U. S. 98, 34 L. Ed. 608. See the title CORPORATIONS, vol. 4, p. 738.

**Powers of president.**—See post, "To Borrow Money and Give Necessary Securities," VI, C, 4.

**Powers of directors.**—See post, "To Borrow Money and Control Finances,"



7. PURCHASE OF PROPERTY FROM CORPORATION.—Where the corporation acquiesced in the sale of its property to its officers, and confirmed it, the conveyance, which, perhaps, might have been set aside had the company seen fit, became absolute as between the parties and carried the title. It is as valid between the parties as if the corporation had conveyed to a stranger. One who then becomes a creditor, and afterwards obtains judgment, and simply makes a levy, cannot come into court and ask its aid to remove this cloud from its title.<sup>40</sup> And the right to avoid the sale must be exercised within a reasonable time.<sup>41</sup>

VI, B, 2. See, also, post, "For Contracts and Instruments in Name of Corporation," IX, B.

40. Purchase of property from corporation.—*Graham v. Railroad Co.*, 102 U. S. 148, 159, 26 L. Ed. 106.

Supposing it be true that the purchase of the lands in question by or for the benefit of officers of the company actively concerned in the transaction could be set aside at the instance of the company as a constructive fraud, yet if there was no actual fraud; if the company received full consideration for the property sold; it cannot be said that subsequent creditors of the company are injured. It would be unjust and a great hardship, therefore, on the mere ground of the constructive fraud, to allow creditors who had no interest at the time to seize and dispose of the property sold, whatever might be the rule as to existing creditors. *Graham v. Railroad Co.*, 102 U. S. 148, 160, 26 L. Ed. 106. See, also, post, "Fiduciary Relation," VIII, A, 2.

By president.—Thus it was held in *McKittrick v. Arkansas Cent. R. Co.*, 162 U. S. 473, 497, 38 L. Ed. 518, that, if the sale of the road was not "brought about" by J., its president, in violation of his duty as an officer of the company, his official relations to the company prior to the foreclosure did not prevent him from bidding for the property, or from being interested in its purchase by H., trustee. So far as is disclosed by the bill, the sale, under the decree in the suit brought by the Union Trust Company, was fairly conducted, with full opportunity to all persons to become bidders.

The charge that the president "brought about" the foreclosure of a mortgage on the corporate property, where it is not suggested that the same could have been prevented by him or any one else, does not necessarily impute to him any fraud of which the general creditors of the company could complain, or which would affect the integrity of the purchase at the sale in the foreclosure suit. *McKittrick v. Arkansas Cent. R. Co.*, 152 U. S. 473, 497, 38 L. Ed. 518.

Nor is the fact that J. was the holder of receiver's certificates, which became a charge upon the property superior to the mortgage bonds in suit, material in the present inquiry; for it does not appear that, if there had been no such certificates in existence, anything would have been left for the general creditors of the rail-

way company after satisfying the holders of mortgage bonds. There is no suggestion in the bill that any receiver's certificates were issued that ought not to have been issued, or in respect to which the court was not fully informed. The mere fact that J. obtained receiver's certificates—even assuming that his ownership of them was inconsistent with the relations he held to the mortgaged property—does not affect the validity or integrity of the foreclosure proceedings and the sale of the property under the decree of the court. *McKittrick v. Arkansas Cent. R. Co.*, 152 U. S. 473, 497, 38 L. Ed. 518. See, also, post, "Of President," VIII, C.

By director.—And see *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 323, where it is held that a director of a corporation is not prohibited from lending it moneys when they are needed for its benefit, and the transaction is open, and otherwise free from blame; nor is his subsequent purchase of its property at a fair public sale by a trustee, under a deed of trust executed to secure the payment of them, invalid. See, also, *James v. Railroad Co.*, 6 Wall. 752, 18 L. Ed. 885, where the purchase of the corporate property by the directors at foreclosure sale, was held fraudulent. See post, "Directors as Trustees," VIII, B, 2.

Receiver and general manager.—See *Farley v. Kittson*, 120 U. S. 303, 318, 28 L. Ed. 684, where it was held that the question whether, by reason of the plaintiff's position as receiver and general manager of the railroads, his entering into the agreement sued on, and engaging in the enterprise of purchasing the bonds and thereby acquiring the railroads, were unlawful, and entitled him to the aid of a court of equity to enforce the agreement or any rights growing out of it, the principal question considered by the court below and argued at the bar, was not presented in a form to be decided upon the record. See, also, post, "Fiduciary Relation," VIII, A, 2.

41. Time for avoidance.—The right of a corporation to avoid the sale of its property by reason of the fiduciary relations of the purchaser must be exercised within a reasonable time after the facts connected therewith are made known, or can by due diligence be ascertained. As the courts have never prescribed any specific period as applicable to every case like the statute of limita-

8. **DEALINGS WITH CORPORATION.**—See post, "Contracts and Dealings with Corporation," VI, B, 1, e; "Of President," VIII, C.

**B. Of Directors**—1. **IN GENERAL**—a. *Relation to Corporation One of Agency.*—The directors of a corporation are its chartered agents.<sup>42</sup>

b. *General Scope and Limitations.*—However broad and general the powers of the directors may be by the general language of the charter and by-laws, those powers are not unlimited, but must receive a rational exposition.<sup>43</sup> They must

tions, the determination as to what constitutes a reasonable time in any particular case must be arrived at by a consideration of all its elements which affect that question. *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328. See, also, *Indianapolis Rolling Mill v. St. Louis, etc., Railroad*, 120 U. S. 256, 259, 30 L. Ed. 639.

The property in controversy in this suit had been appropriated and used for the production of mineral oil from wells—a species of property which is, more than any other, subject to rapid, frequent, and extreme fluctuations in value. The director who bought it committed no actual fraud, and the corporators knew at the time of his purchase all the facts upon which their right to avoid it depended. They refused to join him in it, or to pay assessments then made on their stock; and it was nearly four years thereafter when the hazard was over, and his skill, energy, and money had made his investment profitable, that any claim to, or assertion of right in, the property was made by the corporation or the stockholders. Held, that the court below properly dismissed the bill of complaint of the corporation, praying that the purchaser should be decreed to hold as its trustee, and to account for the profits during the time he had the property. *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328.

42. **Relation to corporation one of agency.**—United States *v. Robertson*, 5 Pet. 641, 666, 8 L. Ed. 257, per Baldwin, J., dissenting; *Fleckner v. United States Bank*, 8 Wheat. 338, 357, 5 L. Ed. 631; *Union Pac. R. Co. v. McAlpine*, 129 U. S. 305, 311, 32 L. Ed. 673; *Mining Co. v. Anglo-Californian Bank*, 104 U. S. 192, 194, 26 L. Ed. 707.

"The directors are the officers or agents of the corporation, and represent the interests of that abstract legal entity, and of those who own the shares of its stock." *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 589, 23 L. Ed. 328.

They, or the trustees as they are some times called, are presumed to exercise a supervision over the property and affairs of the corporation. *Sun Printing, etc., Ass'n v. Moore*, 182 U. S. 642, 650, 46 L. Ed. 366; *Railway Co. v. Alling*, 99 U. S. 463, 25 L. Ed. 438.

In *White Water Val. Canal Co. v. Vallette*, 21 How. 414, 423, 16 L. Ed. 154, it was held that a contract with a corporation for the construction of a canal for

it, where it is admitted that the contract provided prices for the work done far exceeding the cash estimates of the engineer, but this, the witnesses say, was the natural consequence of the embarrassment of the company and their want of credit, and the proposal of the contractor was understood and considerably examined, and was adopted by the board, with only one dissentient vote; and its conditions were performed in good faith by the contractor, and the final settlement between the contracting parties was amicable, was valid and enforceable, as there was, on the part of the contractor, no fraud or circumvention. These facts oppose an insuperable bar to any relief from the contract on the ground of lesion or oppression.

**As between directors and stockholders or creditors.**—"Whether a given power is to be exercised by the directors or the shareholders depends upon its nature and the terms of the enabling act." *Commercial Nat. Bank v. Weinhard*, 192 U. S. 243, 250, 48 L. Ed. 425. See, also, the title **STOCK AND STOCKHOLDERS**.

**The directors own none of the property or funds.** They are trustees for the stockholders and creditors. Their control over the effects is entirely fiduciary and confidential; deriving their power over them by the act of incorporation, they must execute it according to its provisions and directions; which are in their nature creative, and not merely restrictive, inherent powers. If the act of incorporation is their only authority, they must act within its precise terms. *United States v. Robertson*, 5 Pet. 641, 666, 8 L. Ed. 257, per Baldwin, J., dissenting.

43. **General scope and limitations.**—*Minor v. Mechanics' Bank*, 1 Pet. 46, 71, 7 L. Ed. 47; *Nashua, etc., R. Corporation v. Boston, etc., R. Corporation*, 136 U. S. 356, 384, 34 L. Ed. 363; *Railway Co. v. Allington*, 18 Wall. 323, 21 L. Ed. 300. See ante, "Limitation on Powers and Notice Thereof," VI, A, 4.

**Discretion conferred on directors.**—A provision "that the directors shall have power to do whatever shall appear to them to be necessary and proper to be done for the well ordering of the interests of the proprietors, not contrary to the laws of the state," was not intended to give unlimited power, but the exercise of a discretion within the scope of the authority conferred. *Beatty v. Knowler*, 4 Pet. 152, 7 L. Ed. 813. See, also, dissenting opinion of Baldwin, J., in *United*

conform to the laws of the state.<sup>44</sup>

**Government Directors on Board of Railroad.**—The government directors, appointed to represent the government interest in a railroad constructed by government aid largely, have the same powers as other directors and no more.<sup>45</sup>

c. *Acquiescence and Estoppel of Corporation.*—The corporation may be estopped by its conduct from denying the authority of its directors.<sup>46</sup>

d. *Mode and Locality of Action*—(1) *Quorum.*—A majority of the directors of a corporation, in the absence of any regulation in the charter, is a quorum, and a majority of such quorum when convened can do any act within the power of the directors.<sup>47</sup>

(2) *Extraterritorial Action.*—In the absence of a prohibiting statute, the action of a corporate board, taken at a meeting held outside the state of its incor-

States v. Robertson, 5 Pet. 641, 8 L. Ed. 257.

**Ownership of majority of stock by other contracting party.**—The mere fact that one party owned a majority of the stock did not give him the legal control of the company; nor from such ownership can the legal inference be drawn that he dominated the board of directors, Pullman's Palace Car Co. v. Missouri Pac. R. Co., 115 U. S. 587, 596, 29 L. Ed. 499, even if, such being the fact, it could be urged as invalidating the action of the board, in other respects fair and legal. Porter v. Pittsburg, etc., Steel Co., 120 U. S. 649, 670, 30 L. Ed. 830.

**No power to dissipate funds or property.**—"It is clear that the directors of a company, organized under the law, have no power to destroy it, to give away its funds, or deprive it of any means which it possesses to accomplish the purposes for which it was incorporated." Burke v. Smith, 16 Wall. 390, 395, 21 L. Ed. 361.

As to release of stock subscriptions, see the title STOCK AND STOCKHOLDERS.

**44. Conformity to state laws.**—"The power of the directors is coupled with a condition that their management shall be in accordance with the laws of the state. This undoubtedly means with such laws as may be constitutionally enacted touching the administration of the affairs of the company." Railroad Commission Cases, 116 U. S. 307, 331, 29 L. Ed. 636.

**45. Government directors on board of railroad.**—There is nothing in the provisions relating to government directors, appointed to represent the government interests, as in the Union Pacific Railroad Company, which makes it indispensable that the board should formally authorize such contracts as the one under consideration. Congress did not vest in the government directors any peculiar powers. They had the same powers as other directors and no more, but as government directors they were to make reports to the secretary of the interior in respect of the affairs and matters mentioned in the act of 1864. They could not, either by a negative vote or by absenting themselves from the meetings, prevent the transaction of the necessary business of

the company, in which they were entitled to participate on the same terms as their associates. Congress did not look to any action of theirs for the protection of the public interests but sought to secure those interests by specific legislation. Union Pac. R. Co. v. Chicago, etc., R. Co., 163 U. S. 564, 599, 41 L. Ed. 265. See, also, the title RAILROADS.

**46. Acquiescence and estoppel of corporation.**—Pneumatic Gas Co. v. Berry, 113 U. S. 322, 327, 28 L. Ed. 1003; Railway Co. v. Allerton, 18 Wall. 233, 21 L. Ed. 902.

"A court of equity does not listen with much satisfaction to the complaints of a company that transactions were illegal which had its approval, which were essential to its protection, and the benefits of which it has fully received. Complaints that its own directors exceeded their authority come with ill-grace when the acts complained of alone preserved its existence." Pneumatic Gas Co. v. Berry, 113 U. S. 322, 327, 28 L. Ed. 1003. See ante, "Ratification and Estoppel to Deny Authority," VI, A, 5; post, "Loan to Corporation," VI, B, 1, e, (6).

**Conveyance or lease of property.**—After seven years' acquiescence in a lease, something more must be shown than that it was executed in excess of the powers of the directors, before the lessee will be required to surrender the profits he has made under it. Pneumatic Gas Co. v. Berry, 113 U. S. 322, 327, 28 L. Ed. 1003.

**Authority to mortgage.**—See the title CORPORATIONS, vol. 4, pp. 739-741.

**47. Quorum.**—United States v. Ballin, 144 U. S. 1, 8, 36 L. Ed. 321.

"In 2 Kent's Commentaries, 293, the author draws this distinction between what is necessary to a meeting of a representative, and to that of a constituent body: 'There is a distinction taken between a corporate act to be done by a select and definite body, as by a board of directors, and one to be performed by the constituent members. In the latter case, a majority of those who appear may act; but in the former, a majority of the definite body must be present, and then a majority of the quorum may decide.'" United States v. Ballin, 144 U. S. 1, 8, 36 L. Ed. 321. See, also, QUORUM.



poration, will usually be binding on the corporation, upon the ground of estoppel.<sup>48</sup>

e. *Contracts and Dealings with Corporation*—(1) *In General*.—While the contracts and dealings of a director in his own right with the corporation, are, by reason of his fiduciary relationship, regarded with jealousy, they are not void, but merely voidable.<sup>49</sup> And the greater his influence and power of control, the

**48. Extraterritorial action.**—*Galveston Railroad v. Cowdrey*, 11 Wall. 459, 476, 477, 20 L. Ed. 199.

"No doubt it may be true, in many cases, that the extraterritorial acts of directors would be held void, as in the case cited from the 14th New Jersey Chancery Reports 383, where a set of directors of a New Jersey corporation met in Philadelphia, against a positive prohibitory statute of New Jersey, and improperly voted themselves certain shares of stock. And other cases might be put where their acts would be held void without a prohibitory statute; and it is generally true that a corporation exists only within the territory of the jurisdiction that created it. But it is well settled that a corporation may, by its agents, make contracts and transact business in another territory, and may sue and be sued therein. It may hold land in another territory so long as the local authorities do not object. And we see no reason why it should not be estopped by the action of its directors in another territory, when that action is the basis of negotiations by which third parties have bona fide parted with their money and the company has received the benefits of the transaction. A contrary doctrine would authorize a company to take advantage of its own wrong, and would seriously impair the negotiability and value of such securities." *Galveston Railroad v. Cowdrey*, 11 Wall. 459, 476, 477, 20 L. Ed. 199.

"And, if the company are estopped, then those who purchase the property of the company at an execution sale must be estopped. It has frequently been held that such a purchaser takes only the right, title, and interest which the debtor had, subject to the equities which existed against the property in his hands when the judgment was recovered." *Galveston Railroad v. Cowdrey*, 11 Wall. 459, 477, 20 L. Ed. 199.

**Bona fide holders of corporate bonds**, executed in due form and by the proper officers, cannot be prejudiced by the fact that the mortgage given to secure the same was executed out of the state, or by virtue of a resolution of directors, at a meeting held out of the state. The company and its privies are bound thereby. *Galveston Railroad v. Cowdrey*, 11 Wall. 459, 20 L. Ed. 199. See, also, ante, "Locality of Action," VI. A. 2. c.

**49. Dealings with corporation voidable.**—*Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 588, 23 L. Ed. 328.

"That a director of a joint-stock cor-

poration occupies one of those fiduciary relations where his dealing with the subject matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts, and may be set aside on slight grounds, is a doctrine founded on the soundest morality, and which has received the clearest recognition in this court and in others. *Koehler v. Black River Falls Iron Co.*, 2 Black 715, 17 L. Ed. 339; *Drury v. Cross*, 7 Wall. 299, 19 L. Ed. 40. The general doctrine, however, in regard to contracts of this class, is, not that they are absolutely void, but that they are voidable at the election of the party whose interest has been so represented by the party claiming under it. \* \* \* This is the general rule; for there may be cases where such contracts would be void ab initio; as when an agent to sell buys of himself, and by his power of attorney conveys to himself that which he was authorized to sell. But, even here, acts which amount to a ratification by the principal may validate the sale." *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 588, 23 L. Ed. 328; *Richardson v. Green*, 133 U. S. 30, 43, 33 L. Ed. 516; *Wardell v. Railroad Co.*, 103 U. S. 651, 658, 26 L. Ed. 509; *Wright v. Kentucky, etc., R. Co.*, 117 U. S. 72, 94, 29 L. Ed. 821; *Thomas v. Brownville, etc., R. Co.*, 109 U. S. 522, 524, 27 L. Ed. 1018.

But it may often occur that, notwithstanding the vice of the transaction, namely, the directors or trustees, or a majority of them, being interested in opposition to the interest of those whom they represent, and in reality parties to both sides of the contract, that it may be one which those whose confidence is abused may prefer to ratify or submit to. It is, therefore, at the option of these latter to avoid it, and, until some act of theirs indicates such a purpose, it is not a nullity. *Thomas v. Brownville, etc., R. Co.*, 109 U. S. 522, 524, 27 L. Ed. 1018. See, also, *Porter v. Pittsburg, etc., Steel Co.*, 120 U. S. 649, 673, 30 L. Ed. 830.

**Contracts made by directors of a railroad with themselves**, or with others with whom they stand in confidential relations, are open to the suspicion which ordinarily attaches to transactions between a corporation and its directors; and, if they appear to have been made directly or indirectly for their own benefit, courts will refuse to give them effect. *McGourkey v. Toledo, etc., R. Co.*, 146 U. S. 536, 552, 36 L. Ed. 1079; *Drury v. Cross*, 7 Wall. 299, 19 L. Ed. 40; *Twin-Lick Oil Co. v.*

Marbury, 91 U. S. 587, 23 L. Ed. 328; Wardell v. Railroad Co., 103 U. S. 651, 658, 26 L. Ed. 509; Richardson v. Green, 133 U. S. 30, 47, 33 L. Ed. 516, where it was held that a director could not, by unfair and clandestine means, acquire a lien as pledgee of bonds of the corporation.

A contract was made on the part of a (railroad) corporation very favorable in its terms to the other contracting parties, and was afterwards assigned to a corporation controlled by the directors of the first corporation in their own private interests. This contract on the part of the railroad company was made by direction of the executive committee of the board of directors, of whom the president was one, and not by the board itself. It was never reported to the board for its consideration or action. But notwithstanding this defect, in August following the contractors entered upon its execution. It was held, that the contract was a fraud upon the company; that it was made on its part by the executive committee of its board of directors, a majority of whom were, by previous agreement, to be equally interested with the contractors in it, and for that reason its terms were made so favorable to the contractors and unfavorable to the company as to enable the former to make large gains at the expense of the latter, and that the organization of the second company was a mere device to enable those directors to participate in the profits; and that, therefore, the contract was of no validity and binding obligation upon the company. Wardell v. Railroad Co., 103 U. S. 651, 654, 26 L. Ed. 509. See, also, Wright v. Kentucky, etc., R. Co., 117 U. S. 72, 94, 29 L. Ed. 821.

"The scheme thus designed to enable the directors, who authorized the contract, to divide with the contractors large sums which should have been saved to the company, was utterly indefensible and illegal. Those directors, constituting the executive committee of the board, were clothed with power to manage the affairs of the company for the benefit of its stockholders and creditors. Their character as agents forbade the exercise of their powers for their own personal ends against the interest of the company. They were thereby precluded from deriving any advantage from contracts, made by their authority as directors, except through the company for which they acted. Their position was one of great trust, and to engage in any matter for their personal advantage inconsistent with it was to violate their duty and to commit a fraud upon the company." Wardell v. Railroad Co., 103 U. S. 651, 657, 26 L. Ed. 509. See, also, United States v. Union Pac. R. Co., 98 U. S. 569, 610, 25 L. Ed. 143, where it was said that the frauds presented a proper case for relief, but the proper parties were lacking in that the corporation did not ask relief.

As to directors and stockholders taking

part in the fraudulent arrangements, they are participes criminis, and can have no relief. United States v. Union Pac. R. Co., 98 U. S. 569, 612, 25 L. Ed. 143.

**Contract for construction of railroad.**—In Thomas v. Brownville, etc., R. Co., 109 U. S. 522, 524, 27 L. Ed. 1018, the stockholders of the corporation, whose officers accepted those benefits at the hands of the parties with whom they were, in the name of the corporation, making a contract for over a million of dollars, did denounce and repudiate that contract. The court said: "The conduct of these directors is utterly indefensible. The case of Wardell v. Railroad Co., 103 U. S. 651, 26 L. Ed. 509, is in precise analogy to this. See, also, same case in 4 Dillon 330. The original contract being such that the contractors can maintain no suit on it, the bonds which they received are affected with the same vice, and cannot be enforced unless they are negotiable instruments in the hands of innocent holders for value."

Here two of the board of directors of a railroad who took part in making the construction contract with a construction company were interested with the other parties in the contract, and the other contractors besides these two made an agreement at the same time that the construction contract was made, with twelve of the shareholders of the railroad company, that they would relieve them, as subscribers to the stock of said company, from the payment of any further assessments upon the stock which they had subscribed for, by paying out said stock and having same assigned to them; in all not to exceed \$16,500 of the \$41,000 of individual subscriptions to said company, such stock being worthless. The effect upon the directors in making a construction contract with the men who relieved them of their liability, two of them being also parties in the construction contract, is readily seen, and no such contract as this can be enforced in a court of equity where it is resisted and its immorality is brought to light. Thomas v. Brownville, etc., R. Co., 109 U. S. 522, 523, 27 L. Ed. 1018.

But where the contractors had done work for the railroad company, which it had accepted, to the value largely beyond what they had received payment for, except as it was paid by these bonds, and this work was of that much advantage to the company, and its value or cost is estimated as on a quantum meruit, without regard to the prices fixed by the contract, to that extent the consideration is good, and no sound principle is seen on which they cannot to that extent be enforced. To this extent they do not rest on the original contract, but on work, labor, and material actually furnished to the company and received by it. Thomas v. Brownville, etc., R. Co., 109 U. S. 522, 525, 27 L. Ed. 1018. See, also, Porter v. Pittsburg, etc., Steel Co., 120 U. S. 649.



greater his obligation to candor and fair dealing.<sup>50</sup> The principle applies to any arrangement by which an interest adverse to the corporation is acquired.<sup>51</sup>

**Interests Affected.**—There are in such a transaction three distinct parties whose interest is affected by it; namely, the lender, the corporation, and the stockholders of the corporation.<sup>52</sup> And the transaction may be impeached by the corporation, or by mortgagees whose security is affected.<sup>53</sup>

(2) *Mortgage to Directors to Secure Previous Debt and Present Advances.*—It is going too far to hold that a corporation, acting in good faith and without fraudulent intent, may not give a mortgage to its directors who have lent their credit to it, to induce a continuance of the loan of that credit, and obtain renewals of maturing paper at a time when the corporation, though not in fact possessed of assets equal to its indebtedness, and therefore insolvent strictly speaking, is a going concern, and is intending and expecting to continue in business.<sup>54</sup> But

673, 30 L. Ed. 830. And see the title RAILROADS.

"Moreover, it is a well-settled principle, that subsequent creditors cannot be heard to impeach an executed contract, where their dealings with the company, of which they claim the benefit, occurred after the contract became an executed contract." *Porter v. Pittsburg, etc., Steel Co.*, 120 U. S. 649, 673, 30 L. Ed. 830; *Graham v. Railroad Co.*, 102 U. S. 148, 26 L. Ed. 106.

**50. Obligation to candor and fair dealing.**—"When the lender is a director, charged, with others, with the control and management of the affairs of the corporation, representing in this regard the aggregated interest of all the stockholders, his obligation, if he becomes a party to a contract with the company, to candor and fair dealing, is increased in the precise degree that his representative character has given him power and control derived from the confidence reposed in him by the stockholders who appointed him their agent. If he should be a sole director, or one of a smaller number vested with certain powers, this obligation would be still stronger, and his acts subject to more severe scrutiny, and their validity determined by more rigid principles of morality, and freedom from motives of selfishness. All this falls far short, however, of holding that no such contract can be made which will be valid." *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 589, 23 L. Ed. 328. See, also, the title CORPORATIONS, vol. 4, p. 744.

**51. Any acquisition of adverse interest.**—No principle of law is better settled than that any arrangement by which directors of a corporation become interested adversely to such corporation in contracts with it, or organize or take stock in companies or associations for the purpose of entering into contracts with the corporation, or become parties to any undertaking to secure to themselves a share in the profits of any transactions to which the corporation is also a party, will be looked upon with suspicion. A leading case upon this subject is that of *Wardell v. Railroad Co.*, 103 U. S. 651, 658, 26

L. Ed. 509. *McGourkey v. Toledo, etc., R. Co.*, 146 U. S. 536, 565, 36 L. Ed. 1079. See, also, *Wright v. Kentucky, etc., R. Co.*, 117 U. S. 72, 94, 29 L. Ed. 821; *Woodstock Iron Co. v. Richmond, etc., Extension Co.*, 129 U. S. 643, 657, 32 L. Ed. 819. See post, "Directors as Trustees," VIII, B, 2.

**Burden of proof.**—While the relation of a director and officer of the company, does not preclude one from entering into contracts with it, making loans to it and taking its bonds as collateral security, courts of equity regard such personal transactions of a party in either of these positions not, perhaps, with distrust, but with a large measure of watchful care; and unless satisfied by the proof that the transaction was entered into in good faith, with a view to the benefit of the company as well as of its creditors, and not solely with a view to his own benefit, they refuse to lend their aid to its enforcement. *Richardson v. Green*, 133 U. S. 30, 43, 33 L. Ed. 516.

**52. Interests affected.**—*Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 589, 23 L. Ed. 328.

**53. Impeachable by corporation or mortgagees.**—A contract of this kind is clearly voidable at the election of the corporation; and when such corporation is represented by the directors against whom the imputation is made, and the scheme was in reality directed against the mortgagees, and had for its very object the impairment of their security by the withdrawal of the property purchased from the lien of their mortgage, it would be manifestly unjust to deny their competency to impeach the transaction. The principle itself would be of no value if the very party whose rights were sacrificed were denied the benefit of it. *McGourkey v. Toledo, etc., R. Co.*, 146 U. S. 536, 566, 36 L. Ed. 1079. See the title ILLEGAL CONTRACTS, vol. 6, p. 747, as to injury to corporation employer.

**54. Securing directors for previous and present advances.**—*Sanford, etc., Tool Co. v. Howe, etc., Co.*, 157 U. S. 312, 39 L. Ed. 713.

Where the mortgage was executed not simply to secure directors and stockhold-



where corporate directors, instead of honestly endeavoring to effect a loan advantageously, for the benefit of the corporation, as instructed in this case by the stockholders, in violation of their duty and trust secured the payment of their own debts out of the proceeds of the mortgage, to the injury of the stockholders and creditors, such mortgage is invalid and unenforceable against the corporation.<sup>55</sup>

(3) *Mortgage to Sole Stockholder*.—A corporate mortgage to the owner of all the stock, who was not at the time an officer or director, is valid.<sup>56</sup>

(4) *Lease to Director*.—The fact that the lessee of the corporate property was at the time a director of the corporation, of itself was not sufficient ground to set aside the contract, it being made to protect the interests of the company and without any fraudulent design on his part.<sup>57</sup>

(5) *Purchase of Property from Corporation*.—See ante, "Purchase of Property from Corporation," VI, A, 7.

(6) *Loan to Corporation*.—A director is not prohibited from lending money to the corporation when needed for its benefit, and the transaction is open and otherwise free from blame.<sup>58</sup>

ers for past indebtedness but to induce them to procure a renewal or extension of paper of the company then maturing or about to mature, and also to obtain further advances of credit, such a mortgage, though executed to directors who lent the corporation their credit, was valid. *Sanford, etc., Tool Co. v. Howe, etc., Co.*, 157 U. S. 312, 318, 39 L. Ed. 713.

It is often said that the directors may not take advantage of their position and power to secure personal advantage to themselves, but that proposition has no application here, for the corporation itself directed this mortgage. It was an application by the debtor of its property to secure certain of its creditors, and not the act of the agents of a debtor to protect themselves. *Sanford, etc., Tool Co. v. Howe, etc., Co.*, 157 U. S. 312, 317, 39 L. Ed. 713.

**Corporation insolvent.**—Quære, whether a mortgage of all the corporate property of an insolvent corporation to secure one of the directors for moneys previously advanced to the corporation, and an assignment of other property in payment of other advances, although authorized by the board of directors and ratified at the stockholders' meeting, would be valid against other creditors of the corporation. It seems not. *Potts v. Wallace*, 146 U. S. 689, 699, 36 L. Ed. 1135. See, also, the **TITLES ASSIGNMENTS FOR BENEFIT OF CREDITORS**, vol. 2, p. 616; **STOCK AND STOCKHOLDERS**.

**Good faith essential.**—"Of course, an underlying fact, expressly stated to have existed in these transactions, is good faith. Carrying on business after the giving of an indemnifying mortgage, with a knowledge of involency, with the expectation of soon winding up the affairs of the corporation, and only for the sake of giving an appearance of good faith, leaves the transaction precisely as though the mortgage was executed at the moment of distribution, and with the view of a personal preference." *Sanford, etc.,*

*Tool Co. v. Howe, etc., Co.*, 157 U. S. 312, 319, 39 L. Ed. 713. See, also, post, "Loan to Corporation," VI, B, 1, e, (6).

**55. Mortgage securing payment of directors' claims in bad faith.**—*Koehler v. Black River Falls Iron Co.*, 2 Black 715, 720, 17 L. Ed. 339, where it is said that directors cannot so deal with the interests intrusted them. They hold a place of trust, and by accepting it are obliged to execute it with fidelity, not for their own benefit, but for the common benefit of the stockholders.

**56. Mortgage to sole stockholder.**—To the objection to the validity of a corporate mortgage to secure a bond issue that, at the time the mortgage was executed and the bonds were issued, the person to whom they were delivered and who was entitled to the bulk of their proceeds under the company's indebtedness to himself, owned the entire stock of the company and dominated the board of directors, and that the mortgage and bonds were issued under his dictation and coercion, even if such an objection could be legally tenable, it is a sufficient answer, that when the mortgage was made, and the \$1,000,000 of bonds were issued and pledged by him to secure a debt of his, he was not a director or officer of the company. *Porter v. Pittsburg, etc., Steel Co.*, 120 U. S. 649, 670, 30 L. Ed. 830.

The mere fact that he owned a majority of the stock did not give him the legal control of the company; nor from such ownership can the legal inference be drawn that he dominated the board of directors. *Pullman's Palace Car Co. v. Missouri Pac. R. Co.*, 115 U. S. 587, 596, 29 L. Ed. 499, even if, such being the fact, it could be urged as invalidating the action of the board. *Porter v. Pittsburg, etc., Steel Co.*, 120 U. S. 649, 670, 30 L. Ed. 830.

**57. Lease to director.**—*Pneumatic Gas Co. v. Berry*, 113 U. S. 322, 326, 28 L. Ed. 1003.

**58. Loan to corporation.**—*Twin-Lick*

**Ratification and Estoppel.**—Where stockholders sanctioned a contract, under which moneys were loaned to a corporation by its directors, and its bonds therefor, secured by mortgage, given, and the moneys have been properly applied, the corporation is estopped from setting up that the bonds and mortgage are void by reason of the trust relations which the directors sustained to it.<sup>59</sup>

2. **TO BORROW MONEY AND CONTROL FINANCES.**—The custody and disposition of the corporate funds, and the power to borrow money for corporate needs, is usually vested in the board of directors.<sup>60</sup>

3. **TO CONTROL CORPORATE LITIGATION.**—**Discretion of Directors as to Bringing Suit.**—So long as a corporation exists in the possession and unrestrained exercise of all its corporate powers, its board of directors, unless under judicial prohibition or compulsion, is vested with the sole authority to decide whether it will assert its right of action for a supposed injury, or will condone

*Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328; *Richardson v. Green*, 133 U. S. 30, 43, 33 L. Ed. 516. See, also, *Hotel Co. v. Wade*, 97 U. S. 13, 24 L. Ed. 917. See ante, "Mortgage to Directors to Secure Previous Debt and Present Advances, etc.," VI, B, 1, e, (2).

**Lien on bonds by way of pledge.**—Where unfair means were employed by a director to have the entire body of the company's bonds transferred into his own custody, and the clandestine manner in which he took out the 400 bonds in question from that body, not only without notice of the fact to the company, but with an implied, if not an expressed, denial of the transactions, he cannot be regarded as standing in the position of a legal and equitable pledgee; or that he ever acquired, as such pledgee, a lien on the 400 bonds. *Richardson v. Green*, 133 U. S. 30, 47, 33 L. Ed. 516.

**Equitable salvage.**—Where a director, to redeem bonds of the company from a pledge, advanced the money, charged it to the company, and received its notes therefor, and then attempted to levy upon and sell the bonds, and himself become the purchaser at a nominal sum, and thus gain an unconscionable advantage over other bondholders, held that it is a general rule that fraud or any gross misconduct on the part of the salvors in connection with the property saved will work a forfeiture of the salvage, and the evidence in this case with reference to the means employed to obtain a levy on the bonds in question and the sale thereof fully justifies the conclusion that no allowance ought to be made to him by way of "equitable salvage" for the moneys advanced by him to obtain the return of the bonds to the company. *Richardson v. Green*, 133 U. S. 30, 48, 33 L. Ed. 516.

59. **Ratification and estoppel.**—*Hotel Co. v. Wade*, 97 U. S. 13, 24 L. Ed. 917.

"Nor is the legality of the transaction affected by the fact that others of the directors besides the party who submitted the proposition took certain proportions of the bonds and furnished corresponding proportions of the money. It was the company or their agents that pre-

scribed the form of the bonds, and, having issued the same in the form of negotiable securities, it must have been expected that they would be negotiated in the market. Enough appears, also, to warrant the conclusion that the stockholders were more interested to raise the money than to ascertain who would become the holders of the bonds." *Hotel Co. v. Wade*, 97 U. S. 13, 22, 24 L. Ed. 917.

"Examined in the light of the circumstances attending the transaction, as the case should be, the court is of the opinion that the evidence fails to support the proposition that the bonds and mortgage are invalid because the directors became the holders of the bonds and advanced the money. Transactions of the kind have often occurred; and it has never been held that the arrangement was invalid, where it appeared that the stockholders were properly consulted, and sanctioned what was done, either by their votes or silence." *Hotel Co. v. Wade*, 97 U. S. 13, 22, 23, 24 L. Ed. 917. See, also, ante, "Acquiescence and Estoppel of Corporation," VI, B, 1, c; "Mortgage to Directors to Secure Previous Debt and Present Advances," VI, B, 1, e, (2).

60. **To borrow money and control finances.**—"Upon the board of directors of the mining company was imposed, by the laws of California (Civil Code, § 305), the duty of exerting its corporate powers, and of conducting and controlling its business and property. Among the powers which the company had (Civil Code, § 354) was the power 'to enter into obligations or contracts, essential to the transaction of its ordinary affairs, or for the purposes for which it was created.' Necessarily, therefore, the board had authority not only to designate the banking institution in which the money of the company should be deposited, but to prescribe the mode in which, and the officers by whom, it should be withdrawn, from time to time, for the use of the company. It is equally clear that the board had, as incident to the general powers conferred by law upon the company, power to borrow money for the



it. The circumstances of the alleged fraud, the probability of success in the suit, the extent of the injury, the amount which may be recovered, the expense of the proceeding, and the danger of injury to the company itself, are all matters which address themselves to them as grounds for the exercise of the discretion of the directors.<sup>61</sup>

4. **TO MAKE, ALTER, OR AMEND BY-LAWS.—Where Statute Provides That Power to Make By-Laws Shall Not Be Exercised Contrary to Laws of State.**—In a grant of power to the directors to make by-laws, rules, and regulations for the management of the affairs of the company, it was expressly provided that such by-laws, rules, and regulations should not be contrary to the laws of the state. This included laws in force when the charter was granted, and those which came into operation afterwards as well.<sup>62</sup>

**C. Of President or Vice-President.**—1. **IN GENERAL**—a. *General Powers of President.*—A corporation is liable upon a contract executed in its name by its president, acting as its general agent, within the scope of his powers as such, whether he communicated the contract to the corporation or not.<sup>63</sup> But his powers are limited to the course of his usual duties, unless his acts are ratified expressly or impliedly.<sup>64</sup> And the rule is still stronger against the power of the president to bind the corporation by giving up its securities or releasing claims in its favor.<sup>65</sup>

**Suits.**—Suit upon a note given to the president of a corporation, not the corporation, must be in his name, not that of the corporation, and he will recover the money in his own name, as a trustee for the company.<sup>66</sup>

purposes of the corporation, and to invest certain officers with authority to negotiate loans, to execute notes, and to sign checks drawn against its bank account." *Mining Co. v. Anglo-Californian Bank*, 104 U. S. 192, 194, 26 L. Ed. 707. See, also, ante, "To Borrow Money and to Execute Securities Therefor," VI, A, 6.

61. **Directors' discretion as to litigation.**—*United States v. Union Pac. R. Co.*, 98 U. S. 569, 611, 25 L. Ed. 143; *Pacific Railroad v. Ketchum*, 101 U. S. 289, 296, 25 L. Ed. 932. See the title STOCK AND STOCKHOLDERS.

The trustees or directors of a corporation are in law the managers of the property and affairs of the corporation. As such they, in all litigation involving its action, represent it, its stockholders and creditors. If they violate their trust, the remedy must be sought in some court of original jurisdiction. *Railway Co. v. Alling*, 99 U. S. 463, 25 L. Ed. 438. See, also, *Rundle v. Delaware, etc., Canal Co.*, 14 How. 80, 95, 14 L. Ed. 335.

62. **Where statute provides that power to make by-laws shall not be exercised contrary to laws of state.**—*Railroad Commission Cases*, 116 U. S. 307, 329, 29 L. Ed. 636, citing *Ruggles v. Illinois*, 108 U. S. 526, 27 L. Ed. 812.

It is also claimed that the charter contains a contract binding the state to allow the company, at all times and in all ways, to manage its own affairs through its own board of directors, and that the obligation of this contract will be impaired if the provisions of the statute are enforced by the commissioners. As has already been seen, the power of the directors is coupled with a condition that

their management shall be in accordance with the laws of the state. This undoubtedly means with such laws as may be constitutionally enacted touching the administration of the affairs of the company. *Railroad Commission Cases*, 116 U. S. 307, 331, 29 L. Ed. 636. See, also, the title CORPORATIONS, vol. 4, p. 636.

63. **General power of president.**—*Washington, etc., Steam Packet Co. v. Sickles*, 10 How. 419, 13 L. Ed. 479; *Potts v. Wallace*, 146 U. S. 689, 706, 36 L. Ed. 1135.

**Purchase of corporate property.**—See ante, "Purchase of Property from Corporation," VI, A, 7.

64. **Limitations.**—It is true that if the acts of the president are ratified by the corporation, or if the corporation permits a general course of conduct, or accepts the benefit of his act, they will be bound by it. But the general rule is that the president cannot act or contract for the corporation, except in the course of his usual duties. *Potts v. Wallace*, 146 U. S. 689, 706, 36 L. Ed. 1135.

It is said in *Sun Printing, etc., Ass'n v. Moore*, 183 U. S. 642, 649, 46 L. Ed. 366, that it is well settled that the president or other general officer of a corporation has power prima facie to do any act which the directors or trustees of the corporation could authorize or ratify.

65. **Surrender of securities or claims.**—*Potts v. Wallace*, 146 U. S. 689, 706, 36 L. Ed. 1135. See, also, ante, "Limitations on Powers and Notice Thereof," VI, A, 4.

66. **Suit on note to president.**—*Van*



b. *Secret Limitations*.—Where a corporation has held out its president as authorized to make oral contracts, no secret limitation of this authority would affect third persons, dealing with him in good faith and without notice of such limitation, particularly where the supposed limitation would be inconsistent with the authority itself.<sup>67</sup>

c. *Disaffirmance by Board and Time Therefor*.—If the president has acted ultra vires, the corporation must disaffirm his action within a reasonable time, or the corporation will be bound thereby.<sup>68</sup>

d. *Burden of Proof and Sufficiency of Evidence*.—Where the power of the president to enter into this contract is nowhere denied in the answer, and all that can bear on this subject occurs in certain statements concerning the usual course of business of the company, and it seems to have been assumed by both parties, that whatever the president actually did in this transaction, he did for the company, and so as to render them responsible for his acts, and no question was raised on this point in the court below, still it is incumbent on the complainants to offer competent and sufficient evidence of the authority of the president to bind the company, though less evidence may be reasonably sufficient when no issue concerning it is made on the record.<sup>69</sup>

2. TO MAKE CONVEYANCE OF CORPORATE PROPERTY.—The president of a cor-

Ness v. Forrest, 8 Cranch 30, 34, 3 L. Ed. 478.

67. *Secret limitations*.—Commercial, etc., Ins. Co. v. Union Mut. Ins. Co., 19 How. 318, 322, 15 L. Ed. 636. See ante, "Limitations on Powers and Notice Thereof," VI, A, 4.

68. *Disaffirmance by board and time therefor*.—Pittsburgh, etc., R. Co. v. Keokuk, etc., Bridge Co., 131 U. S. 371, 383, 33 L. Ed. 157; Fitzgerald, etc., Const. Co. v. Fitzgerald, 137 U. S. 98, 110, 34 L. Ed. 608.

"When the president of a corporation executes, in its behalf, and within the scope of its charter, a contract which requires the concurrence of the board of directors, and the board, knowing that he has done so, does not dissent within a reasonable time, it will be presumed to have ratified his act. Indianapolis Rolling Mill v. St. Louis, etc., Railroad, 120 U. S. 256, 30 L. Ed. 639." Pittsburgh, etc., Co. v. Keokuk, etc., Bridge Co., 131 U. S. 371, 381, 33 L. Ed. 157. See, also, Jacksonville, etc., Nav. Co. v. Hooper, 160 U. S. 514, 40 L. Ed. 515, where the lease of a hotel by a railroad company was held to have been ratified and adopted by the action of the corporation under such lease.

In Indianapolis Rolling Mill v. St. Louis, etc., Railroad, 120 U. S. 256, 259, 30 L. Ed. 639, the matter being reported to the directors, they had a meeting upon the subject some six weeks after the whole thing had been consummated, and after they had received the benefit of the release by the payment of their drafts. The board, when notified of what had been done by their agents, did not disaffirm their action at that time, but the act or resolution of disaffirmance was passed about two years after notice of the transaction, and if the suit brought in

this case can be considered as an act of disaffirmance, it came too late, as it was commenced some six months after they had knowledge of the release. "As was stated in the somewhat analogous case of the Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 592, 23 L. Ed. 328, 'the authorities to the point of the necessity of the exercise of the right of rescinding or avoiding a contract or transaction as soon as it may be reasonably done, after the party, with whom that right is optional, is aware of the facts which gave him that option, are numerous. \* \* \* The more important are as follows: Badger v. Badger, 2 Wall. 87, 17 L. Ed. 836; Harwood v. Railroad Co., 17 Id. 78; Marsh v. Whitmore, 21 Id. 178; Vigers v. Pike, 8 Cl. & Fin. 650; Wentworth v. Lloyd, 32 Beav. 467; Follansbee v. Kilbreth, 17 Ill. 522; S. C., 65 Am. Dec. 691.' See, also, Gold-Mining Co. v. National Bank, 96 U. S. 640, 24 L. Ed. 648; Law v. Cross, 1 Black 533, 17 L. Ed. 185." See ante, "Ratification and Estoppel to Deny Authority," VI, A, 5; post, "To Borrow Money and Give Necessary Securities," VI, C, 4.

69. *Burden of proof and sufficiency of evidence*.—Commercial, etc., Ins. Co. v. Union Mut. Ins. Co., 19 How. 318, 322, 15 L. Ed. 636.

Where a party claiming under a contract made by the president of a corporation for it, testifies that he has repeatedly made similar contracts with the presidents of similar companies in the same city, this is competent evidence that presidents of such companies in that city are generally held out to the public as having the authority to act in this manner. And upon a point not put in issue in the record, and on which no more than formal proof ought to be demanded, this evidence is sufficient. Commercial, etc., Ins. Co. v. Union Mut. Ins. Co., 19 How.

poration has no power as such to make a general conveyance of the assets of the corporation without at least the assent of the board of directors.<sup>70</sup>

3. **TO RELEASE EXISTING CONTRACT.**—Where the president had, under this same authority (ante, n. 68), without any express resolution or ratification of the board of directors, made the contract on which this suit is brought, it would seem that, not being under seal, a simple contract concerning the ordinary business of the company, the same power which enabled him to make it was sufficient to enable him to release it, unless the power had been withdrawn.<sup>71</sup>

4. **TO BORROW MONEY AND GIVE NECESSARY SECURITIES.**—A general power to borrow money, conferred upon the president of a corporation by resolution of the board of directors, includes authority to give to the lender the ordinary securities for the sum borrowed. Among these are bonds, notes, or acceptances, and collaterals.<sup>72</sup> And such power continued until notice of a revocation thereof was brought home to parties dealing with him.<sup>73</sup>

318, 323, 15 L. Ed. 636. See, also, ante, "Evidence and Presumptions," VI, A, 3.

70. **To make conveyance of corporate property.**—*De La Vergne, etc., Mach. Co. v. German Sav. Inst.*, 175 U. S. 40, 53, 44 L. Ed. 65. See *Indianapolis Rolling Mill v. St. Louis, etc., Railroad*, 120 U. S. 256, 258, 30 L. Ed. 639.

As to conveyances by corporation generally, see the title CORPORATIONS, vol. 4, p. 729.

**Necessity for seal.**—See ante, "Necessity for Seal," VI, A, 2, b.

71. **To release existing contract.**—*Indianapolis Rolling Mill v. St. Louis, etc., Railroad*, 120 U. S. 256, 259, 30 L. Ed. 639.

Where the original contract for the sale of its products by a manufacturing corporation was executed by its president, without the seal of the company, and there is no evidence of any resolution of the board of directors authorizing or approving that contract, and the by-laws of the corporation, as the court finds, declare that the superintendent, who in this case was the president, "shall have charge of the works, property, and operations of the company, and shall employ all operatives and certify all wages due and other expenditures to the secretary, \* \* \* and shall, with the approval of the president, buy and sell material and make all contracts for the same, and for work," etc., and the court further finds that under the by-laws he had the power to buy and sell material, and to make all contracts for the same, under the control of the board of directors, it was held that such president, in the absence of the exercise of control by the directors or limitation of his authority, had power to release or authorize the release of any such contract. *Indianapolis Rolling Mill v. St. Louis, etc., Railroad*, 120 U. S. 256, 258, 30 L. Ed. 639.

72. **To borrow money and give necessary securities.**—*Hatch v. Coddington*, 95 U. S. 48, 24 L. Ed. 339.

The court said it was difficult to see what words would have been more comprehensive for the grant of power to do everything which, in the judgment of

the president, was necessary or advisable, either for borrowing money, or purchasing iron for the corporation. And, upon consideration of the written evidence in this case, the court holds: 1. That the contract entered into April 21, 1859, between the defendant and the corporation by its president, was authorized by the resolution of the board of directors of that company, passed July 13, 1858. 2. That the resolution of said board, passed May 13, 1859, was an acknowledgment that the contract was a binding obligation upon the company. *Hatch v. Coddington*, 95 U. S. 48, 24 L. Ed. 339.

73. **Continuance and notice of revocation.**—*Hatch v. Coddington*, 95 U. S. 48, 56, 24 L. Ed. 339.

The power thus conferred was not revoked or withdrawn by the subsequent resolutions of January 23 and February 3, 1859. They made no reference to the action of the board in 1858, or to any powers conferred by that action upon the president of the company. Undoubtedly, they conferred authority upon another party acting as president of the company in the absence of the president, to dispose of the bonds; but such authority was not inconsistent with the concurrent existence of the like power in him. Two persons may be employed separately to negotiate the sale or hypothecation of bonds, and either may thus dispose of them. If a disposition be made by one, of course the other will be unable to exercise the power with which he was clothed; but, until a sale or hypothecation is made, either may make it. Moreover, in this case there is no evidence that knowledge of the resolutions of January 23 and February 3, 1859, was ever communicated or intended to be communicated to the defendant. The authority given to the president was exhibited to him. On its face it was a continuing authority, on which he had a right to rely until notified of its revocation. Persons who deal with an agent before notice of the recall of his powers are not affected by the recall. *Hatch v. Coddington*, 95 U. S. 48, 56, 24 L. Ed.



**Execution and Negotiation of Notes, Bonds, etc.**—Where certain promissory notes of a corporation, made by its president, which were endorsed by the managing officer and upon which he was held as endorser, and which were paid and taken up by him, if said notes were executed in good faith by the president of the company, and the proceeds, or the proceeds of the notes and drafts of which the notes in question were renewals, were received by and used for the benefit of the company, such officer is entitled to recover on same from the corporation.<sup>74</sup>

**Execution of Guaranty.**—The president is the proper officer to indorse the guaranty of the corporation upon municipal bonds issued to it by a city.<sup>75</sup>

339. See ante, "Revocation," VI, A, 4, c.

**74. Execution and negotiation of notes, bonds, etc.**—Fitzgerald, etc., Const. Co. v. Fitzgerald, 137 U. S. 98, 109, 34 L. Ed. 608.

Where the evidence tended to show that the president of a railroad construction company was authorized to do certain construction, which cost some seven millions of dollars; that he had full charge of the location and construction of the road; that he was authorized to draw checks and drafts, and all these notes and drafts were made, accepted, or authorized by him; that the directors not only did not give contrary instructions in the first instance, but knew of the giving of the notes and drafts, and did not disaffirm the action of the president; and that the proceeds were used for the payment of construction liabilities of the company in every instance, either directly or in taking up paper, the proceeds of which had been so used; it was held that, "if it became necessary for the benefit of said company to execute promissory notes or to draw sight drafts, the said president would have ample authority to do the same, and might likewise empower the cashier or the party whose duty it was to ascertain the amounts due to contractors, materialmen, and persons working upon the construction or building of said railroad, by the construction company, to draw drafts or checks, or even make promissory notes, and that the same, if done for the company or for its use and benefit, would be binding upon the said company, unless the president received from the directors certain instructions which limited his authority in the premises." Fitzgerald, etc., Const. Co. v. Fitzgerald, 137 U. S. 98, 108, 34 L. Ed. 608.

If the moneys were used to pay off indebtedness of the company, arising in the construction of the road, and for work done under proper authority, the transactions were in pursuance of the authorized purposes of the corporation, and occurred in its legitimate business. The execution of the paper could not be held to be in excess of the powers given, and it was clearly the duty of the directors to give contrary instructions, if they wished to withdraw the general management from the president; and to disaffirm the action of their agents promptly and at once, if they ob-

jected to it. Indianapolis Rolling Mill v. St. Louis, etc., Railroad, 120 U. S. 256, 30 L. Ed. 639; Creswell v. Lanahan, 101 U. S. 347, 25 L. Ed. 853; Fitzgerald, etc., Const. Co. v. Fitzgerald, 137 U. S. 98, 110, 34 L. Ed. 608.

The mere fact that the officer paying the notes on which he was liable as endorser, was a stockholder in, a promoter and director of the company, and, with the president, the manager of the work in the prosecution of which the indebtedness arose, would not change the binding character of the obligation. Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328; Fitzgerald, etc., Const. Co. v. Fitzgerald, 137 U. S. 98, 110, 34 L. Ed. 608.

Again, there was evidence to the effect that the managing officer endorsed the notes at the request of the president. Inasmuch as the defendant was answerable for the indebtedness which the money received upon the notes went to pay, if in order to obtain that money he was called on to endorse the notes, and then compelled to protect his endorsement, he could not be treated as a volunteer. There would be no element in such a transaction of the voluntary payment by one of another's debt. So, if the endorser was the manager of the work under the president, and the money was used to pay off the subcontractors, materialmen and hands, then, upon the refusal of the company to repay, he had the right to take up the notes and have them assigned to him; and whether he was the owner and holder of the notes was left to the determination of the jury. Fitzgerald, etc., Const. Co. v. Fitzgerald, 137 U. S. 98, 110, 34 L. Ed. 608. See, also, ante, "To Borrow Money and Execute Securities Therefor," VI, A, 6.

**President of illegally consolidated company.**—Where two railroad corporations consolidated, without any authority of law, and the president of the consolidated company give notes in its name to pay for a steamboat the purchase of which was entirely ultra vires, after the dissolution of this arrangement, the notes could not be enforced against the original corporations. Pearce v. Madison, etc., R. Co., 21 How. 441, 16 L. Ed. 184. See the title CORPORATIONS, vol. 4, pp. 740, 746.

**75. Execution of guaranty.**—New Orleans v. Clark, 95 U. S. 644, 24 L. Ed. 521.



5. **PRESIDENT AS WITNESS TO PROVE CONTRACT.**—The president of a corporation is a competent witness to prove a corporate contract.<sup>76</sup>

6. **VICE-PRESIDENT.**—It has been held that the vice-president of a railroad company had power to make a sale of old rails belonging to the company.<sup>77</sup>

**D. Of President and Secretary.**—Where, in the usual course of corporate business, the authority to check upon the company's bank account was vested in the president and secretary, it will be presumed that their checks were authorized and binding on the company, even when they constituted an overdraft, certainly in the absence of affirmative proof to the contrary.<sup>78</sup>

**E. Of General Manager or Superintendent.**—**General Manager.**—The term general manager, when used in connection with a business corporation, cannot, in the absence of any evidence on the subject, be presumed to mean anything more than that the person filling the position has general charge of those business matters for the carrying on of which the company was incorporated.<sup>79</sup> And the control of the management of the corporation is not inconsistent with reasonable rules and regulations by the board of directors for the

See the title **GUARANTY**, vol. 6, p. 534. See, generally, ante, "To Borrow Money and Execute Securities Therefor," VI, A, 6.

76. **President as witness to prove contract.** *United States v. Johns*, 4 Dall. 412, 415, 1 L. Ed. 888.

77. **Vice president.**—*Wheeler v. New Brunswick, etc., R. Co.*, 115 U. S. 29, 34, 29 L. Ed. 341.

It was also held that, though the contract needed no ratification to make it binding, the company here ratified what its vice-president had done. In doing this, it thought proper to place its own construction on the word "ton," as used in the contract; but neither in the resolution of the directors nor in the letter of the vice-president enclosing it, is there the slightest intimation that a difference of opinion on this matter would be relied on as impairing the obligation of the contract. *Wheeler v. New Brunswick, etc., R. Co.*, 115 U. S. 29, 34, 29 L. Ed. 341. See the title **CONTRACTS**, vol. 4, p. 577.

78. **President and secretary.**—Where a company had power, under its charter, to raise money by an overdraft upon its bank account, for use in its corporate business, and since an indebtedness thus created would, in the usual course of business, be evidenced by the checks of its president and secretary, the presumption should be indulged, not only that those officers, in making an overdraft, did not exceed their authority, but that the moneys thus obtained were paid over to or received by the company. But that is a mere presumption arising from the conduct of the parties, as well as from the general mode in which corporations organized for profit conduct their business. That presumption, if not, under the special circumstances of this case, conclusive, might have been overthrown by affirmative proof of want of authority, express or implied, in the president and secretary of the company to make overdraft checks, and by proof that the company did not receive the money paid thereon

by the bank. *Mining Co. v. Anglo-Californian Bank*, 104 U. S. 192, 195, 196, 26 L. Ed. 707.

"Since checks against the account of the mining company must, in the ordinary course of its banking business, have been signed by some officer or officers designated for that purpose, the bank had the right, in view of the long period during which the checks of that company were signed by its president and secretary—without objection, so far as the record shows, upon the part of the company's board—to assume that those officers had been invested, by the board, with authority to sign all checks drawn against the company's bank account." *Mining Co. v. Anglo-Californian Bank*, 104 U. S. 192, 195, 26 L. Ed. 707.

And the bank is entitled to recover the amount of the overdraft as shown by the checks signed by the president and secretary of the mining company. *Mining Co. v. Anglo-Californian Bank*, 104 U. S. 192, 194, 26 L. Ed. 707. See, also, ante, "Evidence and Presumptions," VI, A, 3.

79. **General manager.**—*Washington Gas Light Co. v. Lansden*, 172 U. S. 534, 547, 43 L. Ed. 543.

From the use of the term "general manager" we should not be authorized to infer any further authority, nor would it be permissible to allow the jury to make a mere guess that it existed. A general manager of a business corporation, such as this gas company is, would not be presumed to have the power to write a letter for the company in reply to an inquiry addressed to the company in relation to a past occurrence unconnected with his own duties. These might include the buying of material, the employment of laborers, the supervision of their labor, the manufacture of gas, in the case of a gas company, its distribution and the general ways and means of accomplishing the object of the corporation—all these in subordination to the board of directors and such superior officers as the board should provide. *Washington Gas Light*

government of the conduct of the officers.<sup>80</sup> And it is well settled that the president or other general officer of a corporation has power *prima facie* to do any act which the directors or trustees of the corporation could authorize or ratify.<sup>81</sup>

*Co. v. Lansden*, 172 U. S. 534, 547, 43 L. Ed. 543.

The fact that the manager copied his letters into the official copy book in the office of the secretary is not material upon this question. It was his own act unknown to the officers of the company, so far as the record shows, and the company cannot be held liable for the original act of the manager by such evidence. It does not tend to show that his action was within the scope of his employment as manager. *Washington Gas Light Co. v. Lansden*, 172 U. S. 534, 547, 43 L. Ed. 543. See the title *LIBEL AND SLANDER*, vol. 7, p. 860.

**80. What constitutes control of the management.**—*Grant v. Parker*, 115 U. S. 51, 52, 29 L. Ed. 346.

Where an association of capitalists, called in the bill a "syndicate," to which both the complainant and defendant belonged, bought 51,000 of the 100,000 shares of the capital stock of the company, and in the contract under which the syndicate was formed it was agreed that the complainant was "to control the management of the mine," this condition was necessarily subject to such reasonable rules and regulations as should be adopted in a proper way, either by the stockholders or by the directors, for the government of the conduct of the officers of the company. At a meeting of stockholders, held a few days after the purchase for the election of directors, the complainant and the defendant, with one other member of the syndicate, were elected directors, as the representatives of the purchasers, and two others not in the syndicate as representatives of the minority stockholders. The complainant was elected president of the board of directors and general manager of the mine. The defendant and the directors who were elected in the interest of the minority stockholders seem to have been of opinion that some additional rules for the government of the affairs of the company were necessary, and so, as is alleged, by false representations the defendant, in December, 1881, induced some of the members of the syndicate to agree to the adoption of certain resolutions by the directors, at a regular meeting held that day, of which the complainant had knowledge, but which he did not attend. A quorum of directors was present at the meeting and the defendant voted for the resolutions. It was to restrain the defendant from aiding the directors in the enforcement of these resolutions, and from voting his shares acquired under the syndicate contract, except in accordance with the will of the complainant, that this

suit was brought. It was held that, as no attempt had been made to remove the complainant from his office of general manager, and he still "controls the management of the mine," so far as anything appears in the bill, all that the directors did by their resolutions, of which complaint is made, being to prohibit the Bank of California, the treasurer of the company, from paying any checks of the company except such as are signed by the president or vice-president and countersigned by the secretary; to direct that all orders for supplies and materials from San Francisco should be made through the head office in San Francisco, and paid for in checks signed and countersigned as above; to authorize the vice-president to sign certificates of stock and all other papers requiring the signature of the president, when the president was away from the office, and authorizing the superintendent at the mine, in the absence of the president, to draw drafts on the company at San Francisco for debts incurred there: there was nothing in this inconsistent with the control of the mine itself by the complainant "as if he owned it." *Grant v. Parker*, 115 U. S. 51, 53, 29 L. Ed. 346.

Quære, whether, if the members of the syndicate should undertake to remove the complainant from the control of the management of the mine without just cause, he could have preventive relief in equity. *Grant v. Parker*, 115 U. S. 51, 55, 29 L. Ed. 346.

**81. General officer of corporation.**—*Sun Printing, etc., Ass'n v. Moore*, 183 U. S. 642, 651, 46 L. Ed. 366.

**Managing editor of newspaper.**—The managing editor of the "The Sun," who as such, the evidence establishes, exercised an unlimited discretionary authority in the collection of news for "The Sun," making all pecuniary and other arrangements in respect thereto, and prior to the hiring of the Kanapaha had, solely on his own volition, hired vessels for the use of "The Sun" for periods of a week at a time, had authority to hire a vessel to obtain news, and also to incur an absolute liability for its return or become responsible for its value at a fixed figure. *Sun Printing, etc., Ass'n v. Moore*, 183 U. S. 642, 649, 46 L. Ed. 366.

The trustees of The Sun Association of New York must be presumed to have exercised a supervision over the business of the corporation, they are to be charged with knowledge of the extent of the power usually exerted by its managing editor, and must be held to have acquiesced in the possession by him of such authority, even though they had not expressly dele-



**F. Effect of Identity of Officers on Relations of Corporations.**—Notwithstanding the commingling of officers, the corporations may be distinct corporations. They have a right to make contracts with each other in their corporate capacities, and they could sue and be sued by each other in regard to these contracts.<sup>82</sup>

## VII. Rights of Officers and Agents against Corporation.

**Right to Compensation for Official Services.**—The general rule as to compensation for official services, rendered in the absence of a specified compensation fixed or agreed upon, is that it cannot be recovered, but there are exceptions to it.<sup>83</sup>

**Implied Liability to Pay Value.**—But where an officer acted as superintendent, treasurer or general manager of a corporation and transacted the usual

gated it to him. *Sun Printing, etc., Ass'n v. Moore*, 183 U. S. 642, 650, 46 L. Ed. 366.

The burden was on The Sun Association to establish that he did not possess the authority he assumed to exercise in executing the contracts. As the trustees of The Sun Association were unrestrained by the charter, and might have authorized him to execute the writings in question, and the association failed to rebut the prima facie presumption, he must be held to have been vested with such power. *Sun Printing, etc., Ass'n v. Moore*, 183 U. S. 642, 651, 46 L. Ed. 366.

**Acting manager.**—Where it is alleged that notwithstanding the acts of the acting manager may have apparently been such as to bind the company plaintiff, he had, in fact, no authority to bind the company by such acts, it is sufficient to say that his own testimony, corroborated by that of other members of the company, is that during the dates of these transactions he was acting as its financial manager, and, therefore, it cannot now repudiate its liability for his actions. *Case Mfg. Co. v. Soxman*, 138 U. S. 431, 439, 34 L. Ed. 1019.

**Superintendent of mining company.**—An agreement made and entered into between superintendent of the Keets Mining Co., parties of the first part, and J. B. P., party of the second part; and by which "the said parties of the first part" agree to deliver at P.'s mill ore from the Keets mine from time to time, and to pay a certain price for each ton crushed and milled, etc., and which is signed and sealed as follows:

"A. W. Whitney, (Seal.)

"Sup. Keets Mining Co.

"John B. Pearson. (Seal.)"

was held to be the contract of the company, and binding on it and its members. *Post v. Pearson*, 108 U. S. 418, 27 L. Ed. 774.

**Powers.**—By the subject matter of this contract, which is the delivery and milling of ore from the Keets mine; by the description of both in the body of the contract and in the signature, as superintendent of the Keets Mining Company; and by the use of the words "parties of the first part," which are applicable to a

company and not to a single individual, the contract made by the hand of W. clearly appears upon its face to have been intended to bind, and therefore did bind, the company; and, upon proof that P. was a partner in the company, bound him. *Post v. Pearson*, 108 U. S. 418, 422, 27 L. Ed. 774; *Whitney v. Wyman*, 101 U. S. 392, 25 L. Ed. 1050; *Hitchcock v. Buchanan*, 105 U. S. 416, 26 L. Ed. 1078.

**82. Effect of identity of officers on relations of corporations.**—*Leavenworth County Comm'rs v. Chicago, etc., R. Co.*, 134 U. S. 688, 707, 33 L. Ed. 1064. See the title RAILROADS. See, also, the title CORPORATIONS, vol. 4, pp. 654, 742, 770, et seq.

**83. General rule in absence of express contract—Exceptions.**—*Fitzgerald, etc., Const. Co. v. Fitzgerald*, 137 U. S. 98, 111, 34 L. Ed. 608; *Corinne Mill, etc., Co. v. Toponce*, 152 U. S. 405, 38 L. Ed. 493.

It often happens that persons render services for others which all parties understand to be gratuitous. Thus, directors of banks and of many other corporations usually receive no compensation. In such cases, however valuable the services may be, the law does not raise an implied contract to pay by the party who receives the benefit of them. *Fitzgerald, etc., Const. Co. v. Fitzgerald*, 137 U. S. 98, 111, 34 L. Ed. 608. See the title IMPLIED CONTRACTS, vol. 6, p. 889.

**Compensation of agent—Commissions.**—In *Hubbard v. Investment Co.*, 119 U. S. 696, 30 L. Ed. 548, it was held that a certain transaction by a corporation, upon which an agent of the corporation claimed the right to receive commissions under his contract of employment with the company, as business originating in his division, did not so originate, did not fall under his contract, and that the instruction of the court below to find a verdict for the defendant was proper. It was conducted by the president of the corporation in person, and grew out of a circular sent from the main office, although negotiated in that division, the plaintiff being present at some of the negotiations.

**Compensation of law agent or attorney.**—See the title ATTORNEY AND CLIENT, vol. 2, p. 727.



business that devolves upon such officer of such a concern as that, with the knowledge and consent of the defendant (during the time before compensation was fixed), there would be an implied agreement on the part of the defendant to pay what the services were reasonably worth.<sup>84</sup>

**Question for Jury.**—Tested by this rule, it was properly left to the jury to determine whether services were rendered of such character and under such circumstances as that compensation could be claimed therefor.<sup>85</sup>

### VIII. Duties and Liabilities of Officers or Agents.

**A. In General**—1. **SUPERVISION.**—It is within the course of corporate business and the employment of the president and directors, for them to investigate the conduct of their officers and agents, and report the result to the stockholders.<sup>86</sup>

2. **FIDUCIARY RELATION.**—The officers and directors of a corporate body are trustees of the stockholders, and in securing to themselves an advantage not common to all the stockholders, they commit a plain breach of duty.<sup>87</sup>

3. **PERSONAL LIABILITY**—a. *Nature and Extent.*—As to liability for conversion of shares, see the title **STOCK AND STOCKHOLDERS**.

**84. Implied liability to pay reasonable value.**—*Fitzgerald, etc., Const. Co. v. Fitzgerald*, 137 U. S. 98, 111, 34 L. Ed. 608; *Corinne Mill, etc., Co. v. Toponce*, 152 U. S. 405, 409, 38 L. Ed. 493.

Where the evidence tended to establish that an officer acted as treasurer for some months in 1886, and that while so acting he went to expense and trouble in the procuring of money for the company, and in the discharge of duties outside of those assigned to the treasurer as such, as defined in § 6 of the by-laws already quoted; and that as manager or superintendent he procured right of way, superintended the doing of the work, the hiring of the men, the subletting of the contracts, etc., which were matters not at all pertaining to his office as director, the character of all these services placed them outside of official duties proper. *Fitzgerald, etc., Const. Co. v. Fitzgerald*, 137 U. S. 98, 111, 34 L. Ed. 608.

And where the two parties who owned substantially all the stock and properties of the corporation attempted to make an arrangement in respect to such compensation, which arrangement proved a failure, on proving a failure, it left the corporation under the implied obligation to pay for the services. *Corinne Mill, etc., Co. v. Toponce*, 152 U. S. 405, 409, 38 L. Ed. 493.

**General manager of ranch.**—Here neither the charter nor the by-laws of the corporation cast any special duties on the vice-president or director. The vice-president was only required to act in the absence of the president, and no special duties of management were in terms cast upon the president. It was provided that he preside at all meetings, sign all certificates of stock, contracts, checks, etc., "and generally do and perform such other duties as are incidental to his office and not in conflict with these by-laws and the articles of association." No duty was cast on any individual director as such.

The board of directors, as a body, were charged with the usual duty of care of the affairs of the corporation, but all the power and duty cast upon them was upon them as a board, and not individually. Obviously, therefore, under the testimony of plaintiff and the foreman of the ranch, the services which the plaintiff performed were not those of a director or vice-president, but outside thereof, and similar to those of a general manager. *Corinne Mill, etc., Co. v. Toponce*, 152 U. S. 405, 408, 38 L. Ed. 493.

**Limitation of action.**—See the title **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, pp. 1016, 1017.

**85. Question for jury.**—*Fitzgerald, etc., Const. Co. v. Fitzgerald*, 137 U. S. 98, 99, 34 L. Ed. 608.

See, also, *Corinne Mill, etc., Co. v. Toponce*, 152 U. S. 405, 409, 38 L. Ed. 493, where it is said that the jury by their verdict had practically affirmed the truth of plaintiff's story, and that showed an understanding on the part of the parties in interest that plaintiff (a vice-president and director acting as general manager) was to receive compensation for his services as manager.

**86. Supervision.**—*Philadelphia, etc., R. Co. v. Quigley*, 21 How. 202, 16 L. Ed. 73; *Sun Printing, etc., Ass'n v. Moore*, 183 U. S. 642, 650, 46 L. Ed. 366. See ante, "Relation to Corporation One of Agency," VI, B, 1, a. See, also, ante, "Breach," IV, C.

**87. Fiduciary relation.**—*Koehler v. Black River Falls Iron Co.*, 2 Black 715, 17 L. Ed. 339; *Hollins v. Brierfield Coal, etc., Co.*, 150 U. S. 371, 385, 37 L. Ed. 1113, where it is said that the officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud or sometimes even mere mismanagement in

(1) *Penal Character of Statute Imposing Same—Construction.*—Statutes imposing a personal liability upon the corporate officers intentionally neglecting or refusing to make the certificates or reports required thereby, are penal and must be strictly construed.<sup>88</sup>

**Burden of Proof.**—And before any party can be held bound by its provisions, it must satisfactorily appear that the legislature of the state has rendered him

respect thereto. See, also, the title CORPORATIONS, vol. 4, p. 639, et seq.

The managers and officers of a company where capital is contributed in shares, are in a very legitimate sense trustees, alike for its stockholders and its creditors, though they may not be trustees technically and in form. *Jackson v. Ludeling*, 21 Wall. 616, 22 L. Ed. 492; *Manufacturing Co. v. Bradley*, 105 U. S. 175, 183, 26 L. Ed. 1034.

They accordingly have no right to enter into or participate in any combination, the object of which is to divest the company of its property and obtain it for themselves at a sacrifice; they have no right to seek their own profit at the expense of the company, its stockholders, or even its bondholders. Contrariwise, in case of embarrassment to the company, and any necessity to sell the estates of the company, it is their duty, to the extent of their power, to secure for all those whose interests are in their charge, the highest possible price for the property which can be obtained for it. *Jackson v. Ludeling*, 21 Wall. 616, 22 L. Ed. 492.

**Application of rule—Purchase of corporate property.**—These principles applied to a case where the local managers and officers of an embarrassed railroad, holding a small portion of its bonds, of which a much greater portion was held by nonresidents, got an order of sale under a mortgage to secure the bonds, and proceeded in a hasty and rather secret way to sell it, and to buy it at a price much below its value, for themselves; the conditions of sale being made such as to render it difficult for persons generally to purchase; and the whole proceeding of sale attended also with evidences of gross disregard of the interests of the bondholders generally, and of course of the stockholders. *Jackson v. Ludeling*, 21 Wall. 616, 22 L. Ed. 492. See ante, "Purchase of Property from Corporation," VI, A, 7; "Contracts and Dealings with Corporation," VI, B, 1, e.

**Dealing in corporate bonds.**—One having possession of negotiable coupon bonds is prima facie their owner. Where he asserted in the most positive manner that they were his property, the fact that he was an officer of the company did not of itself preclude him from dealing in them, or throw the slightest suspicion on his title. *Railway Co. v. Sprague*, 103 U. S. 756, 760, 26 L. Ed. 554.

**As to money received from sale of stock,** see the title STOCK AND STOCKHOLDERS.

**Duty of trustee on dissolution to distribute assets to stockholders.**—See the title CORPORATIONS, vol. 4, p. 797.

**88. Construction of statute imposing personal liability.**—*Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 25 L. Ed. 786; *Huntington v. Attrill*, 146 U. S. 657, 676, 36 L. Ed. 1123; *Chase v. Curtis*, 113 U. S. 452, 458, 28 L. Ed. 1038; *Park Bank v. Remsen*, 158 U. S. 337, 39 L. Ed. 1008.

**Connecticut statute.**—Under a statute of Connecticut requiring the president and secretary of each corporation organized thereunder to annually make a certificate showing the condition of the affairs of the corporation, as nearly as the same can be ascertained, as of a certain date, with certain details, on or before a certain day of the year, and declaring that if they shall intentionally neglect or refuse to comply with said provisions, and to perform the duty required of them respectively, the persons so neglecting or refusing shall be jointly and severally liable to an action founded on the statute for all debts of such corporation contracted during the period of such neglect or refusal; in an action by a creditor of such corporation against its president, held, that the statute is penal, and must be strictly construed, and in order to render such an officer responsible it must appear that he has neglected or refused to do some act which the law made it his duty to perform. *Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 194, 25 L. Ed. 786.

**New York statute.**—The provision of the New York statute applicable to corporations for manufacturing, mining, mechanical or chemical purposes requiring annual reports of the capital and debts of the corporations to be made by certain officers and filed, and providing that if any of said companies shall fail so to do, all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made; but whenever under this section a judgment shall be recovered against a trustee severally, all the trustees of the company shall contribute a ratable share of the amount paid by such trustee on such judgment, and such trustee shall have a right of action against his cotrustees, jointly or severally, to recover from them their proportion of the amount so paid on such judgment; provided that nothing in this act contained shall affect any action now pending (Laws of New York, 1875, ch. 510, passed June 7, 1875): is a penal one and must



subject thereto. So where a corporation is created by a special act not in terms adopting a general statute imposing such liability.<sup>89</sup>

(2) *Liability Secondary Only*.—And the liability is secondary, not primary, and dependent altogether upon the statute imposing it.<sup>90</sup>

(3) *Vested Rights and Repeal*.—And such statutes have been held not to confer vested rights upon creditors, and to be repealable as to any rights thereunder not reduced to judgment.<sup>91</sup>

(4) *Compared to Stockholders' Liability*.—And the liability is to be distinguished from that of the stockholders to the amount of their stock.<sup>92</sup>

be strictly construed as against those sought to be subjected to its liabilities. *Chase v. Curtis*, 113 U. S. 452, 455, 28 L. Ed. 1038. See, also, *Flash v. Conn*, 109 U. S. 371, 27 L. Ed. 966; *Park Bank v. Remsen*, 158 U. S. 337, 39 L. Ed. 1008.

Although held not "a penal law in the international sense." *Huntington v. Attrill*, 146 U. S. 657, 36 L. Ed. 1123; *Park Bank v. Remsen*, 158 U. S. 337, 342, 39 L. Ed. 1008. See the title **CONFLICT OF LAWS**, vol. 3, p. 1074.

**Not a criminal or quasi criminal law.**—The provision of the statute of New York, now in question, making the officers of a corporation, who sign and record a false certificate of the amount of its capital stock, liable for all its debts, is in no sense a criminal or quasi criminal law. The statute, while it enables persons complying with its provisions to do business as a corporation, without being subject to the liability of general partners, takes pains to secure and maintain a proper corporate fund for the payment of the corporate debts. With this aim, it makes the stockholders individually liable for the debts of the corporation until the capital stock is paid in and a certificate of the payment made by the officers; and makes the officers liable for any false and material representation in that certificate. The individual liability of the stockholders takes the place of a corporate fund, until that fund has been duly created; and the individual liability of the officers takes the place of the fund, in case their statement that it has been duly created is false. If the officers do not truly state and record the facts which exempt them from liability, they are made liable directly to every creditor of the company, who by reason of their wrongful acts has not the security, for the payment of his debt out of the corporate property, on which he had a right to rely. As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered penal, in the sense that it should be strictly construed. But as it gives a civil remedy, at the private suit of the creditor only, and measured by the amount of his debt, it is as to him clearly remedial. To maintain such a suit is not to administer a punishment imposed upon an offender against the state, but simply to enforce a private right secured under its laws to an individual. *Huntington v. Attrill*, 146 U. S. 657, 676, 36 L. Ed. 1123.

**89. Burden of showing application of statute.**—*Park Bank v. Remsen*, 158 U. S. 337, 346, 39 L. Ed. 1008; *Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 194, 25 L. Ed. 786.

In the absence of any controlling state decision it should not be held that a provision of a general statute imposing a personal liability on trustees or other officers is incorporated into a special charter by a clause therein declaring that the corporation shall possess all the general powers and privileges and be subject to all the liabilities conferred and imposed upon corporations organized under such general act. Something more specific and direct is necessary to burden an officer of the corporation with a penalty for omission of duty. *Park Bank v. Remsen*, 158 U. S. 337, 346, 39 L. Ed. 1008.

"The officer is not the corporation; his liability is personal, and not that of the corporation, nor can it be counted among the powers and privileges of the corporation." *Park Bank v. Remsen*, 158 U. S. 337, 344, 39 L. Ed. 1008.

Even if it were conceded that "corporation," as used in a statute, includes stockholders as component parts thereof, it does not follow that it also includes the trustees, directors, or other officers. *Park Bank v. Remsen*, 158 U. S. 337, 345, 39 L. Ed. 1008. See post, "Responsibility of Corporation for Acts Generally," IX, A.

**90. Liability secondary only.**—*Huntington v. Attrill*, 146 U. S. 657, 679, 36 L. Ed. 1123.

**91. Vested rights of creditors therein and repealability.**—The New York "court and some others, indeed, have held that the liability of officers under such a statute is so far in the nature of a penalty, that the creditors of the corporation have no vested right therein, which cannot be taken away by a repeal of the statute before judgment in an action brought thereon. But whether that is so, or whether, within the decision of this court in *Hawthorne v. Calef*, 2 Wall. 10, 23, 17 L. Ed. 776, such a repeal so affects the security which the creditor had when his debt was contracted, as to impair the obligation of his contract with the corporation, is aside from the question now before us." *Huntington v. Attrill*, 146 U. S. 657, 679, 36 L. Ed. 1123.

**92. Compared to stockholders' liability.**—*Hornor v. Henning*, 93 U. S. 228, 233, 23 L. Ed. 879; *Chase v. Curtis*, 113 U. S. 452, 458, 28 L. Ed. 1038; *Flash v. Conn*,



(5) *Statute Penalizing Excess of Debts over Capitalization*.—When a statute makes the trustees or directors liable to creditors, if they assent to an excess of indebtedness over the amount of the capital stock, this excess constitutes a fund for the benefit of all the creditors, so far as the condition of the company renders a resort to it necessary for the payment of its debts.<sup>93</sup>

(6) *De Facto Officers*.—Individuals elected and serving as such officers may incur the statute liability for the corporate debts of the company, even though irregularities occurred in their election, if in all other respects the evidence brings them within the category of legal default.<sup>94</sup>

(7) *Debts for Which Liable*.—**Debts Contracted before Period of Default**.—Where the statute imposes liability for debts contracted during the period of such neglect or refusal, the defendant is not liable if the debt was contracted by the corporation before, although it may remain unpaid during, the period when he neglected or refused to comply with the requirements of the statute.<sup>95</sup>

**Tort Liability**.—A liability on the part of the corporation for a tort, though afterwards reduced to judgment against it, is not a debt of the corporation, even when in judgment, within the meaning of the statute imposing upon the trustees the penalty sought to be enforced in this action for not making and

109 U. S. 371, 27 L. Ed. 966. See, also, the title STOCK AND STOCKHOLDERS.

"There is an obvious distinction between the liability of stockholders to the amount of their stock, which is a part of the obligation assumed when the stock is taken and which is an exact sum, ascertainable by the number of shares owned by the shareholder, and the case of the managing trustees, jointly liable for a violation of their trust to all the creditors of the corporation who may be injured thereby." *Hornor v. Henning*, 93 U. S. 228, 233, 23 L. Ed. 879.

**93. Fund for all creditors**.—*Hornor v. Henning*, 93 U. S. 228, 23 L. Ed. 879.

"The fair and reasonable construction of the act is, that the trustees who assent to an increase of the indebtedness of the corporation beyond its capital stock are to be held guilty of a violation of their trust; that congress intended, that, so far as this excess of indebtedness over capital stock was necessary, they should make good the debts of the creditors who had been the sufferers by their breach of trust." *Hornor v. Henning*, 93 U. S. 228, 231, 23 L. Ed. 879.

**94. De facto officers**.—*Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 192, 25 L. Ed. 786.

When power to elect the president is vested in the directors, and the record shows that he was formally elected to the office, and that he acted in that capacity for a month and a half, when he resigned, beyond controversy he was the acting president, and in view of the circumstances the court is not inclined to rest the decision of the case upon the ground that the defendant was not, during the period he performed the duties devolved upon the president of the company, legally responsible for the neglect to comply with the requirement of that statute. He acted as president during that period, and, therefore, is liable, if

any liability exists, notwithstanding the informality of his election. *Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 193, 25 L. Ed. 786. See, generally, ante, "De Facto Officers," III, C.

**95. Debts contracted before or after period of default**.—*Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 25 L. Ed. 786.

"Officers of the kind are responsible for the consequences of their own neglect or refusal to comply with the statute requirement while they remain in office, and they continue to be liable for those consequences even after they go out of office; but they are not responsible for the consequences of subsequent defaults committed by their successors, nor are the successors in such offices in any way responsible for the consequences of such defaults committed by their predecessors in office, for the plain reason that the language of the statute is that the persons so neglecting or refusing \* \* \* shall be liable in an action founded on the statute for all debts of the corporation contracted during the period of such neglect or refusal." *Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 193, 25 L. Ed. 786.

**Connecticut and New York statutes compared**.—"Marked differences exist between the provisions of the New York statute and those of the state of Connecticut, the latter being much less stringent than the former. By the New York law the duty of making the annual return is required of the corporation itself, and the penalty for neglect is imposed upon the trustees who are intrusted with the management of its affairs. Consequently it is a corporate duty, and being such each succeeding board is bound to perform it if it has been neglected by their predecessors. Unlike that, the duty to deposit the certificate under the Connecticut statute is devolved on the president and secretary in terms which show that a new president does not inherit the

publishing an annual report showing, among other things, the amount of its existing debts.<sup>96</sup>

(8) *Evidence to Establish Debt.*—Proof of a judgment against the company, but not the original cause of action against it, on which the judgment was founded, is insufficient, as the judgment was not competent as evidence of any debt due from the corporation, and no action could be maintained thereon against the trustees under this section of the act. The facts upon which the debt is founded must be proved.<sup>97</sup>

(9) *Liability for Cotrustee's Default.*—It has been held, under a statute imposing personal liability on corporate trustees for not making annual reports of capital and debts, that each trustee is liable, although not himself in default.<sup>98</sup>

(10) *Liability to State for Illegal Issue of Bonds with State Indorsement.*—Under the acts of the Alabama legislature of 1867 and 1870, authorizing the loan

consequences of neglect of duty or pecuniary liability from his predecessor in office. He is made liable for his own neglect and not for that of a prior officer, as clearly appears from the closing sentence of the penal section. In New York the trustees, upon default, are made liable for all the outstanding debts of the corporation, whenever contracted, but in Connecticut the president and secretary are liable only for debts contracted during the period of such neglect or refusal." *Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 195, 25 L. Ed. 786.

**Facts disproving culpable neglect.**—Where intentional neglect and refusal create the liability by the terms of the statute, and attempt is made by the plaintiffs to show that the president was culpably guilty of neglect in that regard; but the bill of exceptions also shows that on the day he resigned his office, he, with the secretary, made out in due form and deposited a certificate of the condition and assets of the company as they existed on the first day of July, two weeks subsequent to the day of his election as president of the corporation, such culpable neglect is disproved. *Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 190, 25 L. Ed. 786.

**96. Tort liability.**—*Chase v. Curtis*, 113 U. S. 452, 461, 28 L. Ed. 1038.

"The creditors to be protected are those only who become such by voluntary transactions, in reference to which, for their benefit, the information becomes important as to the debts of the company." *Chase v. Curtis*, 113 U. S. 452, 462, 28 L. Ed. 1038.

A judgment against the corporation, although founded upon a tort, does not become ipso facto a debt by contract, being a contract of record, or a specialty in the nature of a contract. *Chase v. Curtis*, 113 U. S. 452, 464, 28 L. Ed. 1038.

**The New York statute** involved in this discussion is not a remedial statute, to be broadly and liberally construed; but is a penal statute with provisions of a highly rigorous nature, to be construed most favorably for those sought to be charged under it, and with strictness against their alleged liability. Under such a rule of

construction its language is limited, by its own terms, to a liability, on the part of the trustees, to debts of the corporation existing and arising ex contractu. *Chase v. Curtis*, 113 U. S. 452, 463, 28 L. Ed. 1038.

**97. Evidence to establish debt.**—*Chase v. Curtis*, 113 U. S. 452, 459, 28 L. Ed. 1038.

"The debt must be proved by evidence competent against the defendants. The facts upon which the debt is founded must be proved. The naked admissions of the corporation or judgment against the corporation are not evidence against the trustees. They are res inter alios acta; but, when facts are proved which would establish the existence of a debt against the corporation, the liability of the trustees for the debt follows upon the proof of the other facts upon which the liability is made by statute to depend." *Chase v. Curtis*, 113 U. S. 452, 459, 28 L. Ed. 1038.

No right of action could arise upon the judgment itself, but upon the debt alone, on which the judgment was founded, and as to this, it is expressly declared, that the judgment was, as against the trustees, evidence, neither conclusive nor prima facie, of the existence of a debt due from the corporation, for the payment of which they could be charged, whether it was recovered before or after the alleged default of the officers. *Chase v. Curtis*, 113 U. S. 452, 460, 28 L. Ed. 1038.

**98. Liability for cotrustee's default.**—*Chase v. Curtis*, 113 U. S. 452, 459, 28 L. Ed. 1038.

The New York statute imposing a personal liability on the trustees for failing to make annual reports, is a highly penal act, extremely rigorous in its provisions. It is absolute that the trustees shall be liable for all the debts of the company, if the report be not made, no matter by whose default. If one of the trustees did all in his power to have it made, yet if the president, or a sufficient number of his cotrustees to constitute a majority, declined to sign it, or if the president and secretary declined to verify it by oath, the faithful trustee seems to be absolutely liable as well as those who refuse



of the state's credit to a railroad company by indorsing its bonds, but providing that (under the first act) the stockholders should be individually liable for the payment of the bonds, the indorsement of which was fraudulently obtained by such company, or which were sold for less than ninety cents in the dollar, and for all other losses that might follow to the state through any other fraud by such company, unless such stockholders should show themselves ignorant of or opposed to such fraud, and (under the latter statute) that the directors or other officers and incorporators and stockholders of said company, knowingly violating the provisions of the act to the same effect as above, should be held personally liable to the state for any loss incurred thereby; it was held, that the liability of the officers and stockholders to the state was statutory only, and there could be no recovery unless the facts stated in the declaration were such as to bring the defendants within the operation of the liability clause in one or the other of the statutes.<sup>99</sup>

(11) *Effect on Validity of Debt*.—See the title CORPORATIONS, vol. 4, p. 738.

(12) *Personal Liability on Agents of Foreign Corporation*.—See the title FOREIGN CORPORATIONS, vol. 6, p. 321.

b. *Enforcement*.—**When Remedy Only in Equity**.—Where a statute makes the trustees or directors, assenting to an excess of corporate indebtedness over capitalization, personally liable to the creditors for such excess, such liability is enforceable only in equity, by a suit to which all the creditors are parties.<sup>1</sup> And

to do their duty. *Chase v. Curtis*, 113 U. S. 452, 459, 28 L. Ed. 1038.

**99. Liability to state for illegal issue of bonds with state indorsement**.—This suit was not brought to enforce a liability for the payment of the bonds, that being conceded, and, under the act of 1867, the alleged frauds in obtaining the indorsement did not enter into the case, because the liability of stockholders for the payment of losses to the state depended entirely on other frauds than these. *Alabama v. Burr*, 115 U. S. 413, 425, 29 L. Ed. 435.

In order to recover for such losses they must have been connected by sufficient averments with the frauds charged, and the facts from which the conclusion of loss to the state is drawn must be such as to show that the loss was both the natural and immediate consequence of the wrongful and fraudulent acts referred to, the case being heard upon a demurrer. *Alabama v. Burr*, 115 U. S. 413, 426, 29 L. Ed. 435.

The only liability under act of 1870 for such a violation of its provisions, was for the loss which the state sustained on that account, and it was necessary for the declaration to show how the state was injured, and, as under the act of 1867, that the losses were the direct and immediate consequence of the wrongful conduct complained of, which it failed to do. *Alabama v. Burr*, 115 U. S. 413, 428, 29 L. Ed. 435.

As the state had no direct lien on the bonds for its security, a fraudulent use of the bonds was not a fraudulent diversion of the state's securities. *Alabama v. Burr*, 115 U. S. 413, 427, 29 L. Ed. 435.

Upon the facts as set forth in the declaration, there is no liability on the part of the defendants for the alleged frauds

of the company, other than those connected with overissues, or sales of the bonds at less than ninety cents on the dollar, and for these the suit is not brought. *Alabama v. Burr*, 115 U. S. 413, 427, 29 L. Ed. 435.

**1. When remedy only in equity**.—*Hornor v. Henning*, 93 U. S. 228, 23 L. Ed. 879; *Stone v. Chisolm*, 113 U. S. 302, 309, 28 L. Ed. 991.

It is immaterial that it does not appear that there are other creditors than the plaintiffs in error. There can be but one rule for construing the section, whether the creditors be one or many. *Stone v. Chisolm*, 113 U. S. 302, 309, 28 L. Ed. 991.

**District of Columbia**.—The act of congress (16 Stat. 98), under which certain corporations are organized in the District of Columbia, contains a provision, that, "if the indebtedness of any company organized under this act shall at any time exceed the amount of its capital stock, the trustees of such company assenting thereto shall be personally and individually liable for such excess to the creditors of the company." Held, that an action at law cannot be sustained by one creditor among many for the liability thus created, or for any part of it, but that the remedy is in equity. *Hornor v. Henning*, 93 U. S. 228, 23 L. Ed. 879.

"The remedy for this violation of duty as trustees is in its nature appropriate to a court of chancery. The powers and instrumentalities of that court enable it to ascertain the excess of the indebtedness over the capital stock, the amount of this which each trustee may have assented to, and the extent to which the funds of the corporation may be resorted to for the payment of the debts; also, the number and names of the creditors, the amount of their several debts, to determine the



even in equity one creditor cannot sue alone, but must either join the other creditors, or bring his suit on behalf of himself and all the others.<sup>2</sup>

**Enforcibility Outside of State.**—Where suit is brought in one state to enforce the statute liability for the debts of a corporation created by the legislature of another state, the statute is penal, and can only be enforced in the state where the statute was passed. The rule is universal.<sup>3</sup>

**Limitation as to Enforcement.**—Section 554 of the Montana code of civil procedure limiting actions to enforce a statutory liability imposed upon corporate directors to three years from discovery of the facts, qualifies the liability imposed upon directors by § 451 of the civil code, and creates a condition to the corresponding right of action against them, which goes with it into any jurisdiction where the action may be brought, and purports to qualify, or to impose a condition upon, liabilities already incurred under the earlier act taken up into § 451.<sup>4</sup>

**Action Ex Delicto—Survival.**—The action authorized by it has been held to be ex delicto, and it did not survive as against the personal representative of a trustee sought to be charged.<sup>5</sup>

c. *On Contracts, etc., in Corporate Name.*—Where an officer or agent executes a contract or instrument in an official and not a private capacity, there is no personal liability incurred.<sup>6</sup>

sum to be recovered of the trustees, and apportioned among the creditors, in a manner which the trial by jury and the rigid rules of common-law proceedings render impossible." *Hornor v. Henning*, 93 U. S. 228, 232, 23 L. Ed. 879, reaffirmed in *Stone v. Chisolm*, 113 U. S. 302, 308, 28 L. Ed. 991.

**South Carolina.**—So under the South Carolina statute of Dec. 10, 1869. *Stone v. Chisolm*, 113 U. S. 302, 28 L. Ed. 991.

**2. All creditors must be brought in.**—*Hornor v. Henning*, 93 U. S. 228, 233, 23 L. Ed. 879; *Stone v. Chisolm*, 113 U. S. 302, 309, 28 L. Ed. 991.

"To ascertain the existence of the liability in a given case requires an account to be taken of the amount of the corporate indebtedness, and of the amount of the capital stock actually paid in; facts which the directors, upon whom the liability is imposed, have a right to have determined, once for all, in a proceeding which shall conclude all who have an adverse interest, and a right to participate in the benefit to result from enforcing the liability. Otherwise the facts which constitute the basis of liability might be determined differently by juries in several actions, by which some creditors might obtain satisfaction and others be defeated. The evident intention of the provision is that the liability shall be for the common benefit of all entitled to enforce it according to their interest, an apportionment which, in case there cannot be satisfaction for all, can only be made in a single proceeding to which all interested can be made parties. The case cannot be distinguished from that of *Hornor v. Henning*, 93 U. S. 228, 23 L. Ed. 879, the reasoning and result in which we reaffirm." *Stone v. Chisolm*, 113 U. S. 302, 309, 28 L. Ed. 991.

**3. Enforcibility outside of state.**—

*Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 192, 25 L. Ed. 786. See the title **CONFLICT OF LAWS**, vol. 3, p. 1074, for full treatment.

**4. Limitation as to enforcement.**—*Davis v. Mills*, 194 U. S. 451, 454, 48 L. Ed. 1067.

The result is that § 554 purports to substitute a three years' limitation for the one year previously in force, assuming that the previous one year limitation applied to this case, as under the decisions it did. *Davis v. Mills*, 194 U. S. 451, 455, 48 L. Ed. 1067. See the title **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, pp. 917, 919.

**5. Action ex delicto—Survival.**—*Chase v. Curtis*, 113 U. S. 452, 457, 28 L. Ed. 1038. See the title **ABATEMENT, REVIVAL AND SURVIVAL**, vol. 1, p. 22.

**6. On contracts, etc., in corporate name.**—Where a party acting for a corporation discloses his principal and is known to be acting as an agent, and enters as such into a contract, he is not liable thereon in the absence of his express agreement to be thereby bound. *Whitney v. Wyman*, 101 U. S. 392, 25 L. Ed. 1050. See, also, *Elizabeth v. Pavement Co.*, 97 U. S. 126, 140, 24 L. Ed. 1000.

Where it seems, from the facts of the case, entirely clear that both parties understood and meant that the contract was to be, and in fact was, with the corporation, and not with the defendants, its incorporators, individually, the agreement thus made could not be afterwards changed by either of the parties without the consent of the other. *Whitney v. Wyman*, 101 U. S. 392, 396, 25 L. Ed. 1050; *Utley v. Donaldson*, 94 U. S. 29, 24 L. Ed. 54.

In *United States v. Robertson*, 5 Pet. 641, 647, 8 L. Ed. 257, an agreement and bond executed by the officers of a corporation was held to have been made in

d. *Decisions of State Courts as Rules of Decision*.—See the title COURTS, vol. 4, pp. 1077, 1078.

e. *Of Directors*.—See post, "Of Directors," VIII, B.

f. *Fraud of Officer in Purchase of Stock*.—See the title FRAUD AND DECEIT, vol. 6, p. 412.

**B. Of Directors**—1. IN GENERAL.—**To Cease Performance of Ultra Vires Contract**.—The duty of the directors to their stockholders is to cease to perform a contract to which they were never bound.<sup>7</sup>

**Honesty and Diligence Essential**.—Honesty and diligence are required of the directors of a corporation by the common law.<sup>8</sup>

**Degree of Care Required**.—The degree of care to which directors are bound is that which ordinarily prudent and diligent men would exercise under similar circumstances, and in determining that, the restrictions of the statute and the usages of business should be taken into account. What may be negligence in one case may not be want of ordinary care in another, and the question of negligence is, therefore, ultimately a question of fact, to be determined under all the circumstances.<sup>9</sup>

**Passive Negligence**.—A liability for loss should not lightly be imposed upon directors in the absence of any element of positive misfeasance, and solely upon the ground of passive negligence; and it must be made to appear that the losses for which defendants are required to respond were the natural and necessary consequence of omission on their part.<sup>10</sup>

an official and not a private capacity, so that they were not personally liable thereon. See post, "For Contracts and Instruments in Name of Corporation," IX, B.

7. **To cease performance of ultra vires contract**.—*Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 318, 30 L. Ed. 83.

8. **Honesty and diligence essential**.—*Yates v. Jones Nat. Bank*, 206 U. S. 158, 178, 51 L. Ed. 1002; *Martin v. Webb*, 110 U. S. 7, 15, 28 L. Ed. 49. See, also, *St. Louis, etc., R. Co. v. Johnston*, 133 U. S. 566, 576, 33 L. Ed. 683; *Auten v. United States Nat. Bank*, 174 U. S. 125, 147, 43 L. Ed. 920. See, also, ante, "Scope of Bond," IV, B; "Breach," IV, C. See the title BANKS AND BANKING, vol. 3, p. 95.

9. **Degree of care required**.—*Briggs v. Spaulding*, 141 U. S. 132, 152, 35 L. Ed. 662.

The degree of care and prudence which directors must exercise in the performance of their duties depends upon the subject to which it is to be applied, and each case has to be determined in view of all the circumstances. *Briggs v. Spaulding*, 141 U. S. 132, 147, 35 L. Ed. 662.

"The affairs of a company are generally, of necessity, largely intrusted to managing officers. The directors generally cannot know, and have not the ability or knowledge requisite to learn, by their own efforts, the true condition of the affairs of the company. They select agents in whom they have confidence, and largely trust to them. They publish their statements and reports, relying upon the figures and facts furnished by such

agents; and if the directors, when actually cognizant of no fraud, are to be made liable in an action of fraud for any error or misstatement in such statements and reports, then we have a rule by which every director is made liable for any fraud that may be committed upon the company in the abstraction of its assets and diminution of its capital by any of its agents, and he becomes substantially an insurer of their fidelity. It has not been generally understood that such a responsibility rested upon the directors of corporations," and there is no principle of law or rule of public policy which requires that it should. *Briggs v. Spaulding*, 141 U. S. 132, 162, 35 L. Ed. 662.

**Section 556 of Morawetz on Corporations** is to the effect that "the liability of directors for damages caused by acts expressly prohibited by the company's charter or act of incorporation is not created by force of the statutory prohibition. The performance of acts which are illegal or prohibited by law may subject the corporation to a forfeiture of its franchises, and the directors to criminal liability; but this would not render them civilly liable for damages. The liability of directors to the corporation for damages caused by unauthorized acts rests upon the common-law rule which renders every agent liable who violates his authority to the damage of his principal. A statutory prohibition is material under these circumstances merely as indicating an express restriction placed upon the powers delegated to the directors when the corporation was formed." *Briggs v. Spaulding*, 141 U. S. 132, 146, 35 L. Ed. 662.

10. **Passive negligence**.—*Briggs v.*



2. **DIRECTORS AS TRUSTEES.**—It is the duty of directors to administer the important matters committed to their charge for the mutual benefit of all parties interested, and in securing an advantage to themselves, not common to the other creditors, they are guilty of a plain breach of trust.<sup>11</sup>

3. **CONDUCTING BUSINESS AFTER DISSOLUTION.**—Directors cannot carry on

Spaulding, 141 U. S. 132, 151, 35 L. Ed. 662.

It does not seem that the cases have held directors to account, except when they have themselves been personally guilty of some fraud on the corporation, or have known and connived at some fraud in others, or where such fraud might have been prevented had they given ordinary attention to their duties. Not, by any means, that their responsibility is limited to these cases, and that there might not exist such a case of negligence or of acts clearly ultra vires, as would make perfectly honest directors personally liable, but it is evident that gentlemen selected by the stockholders from their own body ought not to be judged by the same strict standard as the agent or trustee of a private estate. Were such a rule applied, no gentlemen of character and responsibility would be found willing to accept such places. *Briggs v. Spaulding*, 141 U. S. 132, 149, 35 L. Ed. 662.

**They are not insurers of the fidelity of the agents** whom they have appointed, who are not their agents but the agents of the corporation; and they cannot be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty, either for failure to supervise the business with attention or in neglecting to use proper care in the appointment of agents. *Morawetz*, § 551, et seq., and cases. *Briggs v. Spaulding*, 141 U. S. 132, 147, 35 L. Ed. 662.

**As to approval and acceptance of bond,** see ante, "Approval and Acceptance, and Proof Thereof," IV, A.

**Cannot authorize breach of bond.**—See ante, "Scope of Bond," IV, B.

**Contract to retain in office.**—See ante, "Contract to Retain in Office," V, C.

11. **Directors as trustees.**—*Drury v. Cross*, 7 Wall. 299, 302, 19 L. Ed. 40; *Burke v. Smith*, 16 Wall. 390, 395, 21 L. Ed. 361; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328; *Wardell v. Railroad Co.*, 103 U. S. 651, 657, 26 L. Ed. 509; *West v. Camden*, 135 U. S. 507, 521, 34 L. Ed. 254; *Woodstock Iron Co. v. Richmond*, etc., *Extension Co.*, 129 U. S. 643, 32 L. Ed. 819; *Wright v. Kentucky*, etc., *R. Co.*, 117 U. S. 72, 94, 29 L. Ed. 821; *United States v. Robertson*, 5 Pet. 641, 666, 8 L. Ed. 257, per Baldwin, J., dissenting. See ante, "Contracts and Dealings with Corporation," VI, B, 1, e.

While the directors of a corporation stand in a fiduciary relation to both the

stockholders and the creditors, whatever may be the extent of the fiduciary obligations of directors to stockholders, there can be no pretense in this case of a breach thereof. The mortgage was expressly authorized by the stockholders, and they cannot claim that the directors in executing the instrument, which they had themselves authorized, were guilty of any breach of duty to them. *Sanford, etc., Tool Co. v. Howe, etc., Co.*, 157 U. S. 312, 317, 39 L. Ed. 713.

Where the directors, who controlled the corporation, in their selfish desire to save themselves on their indorsements for the corporation which was insolvent at the expense of their own reputation and the rights of creditors, were willing to use the means at their command to swell the indebtedness of the corporation beyond its true amount, in order to aid more effectually certain creditors to acquire all the property of the company, this is a breach of trust. *Drury v. Cross*, 7 Wall. 299, 303, 19 L. Ed. 40.

**Dissipation of property.**—See ante, "General Scope and Limitations," VI, B, 1, b.

**Liability to suits.**—Although the directors of a corporation (a bank) are not by its charter expressly made liable to be sued, yet it is not doubted they may be held legally responsible for an abuse of the trust confided to them. *Woodruff v. Trapnall*, 10 How. 190, 205, 13 L. Ed. 383, reaffirmed in *Paup v. Drew*, 10 How. 218, 13 L. Ed. 394.

As to violation of trust by disposal of corporate property, see the title CORPORATIONS, vol. 4, p. 729.

**Title to property.**—Where the defendant in ejectment, in a deposition, admitted that he had been in possession of the property as a managing director; that he at no time denied the right of the company to the possession of the property, and that his term as managing director had expired, and there was nothing in the deposition to qualify this admission, there was no impropriety in the court's directing a verdict for the plaintiff. *Seymour v. Slide, etc.*, *Gold Mines*, 153 U. S. 523, 524, 38 L. Ed. 807.

**Purchase of undelivered corporate bond.**—A director who had himself voluntarily surrendered bonds of the corporation, which were in his custody in an undelivered and unissued state, to a sheriff to be sold under execution as the property of the company, acquired no title or ownership by purchase at such sale. The unissued bonds were not subject to execution as valid and binding obligations



the business of the corporation after dissolution without being accountable for their actions in so doing, however honest they may have been.<sup>12</sup>

**4. RELEASE OF LIABILITY.**—A release executed by a corporation to its directors, which was a full and final settlement of the matters and claims between the parties, there being no evidence that the settlement was obtained by fraud or any improper conduct of either party, is valid, and is of itself sufficient to justify the dismissal of a bill filed by the corporation to charge the directors with improper and ultra vires acts as such directors.<sup>13</sup>

**C. Of President.**—While the relation of the president of a corporation to it is one of trust and confidence,<sup>14</sup> the obligation of the president in the disposition of the money of the corporation, if any of it came to his hands, is to the company. If it was lost it was the company's loss, not the bondholders. If he improperly or fraudulently converted it to his own use, he was liable to the company and not to the bondholders in this suit. There was no privity or trust relation between him and them in this regard.<sup>15</sup>

**For Fraud in Inducing Stock Subscription.**—When the effect of a fraud committed by the president of a corporation in inducing a person to buy stock, inured directly to his own personal advantage, he may be personally liable to the party so defrauded.<sup>16</sup>

**For Money Received in Official Capacity.**—Where money was sent to and received by the president and financial manager of a corporation in his official capacity and applied to the corporate purposes, while the corporation may be liable for the money, the officer is not personally so.<sup>17</sup>

against the company. *Richardson v. Green*, 133 U. S. 30, 47, 33 L. Ed. 516.

**Purchase or mortgage of corporate property and dealings with corporation.**—See ante, "Powers," VI.

**As to director as pledgee of corporate bonds,** see ante, "Loan to Corporation," VI, B, 1, e, (6).

**12. Directors conducting business after dissolution.**—*Mason v. Pewabic Min. Co.*, 133 U. S. 50, 64, 33 L. Ed. 524, where the court said: "However honest the directors may be who conducted the business of this corporation for nearly a year after its dissolution without any attempt to wind it up, but who, on the contrary, assessed \$88,000 on the shares of the stock and collected it, and did much other of the ordinary business of mining operations, it seems to us eminently proper that in this proceeding, by which the court undertook to wind up the affairs of the corporation, to pay its debts, and to realize its assets and distribute them among the shareholders, these directors should account for what they did in that time."

**13. Release of liability.**—*Pneumatic Gas Co. v. Berry*, 113 U. S. 322, 28 L. Ed. 1003. See, generally, the title **RELEASE**.

**14. Trust relation of president.**—*Manufacturing Co. v. Bradley*, 105 U. S. 175, 183, 26 L. Ed. 1034.

**15. Liability of president to corporation primarily.**—*Van Weel v. Winston*, 115 U. S. 228, 247, 29 L. Ed. 384.

Admitting that the president of a corporation converted some of the money arising from a sale of bonds to his private use, and not to the purposes of the company, he came under no obligation

to see to the application of this money as the bondholders might think it ought to be applied. They had bought their bonds, paid their money, and received their security. The money so diverted was the money of the company, and not their money. If he cheated this company out of its money, the right to redress for that wrong is in the company or in its stockholders. As a creditor of the company, a bondholder has no right to interfere in the matter until he has a judgment against the company, with an execution returned nulla bona. He has not in this suit shown any right to use the name of the company or of its stockholders to obtain redress for a tort committed on them. *Van Weel v. Winston*, 115 U. S. 228, 245, 29 L. Ed. 384; *United States v. Union Pac. R. Co.*, 98 U. S. 569, 614, 25 L. Ed. 143.

It was held in *Ketchum v. Duncan*, 96 U. S. 659, 669, 24 L. Ed. 868, that there was no misappropriation of the company's funds by its president—no payment by him of which either the company or the bondholders had any reason to complain. See the title **RAILROADS**.

**16. Fraud in inducing stock subscription.**—*Tyler v. Savage*, 143 U. S. 79, 99, 36 L. Ed. 82. See the title **STOCK AND STOCKHOLDERS**.

**17. For money received in official capacity.**—*Loring v. Frue*, 104 U. S. 223, 26 L. Ed. 713. And see the title **STOCK AND STOCKHOLDERS**.

**Purchase of corporate bond.**—Where a bond of the company was purchased from the obligee by the president of the corporation, with his own means, and not those of the company; and the value paid.

**D. Responsibility and Amenability to Corporation and Stockholders**

—1. To CORPORATION.—The right to maintain a suit against the officers of a corporation for fraudulent misappropriation of its property is a right of the corporation, and it is only when the corporation will not bring the suit, that it can be brought by one or more stockholders in behalf of all.<sup>18</sup>

**Liability to Suit by Assignee in Bankruptcy.**—A suit cannot be maintained by the assignee in bankruptcy of an insolvent corporation against its former officers and directors, for misconduct not amounting to misappropriation of corporate property, whatever remedy there may exist to any one to pursue these parties and others for their share in this transaction, either at law or in equity.<sup>19</sup>

2. To STOCKHOLDERS.—See the title STOCK AND STOCKHOLDERS.<sup>20</sup>

**IX. Liability of Corporation for Acts of Officers and Agents, and Rights Thereunder.**

**A. Responsibility of Corporation for Acts Generally.**—See the title CORPORATIONS. vol. 4, p. 723. As to corporations necessarily act by agents, a corporation is liable for the acts of its servants while engaged in the business of their employment, to the same extent that individuals are liable under like circumstances.<sup>21</sup>

so far as the testimony discloses, was full; and every step, when taken, was made known and assented to by the directors of the corporation; the transaction was legitimate in itself and beneficial to the company, and the dealing was not by the president with himself, but with the corporation, in fact, represented and acting by other directors, with full knowledge of all the facts. The relation does not furnish any defense to the corporation either at law or in equity. *Manufacturing Co. v. Bradley*, 105 U. S. 175, 183, 26 L. Ed. 1034.

**18. Responsibility and amenability to corporation and stockholders.**—*Porter v. Sabin*, 149 U. S. 473, 478, 37 L. Ed. 815; *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827.

**Actions against.**—The suit, when brought by stockholders, is still a suit to enforce a right of the corporation, and to recover a sum of money due to the corporation; and the corporation is a necessary party, in order that it may be bound by the judgment. *Porter v. Sabin*, 149 U. S. 473, 478, 37 L. Ed. 815; *Davenport v. Dows*, 18 Wall. 626, 21 L. Ed. 938. See the title CORPORATIONS, vol. 4, pp. 642, 658, 762, et seq. See the title STOCK AND STOCKHOLDERS, for treatment of the comparative rights of corporation and stockholders as to redress of grievances of all kinds.

**19. Liability to suit by assignee in bankruptcy.**—*Walker v. Reister*, 102 U. S. 467, 472, 26 L. Ed. 220. See, generally, the title BANKRUPTCY, vol. 2, p. 908, et seq.

**Receivership and right of receiver to sue.**—See the title RECEIVERS.

**Knowledge and notice of rights.**—See post, "Notice to Corporation Through Officers or Agents," X.

**20. As to suits to restrain breach of**

**trust and illegal conduct,** see the title STOCK AND STOCKHOLDERS. See, also, the title CORPORATIONS, vol. 4, pp. 763, 765. And see ante, "Directors as Trustees," VIII, B, 2.

**21. Responsibility of corporation for acts generally.**—*Orleans v. Platt*, 99 U. S. 676, 682, 25 L. Ed. 404; *Philadelphia, etc., R. Co. v. Quigley*, 21 How. 202, 209, 16 L. Ed. 73; *Baldwin v. Bank*, 1 Wall. 234, 240, 17 L. Ed. 534; *Railroad Co. v. Howard*, 7 Wall. 392, 413, 19 L. Ed. 117.

The officers of a corporation are held out to the public as having authority to act according to the general usage, practice and course of their business; and their acts, within the scope of such usage, practice and course of business, would, in general, bind the corporation in favor of third persons possessing no other knowledge. *Minor v. Mechanics' Bank*, 1 Pet. 46, 7 L. Ed. 47.

"The acts of a single duly authorized agent of a corporation, within the scope of his authority, bind the corporation, although he keeps no minutes of such acts. They may be, and they are, daily, proved aliunde." *United States Bank v. Dandridge*, 12 Wheat. 64, 83, 6 L. Ed. 552.

"The officer is the corporation for many purposes. Certainly a corporation can be charged with no intelligent action, or with entertaining any purpose, or committing any fraud, except as this intelligence, this purpose, this fraud, is evidenced by the actions of its officers. And while it may be conceded that for many purposes they are agents, and are to be treated as the agents of the corporation or of the corporators, it is also true that for some purposes they are the corporation, and their acts as such officers are its acts." *Pollard v. Vinton*, 105 U. S. 7, 12, 26 L. Ed. 998. See *Park Bank v. Remsen*, 158 U. S. 337, 344, 39 L. Ed. 1008, where it



**B. For Contracts and Instruments in Name of Corporation**—1. IN GENERAL.—Corporations are liable on contracts made by their officers or agents in the course of their employment,<sup>22</sup> even parol contracts, and contracts raised by implication.<sup>23</sup> And although the alleged agreements were not made by the corporation, but by the committee, in their own names, and, in consideration of the work being done, the committee, and not the corporation, personally and expressly agreed to pay the stipulated price, the corporation may be bound.<sup>24</sup>

2. RULES FOR DETERMINING CORPORATE LIABILITY.—The safe rule in all instances of acts done by the officers of corporate companies, or by those who have the management of their business, from which contracts are alleged to have been made, is, to test that fact by an inquiry into the corporate ability which has been given to them and to their subordinate officers, or which the directors of the company can confer upon the latter to act for them.<sup>25</sup>

**Manner of Execution.**—The rule as laid down by the authorities is that the agent should, in the body of the contract, name the corporation as the contracting party, and sign as its agent or officer. This is the mode in which bank bills, pol-

is said that the officer is not the corporation.

**Liability for acts of promoters.**—See the title CORPORATIONS, vol. 4, p. 658, et seq.

**Contracts by committee prior to incorporation.**—It may even be liable on contracts made in its name by a committee before it becomes a corporation, although they sign their own name as a committee, if the intention to bind the corporation is clear. *Whitney v. Wyman*, 101 U. S. 392, 25 L. Ed. 1050. See the title CORPORATIONS, vol. 4, p. 660.

22. **Contracts made in course of employment.**—*Bacon v. Robertson*, 18 How. 480, 485, 15 L. Ed. 499; *Bank v. Patterson*, 7 Cranch 299, 305, 3 L. Ed. 351; *Fleckner v. United States Bank*, 8 Wheat. 338, 5 L. Ed. 631; *Bank v. Guttschlick*, 14 Pet. 19, 27, 10 L. Ed. 335; *Commercial, etc., Ins. Co. v. Union Mut. Ins. Co.*, 19 How. 318, 15 L. Ed. 636; *Eureka Co. v. Bailey Co.*, 11 Wall. 488, 20 L. Ed. 209.

23. **Parol and implied contracts.**—Even the parol contracts of a corporation made by its duly authorized agent are binding. *Fanning v. Gregoire*, 16 How. 524, 14 L. Ed. 1043; *Fleckner v. United States Bank*, 8 Wheat. 338, 5 L. Ed. 631. The absence, therefore, of the corporate seal from a contract of assignment does not render it invalid or void. *Gottfried v. Miller*, 104 U. S. 521, 527, 26 L. Ed. 851.

In *Bank v. Patterson*, 7 Cranch 299, 306, 3 L. Ed. 351, which was an action brought against a corporation by an administrator to recover for work done by his intestate under contracts with the committee of the corporation, it was said: "Wherever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts, made by its authorized agents, are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action may well lie." *Pittsburg, etc., R. Co. v. Keo-*

*kuk, etc., Bridge Co.*, 131 U. S. 371, 381, 33 L. Ed. 157. See, also, *Fitzgerald, etc., Const. Co. v. Fitzgerald*, 137 U. S. 98, 111, 34 L. Ed. 608, as to implied contract.

24. **Contracts of committee.**—*Bank v. Patterson*, 7 Cranch 299, 305, 3 L. Ed. 351; *Louisville, etc., R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 573, 43 L. Ed. 1081, reaffirmed in *Walters v. Chicago, etc., R. Co.*, 186 U. S. 479, 46 L. Ed. 1266. See, also, *Whitney v. Wyman*, 101 U. S. 392, 25 L. Ed. 1050.

Considering the evidence in this case, from which the jury might legally infer an express, or an implied promise of the corporation, the contracts were for the exclusive use and benefit of the corporation, and made by their agents, for purposes authorized by their charter. The corporation proceeded, on the faith of those contracts, to pay money, from time to time, to the plaintiff's intestate. Although, then, an action might have lain against the committee, personally, upon their express contract, yet, as the whole benefit resulted to the corporation, it seems to the court, that from this evidence, the jury might legally infer, that the corporation had adopted the contracts of the committee, and had voted to pay the whole sum which should become due under the contracts, and that the plaintiff's intestate had accepted their engagement. As to the extra work, respecting which there was no specific agreement, the evidence was yet more strong to bind the corporation. *Bank v. Patterson*, 7 Cranch 299, 307, 3 L. Ed. 351.

**Implied contract for compensation.**—See ante, "Rights of Officers and Agents against Corporation," VII.

**In assumpsit.**—See the title ASSUMPSIT, vol. 2, p. 638.

25. **Rules for determining corporate liability.**—*United States v. City Bank*, 21 How. 356, 365, 16 L. Ed. 130.

"Such was the view of this court when it decided, in the case of the Bank of the United States *v. Dunn* (6 Pet. 51, 8 L. Ed. 316), that a release given by its



icies of insurance, and many other contracts of corporations are ordinarily executed.<sup>26</sup>

3. **ASSIGNMENTS AND MORTGAGES.**—Where an assignment of a patent is executed by the duly authorized agent of a corporation, in the manner required by law of an agent making a simple contract in writing for the corporation, and by its authority, the corporation is bound.<sup>27</sup>

4. **BILLS, NOTES, AND NEGOTIABLE OBLIGATIONS.**—One who takes from a railroad or business corporation, in good faith, and without actual notice of any inherent defect, a negotiable obligation issued by order of the board of directors, signed by the president and secretary in the name and under the seal of the corporation, and disclosing upon its face no want of authority, has the right to assume its validity, if the corporation could, by any action of its officers or stockholders, or of both, have authorized the execution and issue of the obligation.<sup>28</sup>

In **Daniel on Negotiable Instruments**, § 416, the rule is laid down that: "Where a note is payable to a corporation by its corporate name, and is then indorsed by an authorized agent or official, with the suffix of his ministerial position, it will be regarded that he acts for his principal, who is disclosed on the paper as the payee, and who, therefore, is the only person who can transfer the legal title."<sup>29</sup>

5. **DISCLOSURE OF CORPORATE NAME.**—**Express Disclosure of Corporation's Name Not Essential.**—Where a person acts merely as agent of a corporation, and signs papers in that capacity, an express disclosure of the principal's name on the face of the papers, or in the signature, is not essential to protect the agent from personal liability to a party having full knowledge of the facts as to his agency and the principal for which he acts.<sup>30</sup>

president and cashier to the endorser of a promissory note of his liability upon it, did not bind the bank, neither nor both having any authority to make contracts of that kind." *United States v. City Bank*, 21 How. 356, 365, 16 L. Ed. 130.

26. **Manner of execution.**—*Gottfried v. Miller*, 104 U. S. 521, 527, 26 L. Ed. 851.

27. **Assignments.**—*Gottfried v. Miller*, 104 U. S. 521, 527, 26 L. Ed. 851.

**Mortgages.**—See ante, "To Borrow Money and Execute Securities Therefor," VI, A, 6; "Contracts and Dealings with Corporation," VI, B, 1, e. See, also, the title **CORPORATIONS**, vol. 4, p. 738, et seq.

28. **Bills, notes and negotiable obligations.**—*Louisville, etc., R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 573, 43 L. Ed. 1081, reaffirmed in *Walters v. Chicago, etc., R. Co.*, 186 U. S. 479, 46 L. Ed. 1266. See, also, ante, "Scope of Bond," IV, B; "To Borrow Money and Execute Securities Therefor," VI, A, 6; "To Borrow Money and Give Necessary Securities," VI, C, 4.

Where a bill of exchange purports to be made at the office of the company, and directs the drawee to charge the amount thereof to the account of the company, of which the signers describe themselves as president and secretary, an instrument bearing on its face all these signs of being the contract of the principal cannot be held to bind the agents personally. It is the bill of the corporation alone. *Hitchcock v. Buchanan*, 105 U. S. 416, 417, 26 L. Ed. 1078; *Falk v. Moebis*, 127 U. S. 597, 602, 32 L. Ed. 266. See, also,

ante, "Of General Manager or Superintendent," VI, E.

29. **Rule stated by Mr. Daniel.**—*Falk v. Moebis*, 127 U. S. 597, 606, 32 L. Ed. 266, where it was held that the notes involved in this controversy, upon their face, were the notes of the corporation. In the language of the court below, they were "drawn by, payable to, and indorsed by, the corporation." There is no ambiguity in the indorsement, but, on the contrary, such indorsement is, in terms, that of the company.

The note here read: "Four months after date we promise to pay to the order of George Moebis, Sec. & Treas., ten hundred sixty-one & 24/100 dollars, at Merchants' & Manufacturers' National Bank, value received," signed: "Peninsular Cigar Co., Geo. Moebis, Sec. & Treas.," and was indorsed: "Geo. Moebis, Sec. & Treas." *Falk v. Moebis*, 127 U. S. 597, 32 L. Ed. 266. See, also, the title **CORPORATIONS**, vol. 4, p. 738, et seq.

**Compliance with formalities.**—See ante, "Mode of Action," VI, A, 2. See, also, the title **CORPORATIONS**, vol. 4, p. 725.

30. **Express disclosure of corporation's name not essential.**—*Metcalf v. Williams*, 104 U. S. 93, 26 L. Ed. 665.

The fact that it bore two official signatures, that of the complainant as vice-president and of A. as secretary, is so unusual on the hypothesis of its being an individual transaction, and points so distinctly to an official origin, that it may very well be doubted whether any holder could claim to be innocently ignorant of its true character. But, in the present

**Appearance of Corporate Name Significant.**—But when the question is whether a negotiable instrument drawn by a corporate officer is a corporate transaction or not, the appearance of the corporate name on the face of the paper at once leads to the belief that it is a corporate and not an individual transaction.<sup>31</sup>

**C. For Torts.**—See the title CORPORATIONS, vol. 4, p. 759. See, also, the titles MASTER AND SERVANT, ante, p. 275; NEGLIGENCE, ante, p. 873; TORTS.<sup>32</sup>

**D. Declarations and Admissions.**—See the title DECLARATIONS AND ADMISSIONS, vol. 5, pp. 222, 223.<sup>33</sup>

**E. Rights Acquired Thereunder.—Purchase of Stock in Another Corporation with Embezzled Funds.**—Where moneys belonging to a corporation in the hands of its president, S., were embezzled and wrongfully invested in stock of another corporation, it being a majority thereof, the first corporation could have no other rights than such as belong to a stockholder holding a controlling interest in the stock of the latter corporation.<sup>34</sup>

case, the party claiming to have the beneficial interest in the check was a fellow agent of the company on whose account it was drawn, actually knew its origin, and cannot pretend that he took it for anything else than a check of the corporation. The plea that the name of the principal was not disclosed on the face of the paper cannot be made by him, for he knew all about it. *Metcalf v. Williams*, 104 U. S. 93, 97, 26 L. Ed. 665.

**31. Appearance of corporate name significant.**—*Mechanics' Bank v. Bank*, 5 Wheat. 326, 336, 5 L. Ed. 100. See *Metcalf v. Williams*, 104 U. S. 93, 97, 26 L. Ed. 665; *Falk v. Moebis*, 127 U. S. 597, 605, 32 L. Ed. 266. See the title BANKS AND BANKING, vol. 3, p. 91. See, also, ante, "On Contracts, etc., in Corporate Name," VIII, A, 3, c.

**32. Contract creating relation of master and servant.**—*Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 523, 33 L. Ed. 440. See the title MASTER AND SERVANT, ante, p. 275.

The provision of the contract, that the agent shall not use the name of the company in any manner whereby the public or any individual may be led to believe that it is responsible for his actions, does not and cannot affect its responsibility to third persons injured by his negligence in the course of his employment. *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 523, 33 L. Ed. 440.

**Exemplary damages.**—See the title EXEMPLARY DAMAGES, vol. 6, p. 196.

**33.** As to representations of agents as to nonassessibility of stock, see the title STOCK AND STOCKHOLDERS.

**34. Purchase of stock in another corporation with embezzled funds.**—*Railroad Companies v. Schutte*, 103 U. S. 118, 136, 26 L. Ed. 327.

Its moneys were wrongfully invested in that stock by an embezzler, who bought the stock as stock, and if the company whose money was embezzled adopts his purchase, the stock must be taken as he held it, and subject to such incumbrances as were put on it while in his hands. This

is not seriously disputed. It cannot lay claim to the property of the corporation as bought with its funds. *Railroad Companies v. Schutte*, 103 U. S. 118, 136, 26 L. Ed. 327.

**Purchase of bonds.**—Where the same things was done with reference to the purchase of the bonds of another corporation by such officer with such funds, the property of the corporation having just been sold, the fact that the purchasers conveyed all its property by a trust deed or agreement which purported, however, to be in trust for S. to convey to the company to be created by an act incorporating the purchasers of the property as soon as the necessary legislation to that effect could be obtained, and which was not executed in a form to pass title, and the security was only to continue under this plan until the contemplated corporation could be organized, did not make such property subject to the claim of the defrauded corporation. When the act of incorporation was obtained, the company at once, without objection from S., or any one in his interest, took possession of the property and operated the railroad as owner. L., who had succeeded to all of S.'s rights under his several contracts, assumed the absolute control of the company and was its principal stockholder. Both S. and L. were named as incorporators of the new company, incorporated on the same day with the purchasers, which shortly after, as no doubt was from the beginning intended, absorbed the purchasers' corporation and took possession of its property. No one ever disputed the title of the new company until long after this litigation began, and the defrauded company in its original bill distinctly averred that the ownership of the property was in that company. *Railroad Companies v. Schutte*, 103 U. S. 118, 137, 26 L. Ed. 327.

**Liability.**—This is clearly recognized in the contract of settlement entered into between S., L., and the commissioners of North Carolina, on the 16th of April, 1870, by which it was agreed that the de-



## X. Notice to Corporation Through Officers or Agents.

The president and directors of a corporation are not merely the agents or servants, but the representatives of the corporation, and the acts, intentions and neglects of such officers are those of the corporation itself, and their knowledge and that of general agents is imputed to the corporation; so with notice to them.<sup>35</sup> The fact that those agents committed a fraud cannot alter the legal effect of their acts or of their knowledge with respect to the company in regard to third parties who had no connection whatever with them in relation to the perpetration of the fraud, and no knowledge that any such fraud had been perpetrated. In such case the rule imputing knowledge to the company by reason of the knowledge of its agent remains.<sup>36</sup>

### OFFICIAL.—See note 1.

frauded North Carolina company should be paid the money it had lost from the proceeds of the sales of the state bonds to be issued to the new company on the faith of its ownership of this very property. Certainly under such circumstances the North Carolina company is estopped from setting up title to the property as against the bona fide holders of these bonds. In this litigation that company can occupy no other position than that of an equitable owner of the stock of L. in the new company, and all incumbrances on the property are necessarily incumbrances on the stock which the property in legal effect represents. The settlement with S. was undoubtedly conditional, and not to be complete until the money agreed on was paid, but nevertheless the North Carolina company became by the transaction a seller of the bonds and is estopped accordingly. *Railroad Companies v. Schutte*, 103 U. S. 118, 137, 26 L. Ed. 327.

**35. Notice to corporations through officers or agents.**—*Craig v. Continental Ins. Co.*, 141 U. S. 638, 647, 35 L. Ed. 886; *Duncan v. Jaudon*, 15 Wall. 165, 21 L. Ed. 142; *Martin v. Webb*, 110 U. S. 7, 15, 28 L. Ed. 49; *St. Louis, etc., R. Co. v. Johnston*, 133 U. S. 566, 576, 33 L. Ed. 683; *Auten v. United States Nat. Bank*, 174 U. S. 125, 148, 43 L. Ed. 920; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 436, 35 L. Ed. 1062; *Mechanics' Bank v. Seton*, 1 Pet. 299, 309, 7 L. Ed. 152. See, also, ante, "In General," VIII, B, 1. As to notice and knowledge of bank officers and agents, see the title **BANKS AND BANKING**, vol. 3, p. 122.

Where it is through its incorporators that a corporation claims title to land, as they are associated together to carry forward a common enterprise, the knowledge or actual notice of all these incorporators and the president was the knowledge or notice of the company, and if constructive notice bound them it bound the company. *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 436, 35 L. Ed. 1062.

Where there is hostile control of the corporate affairs by the directors during a certain period, mere knowledge by, or

notice to, the corporation, or its directors or officers, or more or less of its stockholders, is unimportant. Mere knowledge by helpless stockholders of the fraudulent acts of their directors cannot prevent the corporation itself from seeking redress, if it acts promptly when freed from the control of such directors. *Pacific Railroad v. Missouri Pac. R. Co.*, 111 U. S. 505, 521, 28 L. Ed. 498.

**Mere employee.**—Where one was not an officer of the corporation, or employed directly by it, but was at most a mere employee of the corporation, not its general agent, nor, so far as appears, had it any knowledge of his appointment, his knowledge was not the private knowledge of the corporation. *Craig v. Continental Ins. Co.*, 141 U. S. 638, 647, 35 L. Ed. 886. See ante, "In General," VIII, B, 1.

**President of local board and attorney.**—Where the president and attorney were directors of the local board of a corporation and had to be directors before they could hold either office, and the local directors had to be approved by the board of the main office, the knowledge of the attorney and of the president of the board in regard to a matter coming within the sphere of their duty, and acquired while acting in regard to the same, and sending to the company at its main office their report which it was their duty to make, must be imputed to the company. *Armstrong v. Ashley*, 204 U. S. 272, 282, 51 L. Ed. 482.

As to notice to or knowledge of officers or agents of building and loan associations, see the title **BUILDING AND LOAN ASSOCIATIONS**, vol. 3, p. 543.

As to notice of title to stock transferred to trustee, see the title **STOCK AND STOCKHOLDERS**.

**36. Effect of fraud of agent.**—*Armstrong v. Ashley*, 204 U. S. 272, 283, 51 L. Ed. 482. See, generally, the title **NOTICE**, ante, p. 928.

**1. Official certificates and documents.**—A stamp or certificate on an invoice for the convenience and security of the collector and the government, was not an official certificate, in the sense of the act of March 2, 1799, prescribing fees of collect-



**OFFSET.**—See the title SET-OFF, RECOUPMENT AND COUNTERCLAIM.

**OFFSPRING.**—See note 1.

**OFTEN.**—See note 2.

**OHIO.**—As to judicial notice of Ohio River, see the title JUDICIAL NOTICE, vol. 7, p. 682. As to whether statute of 43 Elizabeth was ever adopted in, see the title CHARITIES, vol. 3, p. 678. See the title BOUNDARIES, vol. 3, p. 494.

**OIL AND GAS.**—See, generally, the title MINES AND MINERALS, ante, p. 364. As to judicial notice of, see the title JUDICIAL NOTICE, vol. 7, p. 677. As to affect of keeping on fire policy, see the title INSURANCE, vol. 7, p. 172.

**OILCLOTH FOUNDATION.**—See note 3.

**OKLAHOMA.**—As to appellate jurisdiction of supreme court, see the title APPEAL AND ERROR, vol. 1, pp. 388, 530. As to criminal jurisdiction, see the title COURTS, vol. 4, p. 861.

**OLEINE.**—See note 4.

**OLEOMARGARINE.**—See note 5.

**ON.**—See note 6.

ors of customs for official certificates and "for every official document, registers excepted, required by any merchant, etc." It was not an official document required by the merchant, nor was it given to him. It was a memorandum between officers in the custom house, as a part of their system of checks and authentications. *Barber v. Schell*, 107 U. S. 617, 624, 27 L. Ed. 490.

A jurat to an oath of entry was held not to constitute an official document within the meaning of the act of March 2, 1799. *Barber v. Schell*, 107 U. S. 617, 624, 27 L. Ed. 490.

An order to the public storekeeper to deliver examined packages did not constitute an official certificate, or an official document required by the merchant, in the sense of the statute. \* \* \* The court said: "The order to the storekeeper was a memorandum between officers. It was 'required' by the merchant, in one sense, because, without it, according to the course of business, the storekeeper would not deliver the examined packages, but it was not an official document passing from the custom house to the merchant. *Barber v. Schell*, 107 U. S. 617, 624, 27 L. Ed. 490. See the title REVENUE LAWS.

**Official services.**—See *United States v. Mosby*, 133 U. S. 273, 281, 33 L. Ed. 625. And see the titles AMBASSADORS AND CONSULS, vol. 1, p. 282; REVENUE LAWS.

**Official bonds.**—See the title PUBLIC OFFICERS, and references given.

**Official reports and certificates.**—See the title DOCUMENTARY EVIDENCE, vol. 5, p. 443.

1. **Offspring.**—Where a testator devises to a child five years old at the date of the will certain lots of land, and further provides that in the event of her dying unmarried, or, if married, dying without offspring by her husband, then the lots to be sold, and the proceeds to be divided equally among the heirs of another, the word offspring here used is but a synonym for

"issue." *Barber v. Pittsburgh, etc., Railway*, 166 U. S. 83, 101, 41 L. Ed. 925.

2. **Often.**—As to meaning of the term use of alcoholic stimulants "often or daily" as applicable to a life insurance policy, see the title INSURANCE, vol. 7, p. 163.

3. **Oilcloth foundation.**—See *Arthur v. Cumming*, 91 U. S. 362, 365, 23 L. Ed. 438. And see the title REVENUE LAWS.

4. **Oleine.**—See *Tilghman v. Proctor*, 102 U. S. 708, 26 L. Ed. 279; *Tilghman v. Proctor*, 125 U. S. 136, 138, 31 L. Ed. 664. And see the title REVENUE LAWS.

5. **Oleomargarine.**—See *McCray v. United States*, 195 U. S. 27, 43, 49 L. Ed. 78; *Cliff v. United States*, 195 U. S. 159, 160, 49 L. Ed. 139; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 9, 43 L. Ed. 49. And see references under FOOD, vol. 6, p. 302. See, also, the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 285, 398.

6. **On account of color.**—An act of congress passed in 1863, which gave certain privileges to a railroad corporation, provided that "no person shall be excluded from the cars on account of color." Held, that this meant that persons of color should travel in the same cars that white ones did, and along with them in such cars; and that the enactment was not satisfied by the company's providing cars assigned exclusively to people of color, though they were as good as those which they assigned exclusively for white persons, and in fact the very cars which were, at certain times, assigned exclusively to white persons. *Railroad Co. v. Brown*, 17 Wall. 445, 21 L. Ed. 675.

**On or before.**—"The negotiability of the note is not affected by its being made payable on or before a named date, or in installments of a particular amount. \* \* \* True, the maker may pay sooner if he shall choose, but this option, if exercised, would be a payment in advance of the legal liability to pay, and nothing more. Notes like this are common in commercial

**ONCE.**—See note 1.

**ONCE IN JEOPARDY.**—See the title *AUTREFOIS, ACQUIT AND CONVICT*, vol. 2, p. 751.

**ONUS PROBANDI.**—See, generally, the title *PRESUMPTIONS AND BURDEN OF PROOF*.

**OPEN.**—See note 2.

**OPEN ACCOUNTS.**—See the title *LIMITATION OF ACTIONS AND ADVERSE POSSESSION*, vol. 7, pp. 932, 1016.

transactions.’” *Chicago R. Co. v. Merchants’ Bank*, 136 U. S. 268, 285, 34 L. Ed. 349, citing *Mattison v. Marks*, 31 Mich. 421.

**Advance or loan “on” stocks, bonds, etc.**—See *Advance*, vol. 1, p. 198.

**On equal footing.**—“Admission (of territories) **on** an equal footing with the original states, in all respects whatever, involves equality of constitutional right and power, which cannot thereafter be controlled, and it also involves the adoption as citizens of the United States of those whom congress makes members of the political community, and who are recognized as such in the formation of the new state with the consent of congress.” *Boyd v. Thayer*, 143 U. S. 135, 170, 36 L. Ed. 103.

**On the part of.**—In *Stevenson v. Sullivan*, 5 Wheat. 207, 260, 5 L. Ed. 70, in referring to a provision that bastards might “inherit and transmit inheritance **on** the part of another in like manner as if they had been lawfully begotten of the mother,” the court said: “What is the legal exposition of these expressions? We understand, it to be, that they shall have a capacity to take real property by descent, immediately or through their mother, in the ascending line; and transmit the same to their line, as descendants, in like manner as if they were legitimate. This is uniformly the meaning of the expressions, ‘**on** the part of the mother or father,’ when used in reference to the course of descent of real property, in the paternal or maternal line.” See the title *DESCENT AND DISTRIBUTION*, vol. 5, p. 340.

**On the western boundary.**—A railroad company was authorized and required by an act of congress to construct a road “from a point **on** the western boundary of the state of Iowa, to be fixed by the president of the United States.” The legal boundary of the state is the middle of the channel of the Missouri River. The court said that eastern or Iowa shore was in-

tended to be the terminus of the road; that congress may well be supposed to have used language in accordance with the common understanding. In common understanding, a point **on** the western boundary of Iowa would be a point in Iowa on the eastern shore of the Missouri, precisely as a point **on** the eastern boundary of Nebraska would be understood to be in Nebraska, **on** the western shore of the river. The words “**on** the boundary of Iowa” are not technical words; and therefore they are to be taken as having been used by congress in their ordinary signification. *Union Pac. R. Co. v. Hall*, 91 U. S. 343, 347, 23 L. Ed. 428.

**1. Once a week.**—An act of congress required that public notice of the time and place of sale of lots in Washington, the property of nonresidents, should be given, by advertising, “**once a week**,” in some newspaper in the city, for three months. Notice of the sale of a lot was published for three months; but in the course of that period, eleven days at one time, at another, ten days, and at another, eight days transpired, in succeeding weeks, between the insertions of the advertisement in the newspapers. The notice was published Monday, January 6th, and was omitted until Saturday, January 18th, leaving an interval of eleven days; still, the publication on Saturday was within the week preceding the notice of the 6th, and this was sufficient. *Ronkendorff v. Taylor*, 4 Pet. 349, 7 L. Ed. 882. See, generally, the title *SUMMONS AND PROCESS*.

**Advertisement “once” a week for twelve weeks.**—See *FOR*, vol. 6, p. 302.

**2. Open.**—Power granted by congress to the corporation of the city of Washington, “to **open** and keep in repair streets, etc.,” includes the power to alter the grade or change the level of the land on which the streets by the plan of the city are laid out. *Smith v. Corporation of Washington*, 20 How. 135, 15 L. Ed. 858. See the titles *STREET RAILWAYS; STREETS AND HIGHWAYS*.

## OPEN AND CLOSE.

### CROSS REFERENCES.

As to order of argument before a court of equity, see the title **EQUITY**, vol. 5, p. 876. As to assigning error to a court in ordering the argument, see the title **APPEAL AND ERROR**, vol. 1, p. 1000.

**As to Opening.**—In all cases, the party who is first in the affirmative ought regularly to open.<sup>1</sup>

**As to Conclusion.**—Where, under the pleadings, the affirmative of the issues framed is upon the plaintiff, he is entitled to the conclusion.<sup>2</sup>

**OPENING, AMENDING AND VACATING JUDGMENTS.**—See the title **JUDGMENTS AND DECREES**, vol. 7, p. 580.

**OPEN POLICY.**—See the titles **INSURANCE**, vol. 7, p. 186; **MARINE INSURANCE**, vol. 8, pp. 155, 160, 164, 192.

**OPERA GLASS.**—See the title **REVENUE LAWS**.

**OPERATION.**—See note 3.

**OPINION.**—See note 4.

**OPINION EVIDENCE.**—See the title **EXPERT AND OPINION EVIDENCE**, vol. 6, p. 207.

1. **As to opening.**—*Leech v. Armitage*, 2 Dall. 125, 1 L. Ed. 316.

2. **As to conclusion.**—*Hall v. Weare*, 92 U. S. 728, 732, 23 L. Ed. 500.

In *Jackson v. Winchester*, 4 Dall. 205, 1 L. Ed. 802, issues were joined on pleas of nonassumpsit, and payment. When the jury were about to be impaneled, the defendant's counsel moved to strike out the former plea, by which (leaving only the affirmative plea of payment) he would be entitled to the conclusion in addressing the jury. The plaintiff's counsel objected, with an allegation that upon the issues as they now stood, they had been obliged to send a commission into another state to prove the sale and delivery of the goods for which the action was brought. The court refused to allow the plea of nonassumpsit to be stricken off.

3. **Use and operation of railways.**—In *Chicago, etc., R. Co. v. Artery*, 137 U. S. 507, 515, 34 L. Ed. 747, the court in construing § 1307 of the Iowa statute in relation to the liability of railroad corporations for injuries to employees arising from neglect on the part of other employees, in connection with the use and operation of railways, said: "The plaintiff was upon a moving car propelled by hand power. The movement of the car, its speed, the position of the plaintiff upon it, and the duties he had to discharge in that position, were under the direction of the foreman, who was upon the same car.

The injury was directly connected with the use and operation of the railway, in whose common service the foreman and the plaintiff were, and they were coemployees. The injuries to the plaintiff were, by the petition and the evidence, sought to be attributed to the smallness of the handcar, its being overcrowded, the failure to provide it with contrivances for removing snow from the track, the absence of a proper brake, the want of footrests, and the arrangement of the cattle guard. The railway was being used and operated in the movement of the handcar, quite as much as if the latter had been a train of cars drawn by a locomotive. If a single locomotive be on its way to its engine-house, after leaving a train which it has drawn, or if it be summoned to go alone for service to a point more or less distant, and, in either case, by the negligence of one employee upon it, another employee is injured, the injury takes place in the use and operation of the railway, under § 1307, quite as much as if it takes place while the locomotive is drawing a train of cars." See the title **FELLOW SERVANTS**, vol. 6, p. 270.

4. **Appeal and error.**—As to effect of division of opinion in appellate court, see the title **APPEAL AND ERROR**, vol. 2, p. 395.

**Jurors.**—As to incompetency of jurors because of formation or expression of opinion, see the title **JURY**, vol. 7, p. 771.



## OPINIONS OF COURTS.

### CROSS REFERENCES.

As to whether the opinion of the court below is part of the record on appeal, see the titles *APPEAL AND ERROR*, vol. 1, p. 766, et seq.; vol. 2, pp. 85, 199, 219; *EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL*, vol. 6, p. 18. As to the delivering of opinions by federal supreme court on matters not brought out in record, see the title *APPEAL AND ERROR*, vol. 2, pp. 83, 84. As to opinions of state court showing a federal question being referred to by federal supreme court, see the title *APPEAL AND ERROR*, vol. 1, pp. 582, 583, 612. As to whether opinion of court below constitutes a special finding and as to right of federal supreme court to refer to it, see the title *APPEAL AND ERROR*, vol. 1, pp. 513, 520, 1042. As to whether expressions of opinion by court constitute an error, see the title *APPEAL AND ERROR*, vol. 2, p. 337. As to right of party favored by judgment to appeal from erroneous opinion, see the title *APPEAL AND ERROR*, vol. 2, p. 380. As to necessity of court's expressing an opinion on moot questions, see the title *APPEAL AND ERROR*, vol. 1, pp. 783, 789; vol. 2, pp. 289, et seq., 299, 397. As to division of opinion among judges of the federal supreme court, see the title *APPEAL AND ERROR*, vol. 2, pp. 45, 295, et seq. As to division of opinion in highest court of state, see the title *APPEAL AND ERROR*, vol. 1, p. 783. As to judgment rendered upon equal division of opinion of judges, see the title *APPEAL AND ERROR*, vol. 1, p. 944. As to certifying cases for the opinion of the federal supreme court, see the title *APPEAL AND ERROR*, vol. 2, p. 22, et seq. As to construction of mandate with reference to opinion, see the title *MANDATE AND PROCEEDINGS THEREON*, ante, p. 97, and references there given. As to whether opinions rendered are precedents for the guidance of courts in deciding similar cases, see the title *STARE DECISIS*. As to the securing of copyrights in the written opinions of the court, see the title *COPYRIGHT*, vol. 4, p. 608.

**Duty of State Courts to Deliver Opinions.**—In some jurisdictions it is the duty of the court to state the reasons of their judgment,<sup>1</sup> and several of the states have provided by statute that written opinions shall be delivered and filed.<sup>2</sup>

**Duty of Federal Supreme Court to Deliver Opinions.**—As to opinions by the federal supreme court, see the title *APPEAL AND ERROR*, vol. 2, pp. 272, 273.

**On Questions Not Necessarily Involved.**—It is not incumbent on the court to give any opinion upon questions that are not necessarily involved in the decision of the cause.<sup>3</sup>

**On Questions of Fact.**—Where on appeal the case turns upon a pure ques-

1. **Duty to state reasons of judgment.**—In Louisiana "the supreme court possesses the right and is under the obligation of examining questions of fact as well as of law, and to state the reasons of their judgment." *Bell v. Hearne*, 19 How. 252, 262, 15 L. Ed. 614.

2. **Illinois.**—The Revised Statutes of Illinois require, not only that the justices of the supreme court of the state shall deliver and file written opinions in cases submitted to it, but that "such opinions shall also be spread at large upon the records of the court." *Gross v. United States Mortgage Co.*, 108 U. S. 477, 486, 27 L. Ed. 795.

**Tennessee.**—An act of the legislature

of Tennessee passed in the year 1809, "to establish circuit courts, and a supreme court of errors and appeals," enacts, "that the judges of the court of errors and appeals, as well as the circuit court judges, shall, as to the decisions on all material points, file their opinions in writing among the papers of the cause in which such opinion may be given, within ten days from the delivering of the same." This sentence amounts to more than a provision that the opinion of the judges shall appear, and shall be preserved with the other papers. *Williams v. Norris*, 12 Wheat. 117, 118, 6 L. Ed. 571.

3. **Opinion on points not necessarily involved.**—*Martin v. Hunter*, 1 Wheat. 304,

tion of fact, depending on conflicting evidence and involving no controverted proposition of law, it is not necessary for the federal supreme court to enter into any discussion of the question.<sup>4</sup>

**On Questions Having No Value as a Precedent.**—The court may refuse to give an opinion on points that involve no question of public interest and may not again arise in the same form.<sup>5</sup>

**OPHTHALMOSCOPE.**—See note 1.

**OPTION CONTRACTS.**—As to "option contracts" as used in the law of gambling contracts, see the title GAMBLING CONTRACTS, vol. 6, p. 539. As to options to buy land, see the title VENDOR AND PURCHASER.

**OR.**—See, generally, the titles STATUTES; WILLS. The word "or" is frequently construed to mean "and" and vice versa, in order to carry out the evident intention of the parties,<sup>2</sup> but it is never construed to mean "and;" when the evident intent of the parties would thereby be defeated.<sup>4</sup>

**'In the construction of statutes,** it is the duty of the court to ascertain the clear intention of the legislature. In order to do this, courts are often compelled to construe, 'or' as meaning 'and,' and again 'and' as meaning 'or.'"<sup>3a</sup>

362, 4 L. Ed. 97. See the title APPEAL AND ERROR, vol. 1, p. 795.

A patentee, in a suit upon his patent, is bound by the claim therein set forth and cannot go beyond it and it is not necessary for the court to express any opinion on points not included in the claim. *Railway Co. v. Stewart*, 95 U. S. 279, 24 L. Ed. 431.

As to scope of review in general, see the title APPEAL AND ERROR, vol. 1, p. 771, et seq.

**4. On questions of fact.**—*Jones v. United States*, 18 Wall. 662, 663, 21 L. Ed. 867; *Hoyt v. Hanbury*, 128 U. S. 584, 585, 32 L. Ed. 565. See the title APPEAL AND ERROR, vol. 2, p. 372.

**5. On questions having no value as a precedent.**—*Logan v. United States*, 144 U. S. 263, 309, 36 L. Ed. 429; *Hoyt v. Hanbury*, 128 U. S. 584, 585, 32 L. Ed. 565. See the title STARE DECISIS.

**1. Ophthalmoscope.**—See *Robertson v. Oelschlaeger*, 137 U. S. 436, 442, 34 L. Ed. 744. And see the title REVENUE LAWS.

**2. Substituting "and" for "or" and vice versa.**—*Durmout v. United States*, 98 U. S. 142, 143, 25 L. Ed. 65.

**Bonds.**—As to or being construed to mean "and" and vice versa in a bond, see the title BONDS, vol. 3, p. 409.

**"And" for "or."**—"In construing a will, the intention of the testator must govern. And that intention is to be ascertained from the whole instrument. If the intent of the testator be apparent, effect will be given to it, though he may have used inappropriate terms to attain his object. Under such circumstances, the conjunction 'and' may be read as the disjunctive or, or the disjunctive may be changed into the conjunctive. But this latitude of construction is never exercised where the language of the will is explicit, and the intent of the testator is not doubtful. In such a case, the import of the words used must be taken." *Doe v. Watson*, 8 How. 263, 272, 12 L. Ed. 1072.

**3. *Durmout v. United States***, 98 U. S. 142, 143, 25 L. Ed. 65; *Travers v. Reinhardt*, 205 U. S. 423, 430, 51 L. Ed. 865.

**Refusal to substitute "and" for "or"—Wills.**—In *Travers v. Reinhardt*, 205 U. S. 423, 430, 51 L. Ed. 865, it was urged that the words that "if any of my sons should die without leaving a wife or child or children living at his death," in a general provision in a will should be interpreted as if it read "if any of my sons should die without leaving a wife and child or children living at his death," and the court was asked, by interpretation, to substitute the word "and" in place of or in the sentence. The court said: "It would seem clear that the words 'without leaving a wife or child or children,' where they first appear in the above general provision, were purposely chosen. They appear three times in the will, and their usual meaning is not doubtful. We think the testator meant or, not 'and.' The court would not be justified in making the proposed substitution unless the whole context of the will plainly and beyond question requires that to be done in order to give effect to the will of the testator."

**3a. Construction of statutes.**—*United States v. Fisk*, 3 Wall. 445, 447, 18 L. Ed. 243.

**"Or" for "and"—Escape.**—A section of a statute provided that a sheriff should not be liable for the escape of debtors in his custody, unless the escape was with his consent, or through his negligence. To this section, which was general, and extended to all actions for escapes, whether the prisoner is in custody on mesne process or on an execution, there was a proviso that when he should have taken the body of any debtor in execution, and should willfully and negligently suffer him to escape, the parties suing out such execution might maintain an action of debt. The court said: "In the enacting clause, he is made liable if the escape

**Use to Show Legislative Intent.**—"Or" is sometimes used between two phrases in a statute designating the same thing for the purpose of making clear and certain the meaning of the legislature.<sup>4</sup>

**"And" Used Independently of Preceding Clause.**—"In legislation, the conjunction 'and' is very often used, when a provision is made in no degree dependent on that which precedes it."<sup>5</sup>

**ORAL AGREEMENTS.**—See the titles *FRAUDS*, *STATUTE OF*, vol. 6, p. 451; *SPECIFIC PERFORMANCE*.

**ORANGE LEAD.**—See note 1.

is with his consent, **or** through his negligence. And in the proviso, he is made liable, if he willfully and negligently suffer the escape. The word **or** must obviously be here substituted for 'and.' Shall willfully **or** negligently suffer the escape. To consent to an escape is, certainly, willfully to suffer it." *Long v. Palmer*, 16 Pet. 65, 68, 10 L. Ed. 888. See the title *ESCAPE*, vol. 5, p. 893.

**"And" for "or"—Prize case.**—Act of congress, of August 6th, 1861, provides that property used in aid of the rebellion, shall be "lawful subjects of prize and capture" and "shall be condemned in the district **or** circuit court of the United States having jurisdiction of the amount, **or** in admiralty, in any district in which the same may be seized, **or** into which the same may be taken and proceedings commenced." In construing this act the court said: "When we look beyond the mere words to the obvious intent we cannot help seeing that the word **or** must be taken conjunctively; and that the sense of the law is that both the circuit and the district courts shall have jurisdiction 'according to the amount' and 'in admiralty.'" *Union Ins. Co. v. United States*, 6 Wall. 759, 760, 764, 18 L. Ed. 879.

**Change of "and" to "or" in statute—Militia.**—The act of March 2, 1863, provided that persons in the military service, if found guilty of certain offenses, should be punished by fine and imprisonment, etc., while persons in civil life guilty of the offense were punishable by imprisonment **or** by fine; but when the military offense was transferred to the military code, the word "and" was changed to the word **or**. It was argued, that congress thereby indicated that it intended to confine the punishment to either fine **or** imprisonment. The court said: "We do not think this is necessarily so. The punishment of persons not in the military or naval service (in addition to a pecuniary forfeiture and double damages) was fixed at fine **or** imprisonment, and no other. The punishment of persons in the military service was fixed at fine and imprisonment, or such other punishment as the court martial might adjudge. The change of the word 'and' to **or** tended to obviate controversy as to the range of discretion."

*Carter v. McClaughry*, 183 U. S. 365, 392, 46 L. Ed. 236.

**4. Showing legislative intent.**—*Arthur v. Cumming*, 91 U. S. 362, 364, 23 L. Ed. 438.

A tariff act laid a duty "on all oilcloth foundations **or** floorcloth made of" certain designated materials. The court said: "The researches of the counsel for the defendants in error have brought to our attention many instances in which two phrases with the like conjunction between them have been used to designate the same thing. In those cases it was obviously done to make clear and certain the meaning of the legislature, and to leave no room for doubt upon the subject. Such in this section seems to have been the purpose of congress. The phrase oilcloth foundations would not necessarily import the article known in commerce as floorcloth canvass; nor would the phrase floorcloth canvass necessarily import an article to be used for oilcloth foundation." *Arthur v. Cumming*, 91 U. S. 362, 364, 23 L. Ed. 438.

**5. Independent of preceding clause.**—*Scott v. Ben*, 6 Cranch 1, 6, 3 L. Ed. 135. In this case a clause in a statute connected with another by the conjunction "and" was held to be a distinct and substantive regulation.

**Or disposed of.**—See *DISPOSE*, vol. 5, p. 393.

**Certiorari.**—As to the words "or otherwise" providing for review of decisions of circuit court of appeals by certiorari, see the title *APPEAL AND ERROR*, vol. 1, p. 498.

**Marine insurance.**—As to the phrase "for **or** on account of whom it may concern," as used in law of marine insurance, see the title *MARINE INSURANCE*, vol. 8, p. 158.

**Negotiable paper.**—As to "or order" as used in the law of negotiable paper, see the title *BILLS, NOTES AND CHECKS*, vol. 3, p. 275.

**Or other publication.**—As to the term as used in a statute prohibiting mailing of books, papers, etc., **or** other publication, see *PUBLICATION*.

**1. Orange lead.**—See *Meyer v. Arthur*, 91 U. S. 570, 571, 23 L. Ed. 455. And see the title *REVENUE LAWS*.



## ORDER OF PROOF.

### CROSS REFERENCES.

See the titles *APPEAL AND ERROR*, vol. 1, p. 333; *ARGUMENT OF COUNSEL*, vol. 2, p. 489; *EVIDENCE*, vol. 5, p. 1004; *OPEN AND CLOSE*, ante, p. 1002; *PRESUMPTIONS AND BURDEN OF PROOF*; *TRIAL*; *WITNESSES*.

**Admission of Testimony.**—The order of admission of testimony lies largely within the discretion of the trial court.<sup>1</sup>

**ORDER OF PUBLICATION.**—See the title *SUMMONS AND PROCESS*.

**ORDERS.**—As to an order as an equitable assignment, see the title *ASSIGNMENTS*, vol. 2, p. 556. As to allegation of nonpayment, see the title *BILLS, NOTES AND CHECKS*, vol. 3, p. 360. As to right of assignee to sue in his own name on, see the title *ASSIGNMENTS*, vol. 2, pp. 591, 592. See note 2.

**ORDERS OF COURT.**—See the titles *ABATEMENT, REVIVAL AND SURVIVAL*, vol. 1, p. 12; *ACCOUNTS AND ACCOUNTING*, vol. 1, p. 70; *ADMIRALTY*, vol. 1, p. 119; *AMENDMENTS*, vol. 1, p. 288; *APPEAL AND ERROR*, vol. 1, p. 333; *ATTACHMENT AND GARNISHMENT*, vol. 2, p. 660; *ATTORNEY AND CLIENT*, vol. 2, p. 703; *BAIL AND RECOGNIZANCE*, vol. 2, p. 765; *BANKRUPTCY*, vol. 2, p. 792; *CERTIORARI*, vol. 3, p. 651; *CLERKS OF COURT*, vol. 3, p. 849; *CONTEMPT*, vol. 4, p. 531; *CONTINUANCES*, vol. 4, p. 543; *COURTS*, vol. 4, p. 861; *DEPOSITIONS*, vol. 5, p. 321; *DISMISSAL, DISCONTINUANCE AND NONSUIT*, vol. 5, p. 356; *DIVORCE AND ALIMONY*, vol. 5, p. 412; *EMINENT DOMAIN*, vol. 5, p. 746; *EQUITY*, vol. 5, p. 803; *EVIDENCE*, vol. 5, p. 1004; *EXECUTIONS*, vol. 6, p. 84; *EXECUTORS AND ADMINISTRATORS*, vol. 6, p. 119; *EXTRADITION*, vol. 6, p. 215; *GUARDIAN AND WARD*, vol. 6, p. 599; *HABEAS CORPUS*, vol. 6, p. 610; *INJUNCTIONS*, vol. 6, p. 1022; *INTERPLEADER*, vol. 7, p. 256; *JUDGMENTS AND DECREES*, vol. 7, p. 544; *JUDICIAL SALES*, vol. 7, p. 704; *JURY*, vol. 7, p. 748; *MANDAMUS*, ante, p. 1; *MANDATE AND PROCEEDINGS THEREON*, ante, p. 97; *MOTIONS AND SUMMARY PROCEEDING* ante, p. 528; *MUNICIPAL CORPORATIONS*, ante, p. 546; *ORDER OF*

1. *Thiede v. Utah Territory*, 159 U. S. 510, 519, 40 L. Ed. 237; *Johnston v. Jones*, 1 Black 210, 227, 17 L. Ed. 117. See the title *APPEAL AND ERROR*, vol. 1, p. 990, where the question is fully treated.

Where testimony offered by the plaintiff was strictly competent only in chief, nevertheless it was a matter of discretion with the court at the time of the trial whether the testimony should be admitted when offered after the defendant had testified; and the plaintiff was entitled to the exercise of that discretion on the part of the court at that time. *French v. Hall*, 119 U. S. 152, 155, 30 L. Ed. 375.

2. **Orders.**—In *Rogers v. Durant*, 140 U. S. 298, 35 L. Ed. 481, it is said: "Again, we are of opinion that checks might properly be held comprised in the word **orders**, as associated with bills of exchange, rather than otherwise. **Orders** are frequently a kind of informal bill of exchange, and a check is, of course, an **order** for the payment of money."

An **order** to pay C. or bearer "\$5.00 worth of merchandise at retail" was held not to be and not within the act of congress providing for a tax of ten per cent

on the amount of notes used or for circulation. *Hollister v. Zion's Co.-Op. Mercantile Inst.*, 111 U. S. 62, 28 L. Ed. 352. See, also, the title *BILLS, NOTES AND CHECKS*, vol. 3, p. 273. And see, generally, the titles *REVENUE LAWS*; *TAXATION*.

Acceptance of an **order** in favor of a certain payee constitutes a new contract between the acceptor and such payee, and the latter may bring suit upon it without tracing title from the drawer. *Superior City v. Repley*, 138 U. S. 93, 34 L. Ed. 914. See, also, the titles *BILLS, NOTES AND CHECKS*, vol. 3, p. 289; *COURTS*, vol. 4, p. 269.

The transferee of a bought note, by which the defendant promises to receive certain stock from A, or **order**, and to pay for the same, may sue thereon in his own name. *Reed v. Ingraham*, 4 Dall. 169, 1 L. Ed. 786.

It has been held that a contract to receive from J. B. or **order** certain stock is negotiable. *Reed v. Ingraham*, 4 Dall. 169, 1 L. Ed. 786.

**Payment by order.**—As to **order** as payment, see the title *PAYMENT*.

PROOF; PLEADING; PUBLIC LANDS; REFERENCE; SUMMONS AND PROCESS; TRIAL; TRUSTS AND TRUSTEES. As to the validity of order containing both finding and judgment, see the title *APPEAL AND ERROR*, vol. 1, p. 1031. As to orders at chambers and in vacation, see the title *CHAMBERS AND VACATION*, vol. 3, p. 667. As to order of entry of continuance, see the title *CONTINUANCES*, vol. 4, p. 546. As to right of court to order nonsuit, see the title *DISMISSAL, DISCONTINUANCE AND NONSUIT*, vol. 5, p. 389. As to decree or order of dismissal of suit, see the title *DISMISSAL, DISCONTINUANCE AND NONSUIT*, vol. 5, p. 385. As to order for removal of causes, see the title *REMOVAL OF CAUSES*. As to order that bill be taken pro confesso, nature and effect of order, see the title *JUDGMENTS AND DECREES*, vol. 7, p. 544. As to service of process by order of publication, see the title *SUMMONS AND PROCESS*. As to writ or order of attachment, see the title *ATTACHMENT AND GARNISHMENT*, vol. 2, p. 679, et seq. As to power of a court having no jurisdiction of a cause to set aside orders improperly made before want of jurisdiction was discovered, see the title *JUDGMENTS AND DECREES*, vol. 7, p. 561. As to order for payment, or delivery of property into court, see the title *ATTACHMENT AND GARNISHMENT*, vol. 2, p. 693. As to necessity for, and operation and effect of, order of sale, see the title *JUDICIAL SALES*, vol. 7, p. 704. As to orders for sale of property in admiralty, see the title *ADMIRALTY*, vol. 1, p. 180. As to order of court to sell real estate of a decedent, see the title *EXECUTORS AND ADMINISTRATORS*, vol. 6, p. 145. As to necessity of order of court for sale of ward's real estate, see the title *GUARDIAN AND WARD*, vol. 6, p. 603. As to order of court for leave to amend pleadings, see the title *AMENDMENTS*, vol. 1, p. 303. As to decree or order of confirmation of private land claims, see the title *PUBLIC LANDS*. As to order of court appointing commissioners in partition proceedings, see the title *PARTITION*. As to writ or order of injunction, see the title *INJUNCTIONS*, vol. 6, p. 1058. As to orders for writ of mandamus, see the title *MANDAMUS*, ante, p. 1. As to order to show cause as connected with mandamus proceedings, see the title *MANDAMUS*, ante, p. 1. As to order admitting attorneys, see the title *ATTORNEY AND CLIENT*, vol. 2, p. 708. As to disobedience of orders of court constituting contempt, see the title *CONTEMPT*, vol. 3, p. 534. As to orders, process and judgments necessary to enforcement of bankrupt act, see the title *BANKRUPTCY*, vol. 2, pp. 822, 838. As to order discharging bankrupt, see the title *BANKRUPTCY*, vol. 2, p. 858. As to order to show cause made on one holding money belonging to a bankrupt estate, see the title *BANKRUPTCY*, vol. 2, p. 870. As to orders of referees in bankruptcy, see the title *BANKRUPTCY*, vol. 2, p. 871. As to the general power of courts over its own orders during the term in which they are rendered, see the title *JUDGMENTS AND DECREES*, vol. 7, p. 544. As to power of court on omission of entry of order in record to have it entered nunc pro tunc, see the title *JUDGMENTS AND DECREES*, vol. 7, p. 544. As to collateral attack on orders of court, see the title *JUDGMENTS AND DECREES*, vol. 7, p. 544. As to insufficiency of title of a cause at the head of orders of courts to show that a certain person not anywhere named in the record was a party to the proceedings and therefore not bound by the decree rendered therein, see the title *RES ADJUDICATA*. As to review of order of revival of suit, see the title *ABATEMENT, REVIVAL AND SURVIVAL*, vol. 1, p. 46. As to the appealability of an order to make an answer more definite and certain, see the title *APPEAL AND ERROR*, vol. 1, p. 1001. As to reviewability of motions and orders for judgments, see the title *APPEAL AND ERROR*, vol. 1, p. 995. As to reviewability of orders of a court at chambers, see the title *APPEAL AND ERROR*, vol. 1, p. 560. As to appeal from orders disbarring attorneys, see the title *ATTORNEY AND CLIENT*, vol. 2, p. 737. As to when orders of court are final judgments and decrees, see the title *APPEAL AND ERROR*, vol. 1, pp. 932, 980. As to the orders in the cause that are brought up on an appeal, see the title *APPEAL AND ERROR*, vol. 2, p. 372. As to bringing into the record orders of a state court subsequent to removal of record to supreme court, see the title *APPEAL AND ERROR*, vol. 1, p. 765. As to order of court allowing appeal, see the title

APPEAL AND ERROR, vol. 2, p. 127, et seq. As to presumption in favor of orders granting rehearings and changes of venue, see the title APPEAL AND ERROR, vol. 2, p. 322. As to the order specifying place of holding district courts, see the title COURTS, vol. 4, p. 1165. And see note 1.

**ORDINANCE OF 1787.**—See the title COLLEGES AND UNIVERSITIES, vol. 3, p. 868.

**ORDINANCE OF SECESSION.**—See the title APPEAL AND ERROR, vol. 1, p. 554.

1. **Necessity of formal order.**—The absence of formal **orders by the court** will not prevail over its essential action. *Gila Reservoir Co. v. Gila Water Co.*, 202 U. S. 270, 274, 50 L. Ed. 1023, where it was said: "The objection made by the appellant to it is, as we have indicated, that suit No. 1996 was a proceeding in rem and that the court did not acquire jurisdiction of the property for the reason that it was in the custody of the court in suit No. 1728 and that the court in the latter case did not extend the receivership to the No. 1996 nor consolidate the suits, and therefore, had no power to order the sale of the property by the receiver in No. 1728. This is tantamount to saying that the absence of formal **orders by the court** must prevail over its essential action. It

is clear from the record that the district court considered the cases pending before it at the same time, considered No. 1996 as the complement of No. 1728, regarded the cases in fact as consolidated, and empowered the receiver appointed in 1728 to sell the property and distribute the proceeds as directed by the decree in 1996."

**Revision.**—All the proceedings in a case are supposed to be within the control of the court, while they are in paper, and before a jury is sworn, or judgment given, **orders** made may be revised, and such as in the judgement **of the court** may have been irregular or improperly made, may be set aside. *Breedlove v. Nicolet*, 7 Pet. 414, 8 L. Ed. 731. See the title JUDGMENTS AND DECREES, vol. 7, p. 580.



## ORDINANCES.

BY A. P. WALKER.

- I. Power to Enact, 1009.**
- II. Necessity, 1009.**
- III. Enactment and Acceptance, 1010.**
  - A. Recording and Publishing, 1010.
  - B. Injunction against Enactment, 1010.
  - C. Acceptance, 1010.
- IV. Amendment and Repeal, 1010.**
- V. Validity, 1010.**
  - A. Constitutionality, 1010.
  - B. Conflict with Charter, 1010.
  - C. Reasonableness, 1010.
  - D. Motive and Purpose of Enactment, 1012.
- VI. Construction, 1012.**
- VII. Operation and Effect, 1012.**
- VIII. Evidence, 1013.**

### CROSS REFERENCES.

See the titles *APPEAL AND ERROR*, vol. 1, p. 333; *CONSTITUTIONAL LAW*, vol. 4, p. 1; *COURTS*, vol. 4, p. 861; *DUE PROCESS OF LAW*, vol. 5, p. 499; *IMPAIRMENT OF OBLIGATION OF CONTRACTS*, vol. 6, p. 758; *INJUNCTIONS*, vol. 6, p. 1022; *MUNICIPAL CORPORATIONS*, ante, p. 546; *MUNICIPAL, COUNTY, STATE AND FEDERAL AID*, ante, p. 618; *MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES*, ante, p. 650; *STATUTES; STREETS AND HIGHWAYS*.

### I. Power to Enact.

The legislature may delegate to municipal assemblies the power of enacting ordinances that relate to local matters.<sup>1</sup>

### II. Necessity.

The general rule is, that where the charter commits the decision of a matter to the council, and is silent as to the mode, the decision may be evinced by a resolution, and need not necessarily be by an ordinance.<sup>2</sup> When a charter requires that certain things be done by ordinance, they cannot be done by resolution.<sup>3</sup>

**1. Power to enact.**—*New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 471, 481, 41 L. Ed. 518.

**Construction of grant of power.**—A city council was authorized to contract with any person or corporation to construct and maintain waterworks "at such rates as may be fixed by ordinance, and for a period not exceeding thirty years." It was held that the powers there conferred can without straining be construed as distributive. The words "fixed by ordinance," may be construed to mean by ordinance once for all to endure during the whole period of thirty years; or by ordinance from time to time as might be deemed necessary. Of the two con-

structions that must be adopted which is most favorable to the public, not that one which would so tie the hands of the council that the rates could not be adjusted as justice to both parties might require at a particular time. *Freeport Water Co. v. Freeport City*, 180 U. S. 587, 600, 45 L. Ed. 679, reaffirming *Danville Water Co. v. Danville City*, 180 U. S. 619, 45 L. Ed. 696; *Rogers Park Water Co. v. Fergus*, 180 U. S. 624, 45 L. Ed. 702.

**2. Necessity.**—*Atchison Board of Education v. DeKay*, 148 U. S. 591, 598, 37 L. Ed. 573. See the title *MUNICIPAL CORPORATIONS*, ante, p. 546.

**3.** *Atchison Board of Education v. DeKay*, 148 U. S. 591, 599, 37 L. Ed. 573.

### III. Enactment and Acceptance.

**A. Recording and Publishing.**—Municipal ordinances may be required to be recorded or published, but a requirement of a city charter that those ordinances which were passed under a specified section of such charter should be recorded or published, does not apply to ordinances which do not belong to that class.<sup>4</sup>

**B. Injunction against Enactment.**—See the title *INJUNCTIONS*, vol. 6, p. 1028. See, also, the title *CONSTITUTIONAL LAW*, vol. 4, p. 270.

**C. Acceptance.**—It is universally held that a previous request for an ordinance obviates the necessity of a subsequent acceptance.<sup>5</sup> An acceptance of an ordinance may be presumed from the fact that it was beneficial to the party whom it affected.<sup>6</sup>

### IV. Amendment and Repeal.

Municipal ordinances not in the nature of a compact may be amended, altered or repealed by the corporation.<sup>7</sup>

### V. Validity.

**A. Constitutionality.**—See the titles *COURTS*, vol. 4, p. 1075; *IMPAIRMENT OF OBLIGATION OF CONTRACTS*, vol. 6, p. 778. See, also, the titles *CONSTITUTIONAL LAW*, vol. 4, p. 56; *DUE PROCESS OF LAW*, vol. 5, p. 499; *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 269; *POLICE POWER*.

**B. Conflict with Charter.**—See post, "Reasonableness," V, C.

**C. Reasonableness.**—In respect to the quasi legislative acts of inferior municipal bodies it is an ancient jurisdiction of judicial tribunals to pronounce upon the reasonableness and consequent validity of their by-laws. In respect to these, it is the doctrine, that every by-law must be reasonable,<sup>8</sup> not inconsistent with the charter of the corporation<sup>9</sup> nor with any statute of parliament, nor with the general principles of the common law of the land, particularly those having relation to the liberty of the subject or the rights of private property.<sup>10</sup>

**What is reasonable in one municipality may be oppressive and unreasonable in another.** "In determining this question the court will have to regard all the circumstances of the particular city or corporation, the objects sought to be attained, and the necessity which exists for the ordinance. Regulations

**4. Recording and publishing.**—*Amey v. Allegheny City*, 24 How. 364, 16 L. Ed. 614.

The charter of a city required that those ordinances only which were passed under the 7th section of the charter are to be recorded and published. An ordinance under which bonds were issued was passed but not published or recorded. Such ordinance was authorized by sections of the city charter other than the seventh. It was held that the fact that the ordinance was not recorded or published did not invalidate the bonds. The ordinance in question did not belong to that class which must be recorded or published. *Amey v. Allegheny City*, 24 How. 364, 16 L. Ed. 614.

**5. Acceptance.**—*City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 568, 41 L. Ed. 1114.

**6. City R. Co. v. Citizens' St. R. Co.**, 166 U. S. 557, 568, 41 L. Ed. 1114; *United States Bank v. Dandridge*, 12 Wheat. 64, 70, 6 L. Ed. 552.

An acceptance of an ordinance extending the franchise of a corporation may be presumed from the fact that the amend-

ment was beneficial to the corporation, *United States Bank v. Dandridge*, 12 Wheat. 64, 70, 6 L. Ed. 552, and from the further fact that it issued its bonds, as was contemplated when the ordinance was applied for, and made them fall due at the expiration of the enlarged franchise. *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 568, 41 L. Ed. 1114.

**7. Amendment and repeal.**—*Goszler v. Georgetown*, 6 Wheat. 593, 5 L. Ed. 339. See the title *IMPAIRMENT OF OBLIGATION OF CONTRACTS*, vol. 6, pp. 778, 781.

So held as to ordinances of May, 1799, by which the corporation of Georgetown first exercised the power to grade its streets. *Goszler v. Georgetown*, 6 Wheat. 593, 5 L. Ed. 339.

**8. Reasonableness.**—*Yick Wo v. Hopkins*, 118 U. S. 356, 371, 30 L. Ed. 220.

**9. Conflict with charter.**—*Yick Wo v. Hopkins*, 118 U. S. 356, 371, 30 L. Ed. 220; *Thompson v. Carroll*, 22 How. 422, 16 L. Ed. 387; *Mt. Pleasant v. Beckwith*, 100 U. S. 514, 25 L. Ed. 699.

**10. Yick Wo v. Hopkins**, 118 U. S. 356, 371, 30 L. Ed. 220.

proper for a large and prosperous city might be absurd or oppressive in a small and sparsely populated town, or in the country."<sup>11</sup>

**Presumption and Burden of Proof.**—It may be presumed that there was no intention to enact unreasonable and oppressive ordinances or regulations.<sup>12</sup> Prima facie an ordinance is reasonable; it devolves upon the party alleging that it is not, to show that it is unreasonable.<sup>13</sup>

**Question of Law or Fact.**—Although in general the reasonableness of an ordinance is matter of law for the court, yet, where it is a question of amount, as of a license charge, it is not improper to submit that question to a jury.<sup>14</sup>

**Effect of Finding Ordinance Unreasonable—Judgment.**—If the amount of a license fee provided for by an ordinance is unreasonable, the ordinance is void, and there is no power in either jury or court to substitute its own judgment as to what was reasonable and to give a verdict or direct a judgment to be entered for that sum. Finding the sum named in the ordinance unreasonable, the verdict or judgment should be for the defendant.<sup>15</sup>

**11. Determined from circumstances of particular case.**—*Atlantic, etc., Tel. Co. v. Philadelphia*, 190 U. S. 160, 167, 47 L. Ed. 995.

**12. Presumption and burden of proof.**—*Owensboro v. Owensboro Waterworks Co.*, 191 U. S. 358, 371, 48 L. Ed. 217.

**13.** *Atlantic, etc., Tel. Co. v. Philadelphia*, 190 U. S. 160, 165, 47 L. Ed. 995; *Western Union Tel. Co. v. New Hope*, 187 U. S. 419, 47 L. Ed. 240; *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 104, 37 L. Ed. 380.

**14. Question of law and fact.**—*Atlantic, etc., Tel. Co. v. Philadelphia*, 190 U. S. 160, 166, 47 L. Ed. 995; *Postal Telegraph-Cable Co. v. New Hope*, 192 U. S. 55, 63, 48 L. Ed. 338.

In *Atlantic, etc., Tel. Co. v. Philadelphia*, 190 U. S. 160, 166, 47 L. Ed. 995, it was said: "It may be conceded that, generally speaking, whether an ordinance be reasonable, is a question for the court. As said by Judge Dillon in his work on *Municipal Corporations*, 4th Ed., vol. 1, § 327: 'Whether an ordinance be reasonable and consistent with the law or not is a question for the court, and not the jury, and evidence to the latter on this subject is inadmissible.' While that may be correct as a general statement of the law, and especially in cases in which the question of reasonableness turns on the character of the regulations prescribed, yet when it turns on the amount of a license charge it may rightly be left for the determination of a jury. There are many matters which enter into the consideration of such a question, not infrequently matters which are disputed, and in respect to which there is contradictory testimony." *Postal Telegraph-Cable Co. v. New Hope*, 192 U. S. 55, 63, 48 L. Ed. 338.

**15. Effect of finding ordinance unreasonable—Judgment.**—*Postal Telegraph-Cable Co. v. New Hope*, 192 U. S. 55, 62, 48 L. Ed. 338.

The trial court held that the question whether the ordinance in this case was reasonable or not was one for the court,

but he submitted it to the jury for their aid and as advisory only, the court stating to the jury that it would thereafter regulate the judgment to be entered in accordance with such views as the court might entertain as to the reasonableness of the ordinance, and after having the benefit of the assistance of the jury upon that question. The direction to the jury was to give a verdict for the full sum, if it thought that the ordinance was reasonable, and if not—that is, if the jury thought that the ordinance was not reasonable—then the verdict should be for the defendant. The jury did not obey that direction. It returned a verdict for a considerably less sum than was due if the ordinance were valid, and by such verdict (regard being had to the charge of the judge) it necessarily found the license fee provided for in the ordinance was unreasonable and the ordinance itself invalid. The verdict is, therefore, simply evidence of what the jury conceived to be a reasonable sum, which it thereupon proceeded to assess by its verdict, and being much less than the ordinance called for. It made itself a taxing body, the verdict being the result of its own views as to what the fees should have been. When the verdict was rendered and the court directed judgment to be entered thereon it must have thereby concurred with the jury and held the ordinance unreasonable and therefore void. Otherwise, if the ordinance was valid, the court would have directed judgment for the full sum without reference to the verdict. *Postal Telegraph-Cable Co. v. New Hope*, 192 U. S. 55, 61, 48 L. Ed. 338.

In *Western Union Tel. Co. v. New Hope*, 187 U. S. 419, 47 L. Ed. 240, the question of the unreasonableness of the license fee exacted was left to the jury, and the jury found a verdict in favor of the plaintiff, and judgment was rendered thereon, which was affirmed by the state courts upon appeal. Upon writ of error from the federal supreme court the case was reviewed here, and it was held that, as the jury and the court of common



**D. Motive and Purpose of Enactment.**—As a general rule courts cannot inquire into the motives of the supervisors or common council in passing ordinances.<sup>16</sup>

**Purpose.**—Courts are not to be deceived by the mere phraseology in which an ordinance is couched when the action of the municipality in the light of the facts shows convincingly that it was passed for an unlawful purpose and not for the purpose therein stated.<sup>17</sup>

## VI. Construction.

It is a reasonable presumption that no provision in municipal ordinances dealing with matters of importance concerning them escaped attention or was misunderstood; and while a mistake might be supposed in one ordinance it cannot be supposed to have occurred in four ordinances dealing with the same subject matter.<sup>18</sup>

**Construction of State Court Binding on Federal Court—Consistency with State and Federal Constitutions and Laws.**—See the title **COURTS**, vol. 4, p. 1075.

## VII. Operation and Effect.

**As Laws.**—Municipal ordinances, being legally enacted, have the force of laws passed under the legislature of the state and are to be respected by all.<sup>19</sup>

**Increase or Vary Power Conferred by Congress.**—The ordinance of the city of Washington cannot increase or vary the power given by the acts of congress, nor impose any terms or conditions which can affect the validity of a sale

pleas, the superior court and the supreme court of Pennsylvania, had all held the ordinance reasonable, the federal court would not say it was so manifestly wrong as to justify its interposition. There is a difference, however, between such a case and one like this, where the jury and the trial court have, in effect, held the ordinance void, and a judgment has been entered which is unauthorized in any event, and which should have been for the defendant. *Postal Telegraph-Cable Co. v. New Hope*, 192 U. S. 55, 62, 48 L. Ed. 338.

**16. Motive and purpose of enactment.**—*Soon Hing v. Crowley*, 113 U. S. 703, 710, 28 L. Ed. 1145.

**Motive of enactment.**—And the rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile. And in the present case, even if the motives of the supervisors were as alleged, the ordinance

would not be thereby changed from a legitimate police regulation, unless in its enforcement it is made to operate only against the class mentioned; and of this there is no pretense. *Soon Hing v. Crowley*, 113 U. S. 703, 710, 28 L. Ed. 1145.

**17. Purpose.**—*Postal Telegraph-Cable Co. v. Taylor*, 192 U. S. 64, 73, 48 L. Ed. 342.

**18. Construction.**—*Cleveland v. Cleveland Electric R. Co.*, 201 U. S. 529, 539, 50 L. Ed. 854.

So held as to ordinances dealing with an extension of street railway franchises. *Cleveland v. Cleveland Electric R. Co.*, 201 U. S. 529, 539, 50 L. Ed. 854.

**19. As laws.**—*New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 471, 481, 41 L. Ed. 518.

It is no longer open to question that "a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the state, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of the article of the constitution of the United States." *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.*, 125 U. S. 18, 31, 31 L. Ed. 607; *Hamilton Gas Light, etc., Co. v. Hamilton City*, 146 U. S. 258, 36 L. Ed. 963; *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. Ed. 341; *St. Paul Gas Light Co. v. St. Paul*, 181 U. S. 142, 148, 45 L. Ed. 778. See the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 778.

for taxes made within the authority conferred by the statute.<sup>20</sup>

### VIII. Evidence.

In an action against a municipality to recover for injuries received by reason of defects in its streets, sections of the municipal code may be put in evidence.<sup>21</sup>

**ORDINARY CARE.**—See the title NEGLIGENCE, ante, p. 873, and references given.

**ORDINARY LOW WATER.**—"These terms (ordinary low water or low water) are only predicable of those parts of rivers within the ebb and flow of the tides, to distinguish the water line at spring or neap tides. Such a difference is uniform twice within every month of the year, and because it is so it is termed ordinary."<sup>1</sup>

**ORDINARY NEGLIGENCE.**—See the title NEGLIGENCE, ante, p. 873.

**ORE.**—Ore is "the compound of a metal and some other substance, as oxygen, sulphur, or arsenic, called its mineralizer, by which its properties are disguised or lost."<sup>2</sup>

**ORGANIC ACTS—ORGANIC LAW.**—Acts of congress conferring powers of government upon the territories are generally known as "organic acts."<sup>3</sup>

**ORIGINAL.**—See note 4.

**20. Increase or vary power conferred by congress.**—Thompson v. Carroll, 22 How. 422, 16 L. Ed. 387.

The ordinances of the city of Washington, passed on the 15th of May, 1820, amended by the act of 1824, cannot increase or vary the power given by the acts of congress, nor impose any terms or conditions which can affect the validity of a sale made within the authority conferred by the statute. Thompson v. Carroll, 22 How. 422, 16 L. Ed. 387.

**21. Evidence.**—Lincoln v. Power, 151 U. S. 436, 38 L. Ed. 224. See the title STREETS AND HIGHWAYS.

1. Howard v. Ingersoll, 13 How. 381, 417, 14 L. Ed. 189. See LOW WATER, vol. 7, p. 1076.

**Ordinary low water.**—Where jury were instructed that the boundary line described in the treaty of cession from Georgia to the United States, as running up the said river and along the banks thereof, was the line impressed upon the land by **ordinary low water**. The court in construing the instruction said: "**Ordinary low water**," however, like 'low water,' is a relative term, and, in the abstract and without practicable application, has no definite meaning, and furnishes no satisfactory guide by which to ascertain or determine the line in question." Howard v. Ingersoll, 13 How. 381, 425, 14 L. Ed. 189.

**2. Ore.**—Marvel v. Merritt, 116 U. S. 11, 12, 29 L. Ed. 550, quoting Webster's Dict. See, generally, the title MINES AND MINERALS, ante, p. 364.

**3. Organic acts.**—In re Lane, 135 U. S. 443, 447, 34 L. Ed. 219. See, generally, the titles CONSTITUTIONAL LAW, vol. 4, p. 1; TERRITORIES.

"The organic law of a territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but congress is supreme, and

for the purposes of this department of its governmental authority has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the constitution." National Bank v. Yankton County, 101 U. S. 129, 133, 25 L. Ed. 1046.

**4. Original bill.**—See the title EQUITY, vol. 5, p. 844.

**Original outfit.**—Converting a ship from her original destination, with intent to commit hostilities; or, in other words, converting a merchant ship into a vessel of war, must be deemed an **original outfit** within the meaning of an act prohibiting any person to fit out and arm any ship or vessel with intent to cruise upon a foreign power with whom the United States is in peace; for the act would, otherwise, become nugatory and inoperative. It is the conversion from the peaceable use, to the warlike purpose, that constitutes the offense. United States v. Guinet, 2 Dall. 321, 328, 1 L. Ed. 398. See the title NEUTRALITY, ante, p. 894.

**Original package.**—See the title INTER-STATE AND FOREIGN COMMERCE, vol. 7, p. 298, et seq.

**Original purchaser.**—See FIRST, vol. 6, p. 291.

**Original process.**—The 22d section of the judiciary act provides that "final judgments and decrees in civil actions, and suits in equity, in a circuit court, brought there by **original process**, or removed there from courts of the several states, or removed there by appeal from a district court," may be re-examined in the supreme court. In Holmes v. Jennison, 14 Pet. 540, 5861, 10 L. Ed. 579, the court said: "By using the term '**original process**,' the law excludes that which is appellate; it relates to the writ, by which a plaintiff brings a defendant into the circuit court, to answer a demand made in a civil action for a debt or damages;

**ORIGINAL JURISDICTION.**—See the title **COURTS**, vol. 4, p. 1006. See note 1.

**ORNAMENTAL PORCELAIN.**—See note 2.

**ORPHANS.**—As to charities for, see the title **CHARITIES**, vol. 3, pp. 680, 684, 693.

**ORPHANS' COURTS.**—See **SURROGATE COURTS**. And see the title **EXECUTORS AND ADMINISTRATORS**, vol. 6, p. 125.

**OTHER.**—"Other is commonly defined to mean not the same or (what is certainly synonymous) not before mentioned."<sup>3</sup>

but surely not to a writ issued for persons in confinement under a criminal charge, directed to the officer or person who has him in custody under the authority of the United States, the object of which is to procure the liberation of the prisoner."

**Original suit.**—"A bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice, or an inequitable advantage under mesne or final process, is not an **original** suit, but ancillary and dependent, supplementary merely to the **original** suit, out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties." *Freeman v. Howe*, 24 How. 450, 460, 16 L. Ed. 749.

1. **Original jurisdiction not equivalent to exclusive jurisdiction.**—As to the doctrine that although the constitution vests in the supreme court, an **original** jurisdiction, in cases affecting ambassadors and other public ministers and consuls, it does not preclude the legislature from vesting a concurrent jurisdiction, in such inferior courts as might by law be established, see the title **AMBASSADORS AND CONSULS**, vol. 1, p. 285.

2. **Ornamental porcelain.**—See *Arthur v. Jacoby*, 103 U. S. 677, 678, 26 L. Ed. 454. And see the title **REVENUE LAWS**.

3. **Other.**—*United States v. Palmer*, 3 Wheat. 610, 638, 4 L. Ed. 471.

In construing the 8th section of the act of 1790, ch. 36, for the punishment of certain crimes against the United States, which amongst other things provides: "If any person or persons shall commit, upon the high seas, etc., murder or robbery, or any **other** offense, which if committed in the body of the county, would by the laws of the United States, be punishable with death, etc.," Justice Johnson says: "Again, there is no reason to think, that the word **other** is altogether a supernumerary member of the sentence. To give the construction contended for in behalf of the United States, that word must be rendered useless and inoperative; the sentence has the same meaning, with or without it. But if we retain it, and substitute its definition, or examine its effect upon the meaning of the terms associated with it, we then have the following results; **other** is commonly defined to mean not the same or (what is certainly synonymous) not

before mentioned. With this expression, the sentence would read thus: 'Murder, or robbery, or any offense, not before mentioned,' for which the punishment of death is by law inflicted. And as the use of the comma is exceedingly arbitrary and indefinite, by expunging all the commas from the sentence, the meaning becomes still more obvious. Or, if instead of substituting the words 'not before mentioned,' we introduce the single term unenumerated, in the sense of which the term **other** is unquestionably used by the legislature, the conclusion becomes irresistible in favor of the prisoners." *United States v. Palmer*, 3 Wheat. 610, 627, 636, 4 L. Ed. 471. See, generally, the title **PIRACY**.

**Assessment of property.**—A statute relating to the assessment of forest products for taxation provides that "in case the transit of any such property is to be **other** than through any watercourse in or bordering on this state, then such assessment shall be made at the point where such property will naturally leave the state in the ordinary course of its 'transit.' The court said: "Was the 'transit to be **other** than through any watercourse in or bordering on' the state? The appellant contends that it was because it was to be by water and by rail; in **other** words, the transit was not to be exclusively, 'through any watercourse.' But to give that meaning to the statute words must be added to it. It must be made to read **other** than exclusively or wholly or entirely 'through any watercourse.' One of these words must be added to make the sense contended for. The word **other** is used to express a difference—the difference being between a transit which is and one which is not through any (the word is significant) watercourse." *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, 92, 47 L. Ed. 394.

**As in other cases.**—As to meaning of term "as in **other** cases" as applicable to appeals from certain courts, see the title **APPEAL AND ERROR**, vol. 1, pp. 432, 433.

**Other chose in action.**—As to meaning of "**other** chose in action" as applicable to suits by assignees in the federal courts, see the title **COURTS**, vol. 4, p. 964.

**Other moneyed capital.**—See *Mercantile Bank v. New York*, 121 U. S. 138, 155, 30 L. Ed. 895; *Aberdeen Bank v. Chehalis*



**OTHERS.**—See note 1.

**OTHERWISE.**—See note 2.

County, 166 U. S. 440, 457, 41 L. Ed. 1069. And see the title **TAXATION**.

**Other paper.**—In *DeJonge v. Magone*, 159 U. S. 562, 568, 40 L. Ed. 260, the court in construing a tariff act, said: "It is obvious that the expression 'and all other paper not specifically enumerated or provided for in this act' meant precisely what was expressed, and embraced paper of any grade, not elsewhere enumerated in the act. 'Other paper, not elsewhere provided for,' would embrace 'tissue' paper, *Lawrence v. Merritt*, 127 U. S. 113, 32 L. Ed. 91, and that term would also seem to include the various grades of brown and other wrapping paper, and the rope manilla paper out of which the 'leather goods' of plaintiff in error were produced, even though not of the high grade of paper known as writing and drawing papers."

**Other person.**—A California statute provides that no action for the recovery of real estate sold by order of a probate court "shall be maintained by any heir or other person claiming under the intestate," unless brought within three years after such sale. The court said: "The words 'other person' means some one other than the heirs, and instead of meaning some one like the heirs or claiming under the heirs, the words expressly refer to some one 'claiming under the deceased testator or intestate.' These last words are unnecessary in reference to heirs, for they can claim in no other way but under the intestate. The words 'other person,' therefore, almost of necessity refer to the administrator, for they can refer to no one but the heirs or some one claiming under them, or to the administrator." *Meeks v. Olpherts*, 100 U. S. 564, 568, 25 L. Ed. 735. See the title **EXECUTORS AND ADMINISTRATORS**, vol. 6, p. 155.

**Other place.**—As to meaning of other in an act giving the federal courts jurisdiction over crimes committed in forts, arsenals, dockyards, magazines, or in any other places, in the sole and exclusive jurisdiction of the United States, see the title **CRIMINAL LAW**, vol. 5, p. 76.

The phrase "all other property" is among its kind, ejusdem generis, and its purpose is answered when its use is limited to explain the other words in this immediate connection. *Alabama v. Montague*, 117 U. S. 602, 610, 29 L. Ed. 1000. See, also, *Tennock v. Coe*, 23 How. 117, 126, 16 L. Ed. 436. And see **ALL**, vol. 1 p. 256.

**Other publication.**—As to the term as used in a statute prohibiting mailing of indecent books, papers, etc., or other publications, see **PUBLICATION**.

**Other sources.**—In *United States v. Norton*, 91 U. S. 566, 568, 23 L. Ed. 454, the court said: "The lexical definition of the

term revenue is very comprehensive. It is thus given by Webster: 'The income of a nation, derived from its taxes, duties, or other sources, for the payment of the national expenses.' The phrase other sources would include the proceeds of the public lands, those arising from the sale of public securities, the receipts of the patent office in excess of its expenditures, and those of the postoffice department, when there should be such excess as there was for a time in the early history of the government. Indeed, the phrase would apply in all cases of such excess. In some of them the result might fluctuate; there being excess at one time, and deficiency at another."

**Patents.**—In *Wilson v. Sanford*, 10 How. 99, 100, 13 L. Ed. 344, in referring to § 17 of the act of 1836 giving right of appeal, when the sum in dispute is under two thousand dollars, in cases arising under laws of the United States, granting patents, the court said: "The section referred to, after giving the right to a writ of error or appeal in cases arising under that law, in the same manner and under the same circumstances as provided by law in other cases, adds the following provision:—'And in all other cases in which the court shall deem it reasonable to allow the same.' The words 'in all other cases' evidently refer to the description of cases provided for in that section, and where the matter in dispute is below two thousand dollars. In such suits no appeal could be allowed but for this provision."

**1. Mechanics' liens.**—As to others as used in an act to secure to mechanics and others payment for labor done and materials furnished in the erection of buildings, see the title **MECHANICS' LIENS**, vol. 8, p. 331.

**2. Otherwise appropriated.**—See *Railroad Co. v. Fremont County*, 9 Wall. 89, 94, 19 L. Ed. 563. And see the title **PUBLIC LANDS**.

**Contraband.**—An act forbade the transportation, or attempt to transport, overland or otherwise, in any wagon, cart, sleigh, boat or otherwise, certain articles from the United States to Canada under penalty of forfeiture of the vehicle of transportation and the articles themselves. The court said: "We find, that when the punishment by way of forfeiture is prescribed, the words 'or otherwise' are very plainly construed to mean the thing by which the articles are transported; thus distinguishing between the thing which transports, and the thing which it transported." *United States v. Sheldon*, 2 Wheat. 119, 121, 4 L. Ed. 199.

**Otherwise disposed of.**—The act of March 6, 1820, granted to the state of Missouri for the use of schools the sixteenth section of every township in the state,

**OUSTER.**—"An entry by one man on the land of another, is an ouster of the legal possession arising from the title, or not, according to the intention with which it is done; if made under claim and color of right, it is an ouster, otherwise, it is a mere trespass; in legal language, the intention guides the entry and fixes its character."<sup>1</sup>

**OUT.**—See note 2.

**OUTAGE.**—See note 3.

**OUTBOUNDARY.**—The phrase "outboundary" has its proper use in regard to certain classes of Mexican grants. There were grants made by officers of the Mexican government which were limited in quantity by the terms of the grant, and which the grantee might locate at any place he chose inside of a much larger quantity of land the limits of which were correctly described as "outboundaries."<sup>4</sup>

which had not been sold or **otherwise** disposed of. The expression "**otherwise** disposed of" in the act of March 6, 1820, granting to the state of Missouri for school purposes a certain portion of every township in the state, which had not been sold or **otherwise** disposed of was held not to include the case of an imperfect title, claimed to be derived from the Spanish governor, which had been rejected by the board of commissioners in 1811. The phrase "or **otherwise** disposed of" must signify some disposition of the property equally efficient, and equally incompatible with any right in the state, present or potential, as deducible from the act of 1820, and the ordinance, accepting the grant. *Ham v. Missouri*, 18 How. 126, 133, 15 L. Ed. 334.

**Unless "otherwise provided by law"**—As to the phrase "unless **otherwise** provided by law" as used in the act conferring appellate jurisdiction on the circuit court of appeals in cases from the district courts, see the title **APPEAL AND ERROR**, vol. 1, pp. 431, 814.

**Otherwise provided—Town officials.**—Where a statute provided that town officers, "except as **otherwise** provided, should hold their offices for one year, and until others were elected or appointed in their places and were qualified," the court said that "the term '**otherwise** provided' had reference to the original term fixed by law, and not to resignations or vacancies. *Badger v. Bolles*, 93 U. S. 599, 603, 23 L. Ed. 991.

**Otherwise provided for—Tariff act.**—The eighth section of the tariff act of July 30th, 1864, provided for a certain duty on all manufactures of silk, or of which silk is the component material of chief value, not **otherwise** provided for, 50 per cent. ad valorem, shall be charged. The words "not **otherwise** provided for" mean not **otherwise** provided for by previous parts of the section of which they make the closing words; and so exclude reference to the acts of 1861 and 1862, which laid a lesser duty on "articles worn by men, women, or children, of whatever material made." *Smythe v. Fiske*, 23 Wall. 374, 22 L. Ed. 47.

**Taxation.**—Section 117 of the internal

revenue act of 1864, requiring stockholders in companies mentioned therein, "to return as income all gains and profits in them to which they should be entitled, whether the same were divided or **otherwise**," embraces not only dividends declared, but profits not divided and invested partly in real estate, machinery, and raw material, and partly applied to the payment of debts incurred in previous years. *The Collector v. Hubbard*, 12 Wall. 1, 20 L. Ed. 272.

**1. Ouster.**—*Ewing v. Burnet*, 11 Pet. 41, 52, 9 L. Ed. 624; *Probst v. Presbyterian Church*, 129 U. S. 182, 191, 32 L. Ed. 642. See the title **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, p. 961. As to pleading date of ouster, see the title **EJECTMENT**, vol. 5, p. 708. As to **ouster** of corporations, see the title **CORPORATIONS**, vol. 4, p. 789.

**2. Out of use.**—"In use" is defined to be 'in employment'; 'out of use' to be 'not in employment.' " *Astor v. Merritt*, 111 U. S. 202, 213, 28 L. Ed. 401.

**Out of the state and beyond the sea** analogous expressions.—See the title **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, p. 991.

**Out of the jurisdiction of any particular state.**—As to the meaning of this phrase as used in 8th section of the act of 1790 providing for punishment of certain crimes, see the title **CRIMINAL LAW**, vol. 5, p. 79.

**3. Outage.**—A Maryland statute provided that it should not be lawful to carry out of the state, in hogsheads, any tobacco raised in the state, except in hogsheads which are inspected, passed, and marked agreeably to the provisions of the act. **Outage** was a charge payable, on withdrawing the hogshead, for labor connected with receiving and handling it and doing the other things rendered necessary by the statute. *Turner v. Maryland*, 107 U. S. 38, 58, 27 L. Ed. 370.

**4. Outboundary.**—*Maxwell Land-Grant Case*, 121 U. S. 325, 369, 30 L. Ed. 949.

The use of the term **outboundary**, as describing the larger and greater tract within which the smaller and more limited quantity might be selected by the grantee, had its just and well-understood

## OUTLAWRY.

It has been held that in cases of outlawry sentence or execution may be properly had on judicial proceedings, without a jury trial.<sup>1</sup> It is necessary that the process state the township, but if the defendant is proved to have been there, it is enough to satisfy the designation.<sup>2</sup> Judgment of outlawry, in England, is given by the coroner,<sup>3</sup> and implies all of which the express judgment upon the indictment includes.<sup>4</sup>

**OUTSTANDING TITLE.**—See the titles *EJECTMENT*, vol. 5, p. 710; *JOINT TENANTS AND TENANTS IN COMMON*, vol. 7, p. 535.

**OVERCERTIFICATION.**—See the title *BANKS AND BANKING*, vol. 3, p. 120.

**OVERDRAFT.**—See the title *BANKS AND BANKING*, vol. 3, p. 121.

**OVERFLOW—OVERFLOWED.**—See note 5.

**OVERSTOCKING OF UNENCLOSED LAND.**—See the title *ANIMALS*, vol. 1, p. 322.

**OVERT.**—As to overt acts, see the titles *CONSPIRACY*, vol. 3, p. 1100; *TREASON*. As to market-overt, see the title *MARKET*, vol. 8, p. 245. See note 6.

meaning. "Grants of that class were quite numerous, and sometimes half a dozen grants to different individuals would be made within the same **outboundaries**, and occasionally there are cases where these smaller portions must include a dwelling or some improvement held by the grantee at the time." *Maxwell Land-Grant Case*, 121 U. S. 325, 369, 30 L. Ed. 949.

1. **Necessity for jury trial.**—*Respublica v. Doan*, 1 Dall. 86, 1 L. Ed. 47.

"That the party had not that trial, was owing to himself; he was not deprived of the right. As well, indeed, might an offender, who confessed the fact in court, by pleading guilty to the indictment, after sentence, complain that he had not a trial by jury. By refusing to take his trial, he tacitly seems to have admitted himself guilty." *Respublica v. Doan*, 1 Dall. 86, 90, 1 L. Ed. 47.

2. **Process.**—*Respublica v. Steele*, 2 Dall. 92, 93, 1 L. Ed. 303.

3. **By whom judgment given.**—*Respublica v. Doan*, 1 Dall. 86, 91, 1 L. Ed. 47.

4. **Implication in judgment.**—*Respublica v. Doan*, 1 Dall. 86, 1 L. Ed. 47.

5. **Overflowed lands.**—"There is a marked distinction between the terms **overflowed** and 'subject to periodical overflow.' The term **overflowed** as thus used, has reference to a permanent condition of the lands to which it is applied. It has reference to those lands which are **overflowed** and will remain so without reclamation or drainage; while 'subject to periodical overflow' has reference to a condition which may or may not exist, and which when it does exist is of a temporary character. It was never intended that all the public lands which perchance might be temporarily **overflowed** at the time of freshets and high waters, but which, for

the greater portion of the year, were dry lands, should be granted to the several states as 'swamp and **overflowed**' lands. At any rate, the question whether or not lands returned as 'subject to periodical **overflow**,' are within the descriptive terms of those granted by the swamp land act (of July 23, 1866)—that is, whether they are 'swamp and **overflowed**,'—is a question of fact properly determinable by the land department. It is settled by an unbroken line of decisions of this court in land jurisprudence that the decisions of that department upon matters of fact within its jurisdiction, are, in the absence of fraud or imposition, conclusive and binding on the courts of the country." *Heath v. Wallace*, 138 U. S. 573, 584, 34 L. Ed. 1063. See the title *PUBLIC LANDS*.

6. **Overt act.**—In *Jones v. Van Zandt*, 5 How. 215, 228, 12 L. Ed. 122, a case involving the act of February 12, 1793, relating to harboring and concealing fugitives from labor, the court said: "The 'overt act' spoken of was required to be one both intended and calculated to elude the master's vigilance. If so, it showed acts and designs of the defendant, which in the words and spirit of the statute amount or tend directly to 'harbour or conceal' the fugitive from labor. \* \* \* That any **overt** act, so marked in its character as to show an intention to elude the vigilance of the master or his agent, and which is calculated to attain such an object, is a harbouring of the fugitive within the statute."

**Overt demonstration.**—"What is or is not an **overt** demonstration of violence varies with the circumstances. Under some circumstances a slight movement may justify instant action because of reasonable apprehension of danger; under other circumstances this would not be so.



**OVERTAKEN VESSELS.**—See the title *COLLISION*, vol. 3, p. 894.

**OVERVALUATION.**—See the title *INSURANCE*, vol. 7, p. 169.

**OWN—OWNER.**—See note 1.

**OXIDE OF ZINC.**—In the nature of things, a metal and its oxide or sulphate are totally distinct and unlike. Oxide of zinc is not a metal; it has no metallic qualities.<sup>2</sup>

**OYER.**—See the title *PROPERT AND OYER*.

**OYSTERS.**—See the titles *CONSTITUTIONAL LAW*, vol. 4, pp. 473, 474; *FISH AND FISHERIES*, vol. 6, p. 291; *GAME AND GAME LAWS*, vol. 6, p. 543; *JUSTICES OF THE PEACE*, vol. 7, p. 782.

**OYSTERY.**—See the title *FISH AND FISHERIES*, vol. 6, p. 291. And see *OYSTERS*, ante, p. 1018.

**PAID-UP POLICY.**—See the title *INSURANCE*, vol. 7, p. 149.

**PAINS AND PENALTIES.**—See the title *PENALTIES AND FORFEITURES*.

**PAINTING.**—See note 3.

**PAMPHLET.**—See *PUBLICATION*.

**PANAMA CANAL ZONE.**—As to whether suit to restrain purchase of is moot question, see the title *APPEAL AND ERROR*, vol. 2, p. 292. See, also, the titles *TREATIES*; *UNITED STATES*.

**PANEL.**—See the title *JURY*, vol. 7, p. 766.

**PAPER.**—See note 4.

**PAPER MONEY.**—See the title *PAYMENT*.

**PAPER TITLE.**—As to necessity for to constitute color of title, see the title *LIMITATION OF ACTIONS AND ADVERSE POSSESSION*, vol. 7, p. 955.

**PARALLEL.**—See note 5.

**PARAPHERNAL PROPERTY.**—See *EXTRA-DOTAL PROPERTY*, vol. 6, p. 231. See the title *HUSBAND AND WIFE*, vol. 6, p. 727.

And it is for the jury, and not for the judge, passing upon the weight and effect of the evidence, to determine how this may be." *Allison v. United States*, 160 U. S. 203, 216, 40 L. Ed. 395.

1. Own establishment.—See *HIS*, vol. 6, p. 692.

Abandoned and captured property act.—See the title *ABANDONED AND CAPTURED PROPERTY*, vol. 1, pp. 5, 6.

Legal owner.—As to the ward's "legal owner or owners" as used in the act of 1891 indemnifying the legal owner or owners for land sold under the tax act of 1861, see *LEGAL*, vol. 7, p. 848.

Tax liens.—The supreme court of Nebraska has held that the term *owner*, as used in the fourth section (Nebraska Laws of 1875, providing that in the enforcement of tax liens, action may be brought against the land where the owner of the land is not known), applies to the owner of the fee, and does not include a person holding a lien upon the premises. *Leigh v. Green*, 193 U. S. 79, 87, 48 L. Ed. 623.

2. Oxide of zinc.—*Meyer v. Arthur*, 91 U. S. 570, 577, 23 L. Ed. 455.

3. Painting.—See *Arthur v. Jacoby*, 103 U. S. 677, 678, 26 L. Ed. 454; *United States v. Perry*, 146 U. S. 71, 73, 36 L. Ed.

890. And see the title *REVENUE LAWS*.

4. Books.—A book is not paper or a manufacture of paper within the meaning of the tariff acts. No man of literary culture, would call a book paper or a manufacture of paper, any more than he would designate a masterpiece of Raphael as canvas or a manufacture of canvas. *Pott v. Arthur*, 104 U. S. 735, 736, 26 L. Ed. 909.

Single paper.—"Section 828 (Revised Statutes, providing for fees of clerks of court) allows 'for filing and entering every declaration, plea or other paper, 10 cents.' Each deposition is not necessarily a paper within the meaning of this clause. If two or more depositions are embraced in a single paper, or a series of sheets are attached together, they form but a single paper, within the meaning of the law. We had occasion recently to pass upon this question in the case of *Schell v. Fauche*, 138 U. S. 562, 34 L. Ed. 1040, where two letters pasted together were held to constitute but one in law." *United States v. Barber*, 140 U. S. 164, 168, 35 L. Ed. 396.

Publication.—As to paper constituting a publication, see *PUBLICATION*.

5. Parallel and competing.—As to parallel and competing lines, see *COMPETING*, vol. 3, p. 978.











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